Revolutionary Amnesia and the Delegated Nature of Prerogative Power

David Kershaw

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Law Department

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Abstract: What is the nature and source of prerogative power? Where does it come from and how was it created? British constitutional law makes several assumptions in these regards, none of which have been subject to careful interrogation. Presumptively, it assumes that these powers are powers constituted in the midst of time through an amalgam of conquest, religion and community. It assumes that these kingly powers are original powers, meaning that the end for which a power is to be used is determined by the power-holder; they are not delegated powers subject to purposive limitation as are statutorily delegated powers. And it assumes that the prerogative powers exercised today are the same kingly powers exercised by Kings and Queens, time out of mind. These assumptions are the structural drivers of the arguments on both sides of the recent debate and case law surrounding the Government's use of the prerogative of prorogation. However, as this article demonstrates, historically situated, all of these assumptions are inaccurate. The article shows how we have ignored the revolutionary implications of the Glorious Revolution in 1688; the U.K.'s last "historically first" constitutional event. When we interrogate this event we see that the prerogative powers exercised by the executive today are not original but delegated, and they were not constituted prior to 1688 but were formed through statutory delegation from a constituted parliamentary sovereign in 1689, the Convention Parliament. They are merely a grander form of statutory delegated powers and as such can be subject to judicial review which focuses on the use of those powers for their proper purpose. This insight renders the Supreme Court's approach in Miller II unnecessary, and the Divisional Court's approach untenable.

* Professor of Law, London School of Economics and Political Science. I am very grateful for comments on earlier versions of this paper from Robert Craig, Sir Ross Cranston, Tatiana Cutts, Neil Duxbury, Conor Gearty, Josh Getzler, Michael Lobban, Martin Loughlin, Kai Möller, Jo Murkens, Tom Poole and Emmanuel Voyiakis.

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A. INTRODUCTION

In England, constitutional crisis is invariably connected to the exercise of the Monarch's prerogative powers. This is as true in the twenty-first century as it was in the seventeenth, even if the UK's modern political civil war crystalized around a minor, essentially administrative prerogative power, the power to prorogue Parliament. The exercise of this power—proroguing Parliament on 10 September 2019 for five weeks prior to the expiry of the extended deadline for the Article 50 TEU process—gave rise to a passionate legal debate about whether the exercise of this prerogative power was capable of being subject to judicial review, and, if so, the nature and scope of such review. The UK's Supreme Court decided that the exercise of the power was justiciable, without dissent on an unprecedented bench of eleven Justices. In *R (on the application of Miller) v The Prime Minister*,[1] the Supreme Court held that prerogative powers are powers which are recognised by the common law and that their exercise cannot, without "reasonable justification", "impede or frustrate" the constitutional principles of parliamentary sovereignty and parliamentary accountability.[2] For the Divisional Court,[3] whose unanimous decision the Supreme Court overruled, this exercise of the prerogative power of prorogation was not justiciable because, following the considerable weight of authority, the decision to exercise this power involved a quintessential political judgment.

Whether the exercise of this prerogative power is justiciable has split the academy as it has split the judiciary. For several leading constitutional law scholars, the Supreme Court's decision is an example of unconstitutional judicial activism;[4] for other equally eminent scholars it reflects merely a more explicit recognition of ideas long embedded in British constitutional law.[5] The focus of this article, however, is not on the detail of these judicial and academic differences; rather it is concerned with the foundational assumptions about the source and nature of prerogative power, assumptions which both sides of this polarised debate share and which, historically situated, are untenable.

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[1] Also *Cherry v Advocate General for Scotland* [2019] UKSC 41 (*Cherry*).
[2] [2019] UKSC 41 at [49].
[3] [2019] EWHC 2381 (referred to together with the Supreme Court's decision *supra* note 1 as *Miller II*).
[4] M. Loughlin, *The Case of Prorogation: The UK Constitutional Council's ruling on appeal from the judgment of the Supreme Court* (Policy Exchange: 2019); J. Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (Policy Exchange: 2019); T. Endicott., 'Making Constitutional Principles into Law' 136 *LQR* 175.
[5] P. Craig 'Prorogation: Three Assumptions' (UK Constitutional Law Blog, 10 September, 2019); M. Elliot, 'Prorogation and justiciability: Some thoughts ahead of the Cherry/Miller (no.2) case in the Supreme Court' (Public Law for Everyone, 12 September, 2019).

For all sides in this constitutional debate, prerogative powers—whether exercised by the Queen on the advice of her ministers, or directly by the Privy Council (in the form of an Order in Council) or by government ministers—are original powers. An original power is a power whose ends—the purposes for which that power is to be used—are determined by the holder of the power. This contrasts with a delegated power which, whether delegated to the executive through a statute or an Order in Council, is delegated for a particular purpose—to be used for the ends identified by, or intrinsic to, the delegation.[6] Moreover, these original prerogative powers are constituted independently of parliamentary power; they are "without parliamentary authority".[7] For both sides in this the debate, Dicey provides the authoritative point of departure:

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

In the leading case of *Council of Civil Service Unions v Minister for the Civil Service* (*CCSU*),[9] where Dicey's position was cited by several of their Lordships,[10] Lord Diplock refers to the prerogative as being, alongside statute, one of the "ultimate source[s] of power".[11] More recently, the Supreme Court in *R (Miller)* v. *Secretary of State for Exiting the European Union* observed that the prerogative is a "source of power", one which "encompasses the residue of powers which remain vested in the Crown".[12] And it has become commonplace since Lord Denning's judgment in *Blackburn* v. *Attorney General*[13] to cite Lord Colleridge position in *Rustomjee* v. *The Queen* that prerogative power is the Queen's "*own inherent* authority".[14] The Cabinet Manual echoes this idea, describing prerogative power as the power "inherent in the Sovereign".[15] For Professor Loughlin, more recently, prerogative power "invests intrinsically in the Crown".[16] Of course, since the Glorious Revolution in 1689 it has been clear that prerogative power is subordinate to, and capable of being removed by, an exercise of parliamentary power;[17] nevertheless it remains an original,

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[6] As Lord Northington observed in in *Alyen* v. *Belchier* in 1758 (1 Eden 131 (1758)) in relation to a power of jointur granted to a spouse: "no point is better established than that, a person having a power, must exercise it bona fide *for the end designed* otherwise it is corrupt and void" (emphasis supplied).
[7] *In re A Petition of Right of De Keyser* [1919] 2 Ch. 197 at 216.
[8] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 8th ed, 1915) at 282 (emphasis supplied).
[9] [1985] A.C. 374.
[10] *Ibid Per* Lord Fraser and Lord Roskill at 398 and 416.
[11] *Ibid* at 411
[12] R *(Miller)* v. *Department for Exiting the European Union* [2017] UKSC 5 at [47].
[13] [1971] 1 W.L.R. 1037.
[14] (1876)2 QBD 69 at 74, a case and a quotation that benefits from only one citation prior to *Blackburn* and 26 thereafter including in both the majority and dissent in *Miller* v. *Department for Exiting the European Union, supra* note 12..
[15] *The Cabinet Manual: A guide to laws, conventions and rules on the operation of government* (2011) at 8.
[16] Loughlin, *supra* note 4 at [10].
[17] *See*, for example: Succession to the Crown Act 1707; section 8, Appellate Jurisdiction Act 1876 section 52; Reserve Forces Act 1996; section 28 Civil Contingencies Act 2004.

separately sourced power, intact to the extent that Parliament has not acted through legislation to remove it. In this vein, Lord Browne-Wilkinson in *R.* v. *Secretary of State for Home Department, Ex Parte Fire Bridges Union* observed that:

> The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them.[18]

For some twentieth century courts, this original power assumption is interlaced with the claim that prerogative power is a "common law power"—a power whose existence and form is constituted by the common law, or is dependent on its recognition by the common law. For Lord Diplock in *CCSU*, for example, the "ultimate source" of this power is "not a statute but the common law"; Lord Bingham in *R. v Secretary of State for the Home Department, ex parte Fire Brigades Union* refers to prerogative powers as "common law powers";[19] and for the Supreme Court in *Miller II*, slightly more equivocally, prerogative powers are "only effective to the extent [they are] recognised by the common law".[20]

This assumption that prerogative power is an original, separately constituted power is a central component of our modern understanding of the British political constitution, which is understood to have evolved to find a balanced political accommodation between the Crown as executive (in Council), which "is not a creature of statute,"[21] and the Crown in Parliament. Moreover, this assumption is the base-structural driver of all of the main arguments deployed on both sides of the *Miller II* prorogation debate. In the linked case of *Cherry*, in the Inner House Lord Drummond Young applied the judicial review standard that a power cannot be used for an improper purpose—in this case the improper purpose of interfering with the principle of parliamentary sovereignty. The central problem with this argument is that the language of improper purpose implies that there is a proper purpose or end which the Queen, on the advice of the Prime Minister, had to further when she exercised the prorogation prerogative. However, although Lord Young proceeds to find that the power was not a "proper exercise of the power"[22] he does not identify "the purposes which the power, construed objectively, is intended to achieve".[23] This is a natural consequence of the underlying assumption that the power is an original, independently constituted power which, necessarily, has no purposive limitation. Assuming an impulse to legally regulate the exercise of the power, this purposive impasse naturally leads to the search for external limitations on the use of the power because there

[18] [1995] 2 A.C. 513 at 552.
[19] [1985] 2 A.C. 513, 523; *R. (Bancoult) v Secretary of State For Foreign and Commonwealth Affairs (No.2)* [2008] 3 WLR 955; *CCSU supra* note 9; *Laker Airways Ltd. v Department of Trade* QB 643, 705; R v. *Secretary of State for the Home Department, Ex Parte Northumbria Police Authority* [1988] 2 WLR 590, 603.
[20] *Supra* note 2 at [49].
[21] R. *(Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 at [16].
[22] *Cherry v Advocate General* [2019] CSIH 49 at [124].
[23] *Ibid* at [104].

is no other way to formally control the exercise of such an original power. Lord Brodie's judgment in *Cherry* and the Supreme Court's decision in *Miller II* track this logic by eschewing the language of proper purpose[24] and by focusing on the effects of the exercise of the power, namely that the power is limited by the principle of parliamentary sovereignty or Parliament's "right to sit",[25] with which an exercise of the power cannot interfere in the absence of reasonable justification.

The Divisional Court's position in *Miller II*, as well as the Government's and Lord Advocate's position in *Miller II and Cherry*, were similarly structured by the original power assumption. Prior to *CCSU*, which held that an exercise of prerogative power was not "immune from judicial review,"[26] there was no scope to review an exercise of prerogative power. However, the decision in *CCSU* seeded confusion because it failed to explain the basis on which such a review could take place apart from, as in *CCSU* itself, limits on the ability to exercise a the power arising from right-like protections generated by the petitioner's legitimate expectations.[27] Outside of the category of legitimate expectations, what standards of judicial review could apply,[28] given that all the then existing standards of review related to the exercise of delegated power delegated for a particular purpose?[29] This uncertainty gave birth to one of the most unpersuasive public law doctrines of the modern era, namely that the subject matter in relation to which the prerogative was exercised determined whether it was reviewable—when the subject matter fell within the zone of the political it was not reviewable. The underlying basis for this doctrine, as the Divisional Court in *Miller II* affirmed, was that there are no judicial standards according to which the exercise of the power could be reviewed.[30] However, although this position on judicial standards is correct it is not because the matter in question does or does not fall within the realm of the political, a realm within which the review of delegated powers regularly intervenes, but because the power is understood to be an original power. Whether or not the exercise of a prerogative power invokes the political, as an original power there

[24] The Supreme Court only uses the term proper purpose when setting forth the Inner House's holding, *see supra* note 2 at [24].
[25] *Ibid* at [91]. Also the principle of parliamentary accountability.
[26] *Supra* note 9 at 410 *per* Lord Diplock.
[27] *CCSU* involved a legitimate expectation of consultation in relation to the removal of the right of GCHQ employees to belong to a trade union; an expectation which the courts readily accepted could be overridden by the interests of national security. As Lord Fraser put it: the "question, therefore, is whether it has been shown that consideration of national security supersedes the expectation" (*supra* note 9 at 400). Or as Lord Diplock put it: "whether procedural propriety must give way to national security" (at 413).
[28] Here I leave to one side the question of "illegality" as Diplock in *CCSU* (*supra* note 9 at 410-411) understood it, which involves determining the area within which the prerogative power could be exercised, for example whether or not there is a prerogative power in wartime to destroy property without compensation (*Burmah Oil Company (Burma Trading) Ltd. v Lord Advocate* [1985] AC 374). For Lord Roskill in *CCSU* this "illegality" review is designed to determine whether "the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess" (at 414). In the prorogation context this is not in issue, as there is clearly no question about the existence of the prerogative power to prorogue Parliament.
[29] Including improper purpose review, but also irrationality or Wednesbury unreasonableness—irrationality can only be measured by reference to an end or purpose in the sense of there being a (or no) rational connection to that end or purpose. For Lord Diplock in *CCSU* irrationality related to "the question to be decided"; for Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 2 All ER 680 at 683 "so unreasonable" relates to "the matter he has to consider".
[30] *Supra* note 3 at [42]-[51].

are no standards[31] by which the exercise of such a power could be reviewed. It was not surprising, therefore, that after *CCSU* judicial interventions in relation to the exercise of prerogative power relate to the limits imposed on the use of that power arising from the legitimate expectations of the petitioner.[32]

These arguments and counterarguments about the justiciability of an exercise of prerogative power have, however, a significant and structurally devastating Achilles heel: *prerogative power is not an original power*. Prerogative power is a delegated power, formed and delegated by the modern Parliament's foundational ancestor—the Glorious Revolution's Convention Parliament of 1689—to the Crown, which *is* a creature of several statutes. And, as a delegated power, an investigation into the purpose or ends for which a prerogative power is delegated, and whether the exercise of the power furthered such purposes, is both legitimate and quite straightforward without any need for recourse to the identification of limiting constitutional principles or a determination of justiciability based on the subject matter of the exercise of the prerogative.

Through the Declaration of Right and then the Bill of Rights of 1689, but also through the lesser known *Act for the Exercise of Government by Her Majesty during his Majesty's absence of 1689*, the Convention Parliament delegated prerogative power to a new Monarch, William III and Mary II. When it appointed and empowered the Monarch this Convention Parliament had no King or Queen "in" it; indeed, it was wholly unauthorised to act within the then prevailing constitutional arrangements, and in acting it remade the institutions of the British state even if the structures of law-making and government, the names and titles given to the actors, and the geography and architecture associated with law-making and government had much in common with those of the former regime. This was a—and in the United Kingdom, the last—foundational, "historical first"[33] constitutional event.

Of central importance for understanding the "historical first" nature of the Glorious Revolution, as well as the delegated nature of post-1689 prerogative power, is the proto-corporate conception of the "Royal Dignity". As the article shows, modern constitutional law's failure to understand the nature of prerogative power and the statutory foundations of the Crown is in no small part due to its failure to understand that "the Royal Dignity" in 1688 did not refer merely to its limited modern connotations of position, respect and honour, but also encapsulated authority, regal power and prerogative and provided for the corporate transfer of such authority and power between kings.[34] As of 1688 this proto-corporation was fused with the kingly dynasty and the rules of royal succession. When the Convention Parliament of 1689 "eradicated" the prevailing succession in appointing William III as King, the Dignity, and the regal powers contained within its umbrella, was effectively dissolved. It was, *and had to be*, made anew by the Declaration and Bill of Rights.

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[31] Placing the legitimate expectations category to one side.

[32] *See*, for example, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655 at 660; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; *R (on the application of Sandiford) Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 at [60]-[65].

[33] H. Kelsen, *General Theory of Law and State* (New York: 1945) at 115 observing that "if we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly".

[34] Dicey, for example, in his *Introduction to the Study of the Law of the Constitution* does not refer to this idea at all (A.V. Dicey, *Introduction to the Law of the Constitution* (8th eds, 1915)).

This article is, of course, not the first to note the radical constitutional implications of this event and also the tendency of both the participants in the Glorious Revolution, as well as modern constitutional law, to ignore or turn a blind eye to it. Maitland, for example, having forcefully asserted the revolutionary nature of the Revolution, observed that: "we cannot work it into our constitutional law";[35] Howard Nenner has described the event as "a patently unconstitutional act";[36] and, more recently, Richard Kay observes that the Convention Parliament "crammed irregular decisions into the irregular forms; they described illegal actions in legal terminology[, i]n short they faked it".[37] This article is, however, the first article which takes seriously the fact that the nature of modern prerogative power is built on this "unconstitutional" event. The Crown's prerogative powers today are not the prerogative powers exercised by Kings and Queens prior to 1689. The former were sourced over time through an amalgam of conquest, god, custom and community; the latter represent delegated authority from a constituted, newly formed (as of 1689) parliamentary sovereign. When we see this, we then see that all the heat and fury of the modern debate about the justiciability of prerogative power rests on a false premise.

B. KINGLY POWER BEFORE THE REVOLUTION: DIVINE RIGHT AND THE ANCIENT CONSTITUTION

The "Prerogative" in the United Kingdom is a label for a set of executive powers located within and exercised by, or on behalf of, the Crown.[38] In the century prior to the watershed constitutional event known as the Glorious Revolution in 1689, when William III and Mary II took the throne, the extent of the King's prerogative powers was ferociously and violently contested. Theories about the source of these powers were similarly contested. However, whilst these theories of power may have differed in their understanding of the extent and constitution of those powers, none questioned that they were original powers—a power whose ends or purposes for which that power is to be used are determined by the holder of the power—and none entertained the notion that they were delegated from a parliamentary sovereign. Prior to 1688, irrefutably, these powers were "without parliamentary authority".[39]

For the deposed James II and his Stuart ancestors, as God's viceroy on earth all earthly public power in England originated in him.[40] As Counsel for the King in the

[35] F. W. Maitland, *The Constitutional History of England* (1908) at 285.
[36] H. Nenner, *By Colour or Law: Legal Culture and Constitutional Politics in England, 1660-1689* (1977) at 173.
[37] R. Kay, *The Glorious Revolution and the Continuity of Law* (Notre Dame: 2014) at 17.
[38] Prerogative power is exercised in three different ways, depending on the prerogative power being exercised: first by the sovereign on the advice of her ministers in relation to, for example, the prorogation of parliament; second, by the executive "in their own right" (Cabinet Manuel *supra* note 15 at [23]) without any actual involvement of the monarch, for example in relation to the prerogative of mercy; and thirdly, by the executive exercising power delegated to them by an Order in Council exercising a prerogative power.
[39] *In re A Petition of Right of De Keyser* [1919] 2 Ch. 197 at 216.
[40] C. Weston, 'England: Ancient Constitution and Common Law' in J.H. Burns (eds), *The Cambridge History of Political Thought 1450-1700* (CUP: 1991) at 375.

infamous *Ship Money* case put it: "he is an absolute monarch and holdeth his kingdom under no one but God himself".[41] James I had previously warned, "encroach not upon the prerogative of the crown for they are transcendent matters".[42] This claim to divine representation was, even in a God-fearing seventeenth century, historically suspect given England's penchant for monarchical deposition over the previous 400 years,[43] which had "dimmed those 'sparkles of divinity' with which King James I attempted to adorn his imperial person".[44] As Dunham and Woods show in their history of these kingly depositions in the late middle-ages, whilst kingly power was always connected to the divine, in practice its source was attributed to an opaque amalgam of divine representation, conquest (which also expressed God's will) and, to a more limited extent, rituals of popular approbation.[45] Nevertheless, whatever the secular or spiritual nature of its source, both prior to and during most of the seventeenth century, and certainly after the restoration in 1660, the dominant constitutional idea was that original public power was located within and could only be exercised by or through the King, was passed "by right hereditary"[46] to his successor, and could not be divorced or taken from him and his successors. Laws and governmental and judicial structures were, therefore, the product of an exercise of his, and his ancestors, kingly power.[47] A position strongly affirmed shortly before the Glorious Revolution by the Court of the King's Bench in 1686 in *Godden v Hales*, which, in confirming the King's power to dispense with the application of a statute, held that:

> The laws of England are the King's laws, it is therefore an indispensable prerogative in the kings of England to dispense with penal laws, [the reason for which] the king is the sole judge. [Moreover], *this is not a trust invested in, or granted to, the King by the people, but the ancient remains of the sovereign power and prerogative of the kings of England.*[48]

It followed that the extent to which kingly power was limited by law, rights and liberties, such limitations were granted by kingly power. Accordingly: the Coronation Oath prior to 1689 referred to the laws "*granted*' to the people "*by* the ancient kings your *rightly godly* predecessors" and the King, when asked to observe those laws, replied "I grant and promise";[49] the rights and limitations contained in the Magna Carta were understood to have been granted by King John, even if he acted under baronial duress;[50] and Parliament's

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[41] *The King against John Hampden, esq.* (1637) 13 Ch at [1065].
[42] Quoted in M. Loughlin, *Foundations of Public Law* (OUP: 2010) Loc 2068 (Kindle eds.).
[43] *See,* W.H. Dunham and C.T. Wood, The Right to Rule England: Depositions and the Kingdom's Authority, 1327-1485' (1976) *American Historical Review* 738 detailing five depositions from 1327.
[44] *Ibid.* at 761.
[45] *Ibid.*
[46] E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: 1957) at 381.
[47] See T. Poole, *Reason of State: Law, Prerogative and Empire* (CUP: 2015) 24 quoting W. Harrison Moore "that as all jurisdictions emanate from the King, so he is the great reconciler, determining what are their boundaries" (W. Harrison Moore, *Act of State in English Law* (London: John Murray, 1906) 11).
[48] *The Case of Sir Edward Hales, Baronet* (London: J. Watts, 1689) (emphasis supplied).
[49] *See* J. Greenberg, 'The Confessor's Laws and the Radical Face of the Ancient Constitution' (1989) 104 *English Historical Review* 611, quoted at 615 (emphasis supplied).
[50] *See* Weston, *supra* note 40 at 409 detailing Robert Brady's account of why Magna Carta was a statute "the king their only maker" and that "the authority of Magna Carta we due to its being a royal grant confirmed by royal seal".

existence, rights and privileges were in the King's gift. As Maitland observed in relation to the first half of the seventeenth century:

> [Parliament] comes when he calls, it disappears when he bids it go…*[I]s this body not but an emanation of the kingly power*. The king does well to consult Parliament but is this more than a moral obligation, a dictate of sound policy?[51]

However, throughout the seventeenth century, in opposition to this divine and absolute understanding of prerogative power, there arose a set of powerful constitutional ideas which came to be grouped under the notion of the "ancient constitution".[52] Central to the production of this theory of the ancient constitution were several of the period's most renowned jurists and historians, most importantly Sir Edward Coke, who is commonly considered to be the theory's creator,[53] but also the leading seventeenth century legal antiquaries, including, John Seldon, Henry Spelman, William Dugdale and William Petyt.[54]

The theory was rooted in pre-1066 notions of Anglo-Saxon constitutional governance, which, it was claimed, were not abolished on conquest, as these rights and liberties were subsequently affirmed by William I when he affirmed the Confessor's laws in the fourth year of his reign, as did Henry I thereafter.[55] Indeed for ancient constitutionalists Magna Carta itself was merely an affirmation of the ancient common law.[56]

The theory had two component parts: a theory about the source of public power and of institutional and individual rights, and an account of the institutional and individual rights protected by this constitution. Public power in this theory was sourced in ancient tradition, custom, the people and community, combined with divine approbation. Greenberg observes in this regard that for this theory "government in general was from God, with a particular form proceeding from the people".[57] John Fortescue, an important source for the ancient constitutionalists, writing in 1470 put the relationship of kingly power to the people as follows:

> The king "is obliged to protect the law, the subjects and their bodies and goods, and *he has the power to this end issuing from the people*".[58]

However, this kingly empowerment "issuing from the people" did not involve a popular mandate or any form of democratic empowerment, rather this power emanated from ancient and maintained custom which provided a compact between King and

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[51] *Supra* note 35 at 298 (emphasis supplied).
[52] *See generally*, J.G.A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (CUP: 1957).
[53] Weston, *supra* note 40 at 357.
[54] Greenberg, *supra* note 49 at 619.
[55] Greenberg, *supra* note 49 at 614.
[56] W. Petyt, *Antient Right of the Commons of England Asserted* (London: 1680) at 25 observing that "indeed this famous resolution was no other than a declaration of antient common law of the land before the Norman Duke gained the imperial crown of England".
[57] *Ibid* at 621.
[58] J. Fortescue, *De Laudibus legume Angliae* (1470) ("In Praise of the Laws of England") (emphasis supplied).

community,[59] thereby constituting and delineating the King's powers. John Sadler, in his influential *Rights of the Kingdom and Peoples*, observed, for example, that "'the laws and customs of our ancestors" defined the rights of kings and parliament'.[60] For John Davies, a renowned ancient constitutionalist, "neither did the king make his own prerogative" rather it was sourced in the "long experience, and many trails of what was best for the common good [which] did make the common law."[61]

The ancient constitution's right-defining customs were found either in Edward the Confessors laws (or rather an account thereof set forth in *Legis Edwardi Confessori*, considered by Maitland to be "bad and untrustworthy")[62] and confirmed by Kings thereafter, or had otherwise been confirmed by prescription[63] having been in place since "time immemorial" or "time out of mind"—that is, in place at least prior to 1169 and the coronation of Richard II—and continually affirmed or claimed thereafter.[64] As the above quote from Davies indicates, this ancient custom was co-extensive with the common law. The common law identified those rights, liberties and powers which were part of the Confessor's laws or by prescription had become part of the ancient constitution. As Corrine Weston observed: "if the conditions [for prescription] were met, a customary usage was established that demonstrated tacit consent and the rights and liberties involved were allowed by the common law".[65] Pocock observed in this regard that "common law historical thought represented the most vigorous survival of the medieval concept of custom in English political thought".[66] It is for this reason that Coke in the *Case of Proclamations* in 1611 could argue that "the King hath no prerogative, but that which the law of the land allows him", because according to the (his) theory of the ancient constitution the common law was an expression of the ancient customs which established rights and constituted kingly power. Common law courts were naturally, therefore, tasked with identifying the boundaries of the such customary constituent power. It is in this sense that ancient constitutionalists could have referred to prerogative powers as common law powers.

There were three component parts of the theory's distribution of power and rights, although the precise contours of each part were somewhat protean:[67] first, that the Kingship was a contractual office;[68] second, that Parliament was the King's constitutional equal, not a subordinate emanation of Kingly power; and third, a set of immutable rights of Englishmen.

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[59] Bacon observed, for example, that title of English kings was the product of "compact and agreement" (N. Bacon, *An Historical Discourse on the Uniformity of the Government of England* (1647) 118-120.
[60] Greenberg, *supra* note 49 at 625 quoting John Sadler, *The Rights of the Kingdom and Peoples*" (1649).
[61] J. Davies, Preface to *Irish Reports* (1615) (cited in Pocock *supra* note 52 at 41).
[62] F. Pollock and F.W. Maitland, *The History of English Law: Before the time of Edward I* (2nd eds, Vol. I (CUP: 1898) at 103.
[63] On prescription in the seventeenth century and exploring the grounding of rights through prescription see N. Duxbury, 'Acquisitive Prescription and Fundamental Rights' (2016) 66 *University of Toronto Law Journal* 472.
[64] *See supra* note 40 at 376-378.
[65] *Ibid* 377.
[66] Pocock *supra* note 52 at 51.
[67] See Weston *supra* note 40 at 374 describing the list of rights and liberties as "surprisingly protean".
[68] On the concept of the office see, J. Getzler, "Personality and Capacity: Lessons from Legal History" in Tim Bonyhady (eds) *Finn's Law: An Australian Justice* (Federation Press, 2017).

As earthly kingly power was derived from the community, the Office of the King was understood as a contractual office, which could be lost on failing to perform the role. Bracton and *Legis Edwardi Confessori* were central to this contractual theory. The "Office of a King", which was one the Confessor's laws, provided that although the King is "the vicar of the highest king" he "loseth the name of a king" if he fails to perform the role.[69] And for Bracton, "a king is a king as long as he rules well".[70] For some, this idea provided a basis to identify the foundations of government in popular sovereignty.[71] For example, John Maynard, a member of the Convention Parliament, argued that "our government has had its beginning from the people",[72] and that "all government had a first its foundation from a pact with the people".[73] However, prominent late seventeenth ancient constitutionalists, most notably William Petyt,[74] were more hesitant and carefully contained the radical potential of this idea, aware of the spectre of "popular sovereignty" which it raised and "which it was no part of the Whigs intention to allow, lest they return to the days of the commonwealth".[75] These radical implications were contained by focusing on the coronation oath: the breach of contract arose from breaking this oath. This meant that this contractual theory of the Kingship still operated within the rules of hereditary succession and, accordingly, that loss of office arising from breaking the oath would then result in the crown passing to the next in line. For Coke, the founding father of ancient constitutionalism, the crown passed "by birth right inherent".[76]

With regard to the position, role and rights of Parliament, the theory of the ancient constitution presented Parliament as separately constituted by custom and as the King's constitutional equal. For example, Lambarde's *Acheion*, "the tract par excellence of the ancient constitution,"[77] identified an immemorial House of Commons with prescriptive constitutional status, and a prescriptive right for the commons to send members to the House of Commons.[78]

However, although the theory and the idea of the ancient constitution was a central element of seventeenth century constitutional discourse and profoundly influential in the 1689 settlement, it was less a historically grounded theory of law and public power and more an aspirational political theory formed and conscripted in the service of both resisting claims to absolute kingly power and radical constitution change. Its core weakness was that it was a theory embedded in history but its historical grounding was inferential

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[69] Greenberg *supra* note 49 at 617. Chapter 17 *Legis Edwardi Confessori.*
[70] *Ibid* 618.
[71] On the variation in how this idea was understood see J. Miller, 'The Glorious Revolution: "Contract" and "Abdication" Reconsidered (1982) 25 *The Historical Journal* 541.
[72] *Debates of the House of Commons from the Year 1667 to the Year 1694* Volume IX (London: 1763), at 12.
[73] L. Schwoerer, 'A Jornall of the Convention at Westminster begun the 22 of January 1688/9' (1976) 49 *Bulletin of the Institute of Historical Research* at 258.
[74] See W. Petyt, *Antient Right of the Commons of England* (1680). Petyt was appointed Keeper of the Records of the Tower of London by William III in July 1689.
[75] Pollock, *supra* note 52 at 230, quoting W. Petyt, *Historical Manuscript Commission* XII Report, Appendix vi. pp. 14 ff.
[76] Which Kantorowicz *supra* note 46 at 317, which he attributes to *Bate's Case.*
[77] Weston, *supra* note 40 at 393.
[78] Weston, *supra* note 40 at 394. A later but similar and very influential idea was articulated in the "co-ordination principle" articulated by Charles Herle in *Fuller Answer to a Treatise Written by Doctor Ferne* (1642). See further Duxbury, *supra* note 63.

and speculative, as royalist scholars comprehensively demonstrated in the years shortly prior to the Revolution. For Corrine Weston, a pre-eminent scholar of the ancient constitution, the case for the ancient constitution rested on a panglossian continuity-account of the 1066 conquest and the historical supports for the ancient liberties and parliamentary power were inferential and very limited. For Weston, the "superior [historical] scholarship" of the late seventeenth century royalist antiquaries made a compelling case that there was no legal continuity after 1066, that there was no immemorial House of Commons and that the rights and liberties found in foundational constitutional documents such as the Magna Carta were granted by the King and did not "suggest that law making was a shared power".[79]

C. THE GLORIOUS REVOLUTION AS CONSTITUTIONAL BEGINNING

The longstanding view of the Glorious Revolution is that it was not really a revolution at all. In the traditional account of the event, James II implicitly abdicated the throne when William, Prince of Orange, landed 20,000[80] soldiers in the Westcountry and many of James's soldiers deserted his cause. The Throne was then offered to William and Mary jointly, although William III alone was to exercise kingly power on behalf of both himself and Queen Mary II.

The orthodox historical position combines the ideas of Dutch invasion with English aristocratic coup and invitation. For Israel, for example, "the armies, not the people" were determinative of the outcome.[81] For Trevelyan, the revolution was the product of "aristocratic and squirearchical leadership".[82] The result was a transition to a new Monarch without war or violence and with a large amount of political agreement. Modern scholarship has, however, cast much doubt on these orthodoxies. Steven Pincus's work in particular marshals a considerable body of original sources to show that "the evidence overwhelmingly suggests that the events of 1688-89 were not the result of a Dutch invasion,"[83] more a "joint Anglo-Dutch venture against James II regime;"[84] a position which, importantly, was taken by William's prominent supporters at the time,[85] as well as

[79] Weston *supra* note 40 at 409. See also Weston's discussion of the work of Dr Robert Brady at 406-411 observing that "Brady's scholarship was superior to that of supporters of the ancient constitution'. See also, Greenberg, *supra* note 49 at 621 observing that "bogus and propagandist that version may have been, wrong it certainly was, but nevertheless it was not a complete fabrication".

[80] There is much debate about the estimated number of his troops with estimates ranging from 15,000 to 40,000, *see* Kay *supra* note 37 at 13. Lord Delamere was of the view that a mere "eight or ten thousand men" stationed where William landed "would have destroyed his army, or else have broke it so much that a small supply of fresh men would have made an end of that matter" The Works of the Right Honourable, Henry Late L. Delamere and Earl of Warrington (John Lawrence, Angel: 1694) at 57.

[81] J. Israel, 'Introduction' in J. Israel (eds.) *The Anglo-Dutch Moment: Essays in the Glorious Revolution and Its World Impact* (Cambridge: CUP, 1991).

[82] G.M. Tevelyan, *The English Revolution, 1688-1689* (Oxford: OUP, 1938) at 7.

[83] S. Pincus, *1688 The First Modern Revolution* (Yale: 2009) Loc. 3876 (Kindle eds.).

[84] *Ibid* at Loc. 3536.

[85] For example, Lord Delamere, the Whig, protestant agitator and strong supporter of William, observed: "the thought of the Princes forces could not be the only thing that sent King James away in such haste: For even the

by the clear sense within the Convention Parliament of 1689, discussed below, that the Throne was within their gift following James's flight. Pincus also forcefully destabilizes the orthodox bloodless and cohesive history of the period. His work demonstrates that, on the contrary, the revolution was violent, popular and divisive; a majoritarian and contentious rejection of catholic influence, constitutional absolutism and James II's approach to state modernisation; a revolution *in fact* not in name only.[86]

But whether the Glorious Revolution should be understood as a "revolution" similar in nature to the French or American revolutions, which took place a century later, is of limited consequence for this inquiry into the prerogative. This is because from a constitutional perspective it was *unquestionably* a constitutional revolution. It was a revolution which—whichever seventeenth-century side one could have taken on kingly and parliamentary power—took place completely outside the prevailing pre-Civil War and post-restoration structures of seventeenth century public power, and which created a new structure, hierarchy and distribution of power even though this distribution, along with the institutional nomenclature it deployed and the geographical sites at which it occurred, had much in common with, or were the same as, the pre-revolutionary settlement.

It is an article of faith in British constitutional law that there is an unbroken link in the nature of pre-1689 prerogative powers and the modern prerogative powers of the crown. William and Mary replaced James II and took possession of the crown and its powers—the same powers which James II exercised; the same powers which Henry VII took from Richard III or Henry IV took from Richard II. But this claim is only tenable if, "the constitution [remained] intact" and the Monarch was "changed [and power transferred] according to [the constitution's] own terms".[87]

Any state, corporation or association has a set of rules accordingly to which power is distributed and transferred. If a claim is made to lead a state, corporation, or association and to control its people or assets, that claim must be asserted within the applicable constitutional and legal arrangements. Alternatively, the individuals making the claim either usurp control over those people and assets through force or the members of that state, association or corporation must acquiesce to their taking of control outside of those constitutional arrangements.[88] But in these two cases, the power that is exercised over those citizens and assets is not, and cannot be, the power that was the product of the prior constitutional arrangements. If, for example, citizens revolt and take control over all corporate assets and their representatives proceed to make all major decisions in relation to those assets, those representatives do not exercise the powers of the applicable corporations; which although may still exist in the prior legal ether are to all intents and purposes dissolved. The power that is now exercised over those assets, as well as the rules

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prince though he thought well of his men, as he could do of such a number, yet he did not think them sufficient without other assistance to engage King James his army, and therefore when he saw so very few to resort to him after he had been ten or fourteen days of shore, he began to look towards his ships, and had certainly gone away if the scene had not changed very much in four or five days" Lord Delamere, *Reasons why King James Ran Away from Salisbury; In a letter to a friend* (The Works of the Right Honourable, Henry Late L. Delamere and Earl of Warrington (John Lawrence, Angel: 1694) at 61).

[86] Pincus, *supra* note 83.

[87] H. Kelsen, General Theory of Law and State (New York: 1945) 368. See quotation at note 33.

[88] T. Hobbes, *Leviathan* (Oxford: OUP: 1996) at 114-115.

that determine such power's exercise and transfer, is a new power and constitutional formation. Moreover, juristically it does not matter if those new power holders think they are exercising the same powers exercised by former directors of the corporation or did not intend to change the nature of the corporation in expropriating the means of production; their actions generate those changes.

This section shows that the Glorious Revolution took place wholly outside of the terms of the prior constitutional settlement and as a result it effectively dissolved the Kingly powers located within and exercised by James II. William and Mary's powers were, and had to be, made anew through a statutory delegation of constituted parliamentary power. Following Kelsen, the Glorious Revolution created a new constitutional settlement outside of the prior structures of constitutional authority; it founded a new, "historically first" constitution; whose power structures can only be made sense of in accordance with the event and not by reference to what came before it.[89]

1. As if it were a Parliament

As Maitland observed in his *Constitutional History of England*, prior to 1689 Parliament could only be called by the King, and could be prorogued and dissolved by the King. James II had, however, dissolved Parliament in July 1687 and had not recalled it. *According to the then prevailing constitutional order*, therefore, as of December 1688 when James had fled to France and William had arrived in London, there was no Parliament in session capable of exercising any power to deem the Crown vacated or to settle the succession.[90] At the time William landed in England, of the King, the House of Lords and the House of Commons, the *only* public power holder in England which was capable of acting at all, was James II himself.

Once James had fled to France, William invited the Lords, counties and boroughs to form a convention: an assembly of "representatives" who met in Westminster Hall as a "House of Commons" and as a "House of Lords", but *were not*, *and could not be*, according to the pre-1689 constitutional arrangements a Parliament, or a House of Parliament. They were, from the vantage point of the pre-1689 constitutional order, merely a group of people claiming authority to act on behalf of the Kingdom, assembled to determine the future constitutional structure of the country *outside* of the prior constitutional arrangements (a wholly illegal, indeed treasonous,[91] act from the perspective of those prior arrangements). Architecture, pomp and ceremony allow us to soft-ball the constitutional nature of this assembly. Had the identical actions and events taken place in a town hall in a "Philadelphia" in the North East of England,[92] it would be easier for us to place this assembly within the orbit of a constitutional convention.

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[89] *Ibid. and* H. Kelsen, *Pure Theory of Law* (Berkeley: 1960) at 200.

[90] According to the dominant view of the constitutional order and prior historical practice even a duly summoned parliament did not have such power. See further text to notes 108-114.

[91] Maitland *supra* note 35 at 284 observes "had it failed, those who had attempted it would have suffered as traitors and I do not think that any lawyer could maintain that their execution would have been unlawful".

[92] Although, Philadelphia in Tyne and Wear was named after its U.S. counterpart during the War of Revolution and did not exist in 1689. Boston would be a more historically relevant counterpart.

Although the Convention Parliamentarians acted as if they were a Parliament, and followed procedures adopted in prior Parliaments,[93] its members were acutely aware that it was not a parliament. The Convention self-identified as being "tantamount to a legal parliament".[94] This tension between the unauthorised nature of the Convention Parliament and its assumption and exercise of public power is particularly evident in the debates on the King's speech following the proclamation of William III as King. As the raising of money for military activity in Ireland required parliamentary approval, several convention parliamentarians called for a new parliament to be called into session by the King's writ. Others moved "to turn this convention into a parliament"[95] because the funding was required urgently, which meant that that no time to wait for the calling of a new parliament. "If we have not the power of a parliament, we can go upon nothing", observed Serjeant Maynard, after all "what is a parliament but King, Lords and Commons."[96] Other Convention Parliamentarians responded angrily. Sir Edward Seymour, for example, observed "you declare yourself a parliament, and the law says, you are not a parliament."[97] Thomas Clarges observed that "if this convention be turned into a parliament 'tis the greatest disservice you can to the King".[98] Maitland agreed:

> Grant that parliament may depose a king, James was not deposed by Parliament; grant that Parliament may elect a king, William and Mary were not elected by Parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament.[99]

Both these positions on the status of the Convention Parliament were correct. Clarges and Seymour were correct that it was not a Parliament under the old constitutional order. It seems clear from the debates that all Convention Parliamentarians were aware of that. But that order was no more. The King had been removed and replaced with an elective monarch[100] by a body that had no formal constitutional authority. This then was a new constitutional order, the rules of which were there to be written. Accordingly, if this body wished to call itself "a parliament", *to turn itself into* "a parliament", and award the funding requested in the King's speech then it could do so. Which it did by resolving that "the Lords Spiritual, and the Commons, now sitting at Westminster, are a Parliament".[101] Of course, whether its decision would command the legitimacy required to ensure compliance with the funding commitment in the nation as a whole was not answered by the pure assertion of authority contained within the decision. Moreover, had the Convention Parliament instead elected to call a Parliament in accordance with the procedures with which pre-1688 parliaments were called it would not have resulted in a reversion to the

[93] *Supra* note 71 at 2. The note to the opening of the Convention of January 22, 1689 observes that "both Houses had their clerks, and several officers *as in a regular Parliament*" (emphasis supplied).
[94] *Ibid* at 15 *per* Thomas Clarges.
[95] *Ibid* at 84 *per* Mr. Medlycott.
[96] *Ibid* at 92 *per* Lord Falkland.
[97] *Ibid* at 94.
[98] *Ibid* at 100.
[99] *Supra* note 35 at 285.
[100] Discussed further in section C.2 below.
[101] *Supra* note 72 at 106.

old constitutional structure because it would have been called pursuant to institutions formed by the new constitutional structure: a non-hereditary, newly appointed King who, as we shall see below, was empowered by Parliament.

This uncertainty continued even following the dissolution of the prior (Convention) Parliament and the formal opening of a new Parliament, a year later, on 9 April 1690. The House of Lords thereafter moved a Bill to, *inter alia*, confirm the acts of the prior (Convention) Parliament as "Laws".[102] This was a proposal born of the anxiety and insecurity about the constitutional authority of the Convention Parliament and the Parliament which it became; anxiety that suggested that the Bill of Rights was not a lawful statute. What the proposing members of parliament could not see, or perhaps not accept, was that a newly called Parliament and its assertions of legality did nothing to alleviate this anxiety. As John Somers insightfully observed, "this parliament depends entirely on the foundation of the last, and if they want confirmation, neither this nor the last parliament can confirm it".[103] That is, the authority of this Parliament rested on the authority of the Convention Parliament, and its authority was not sourced under the prior constitutional regime but in the combination of its assertion of authority and in the acquiescence "in their authority [by] the whole nation".[104] This is why Maitland is clearly correct when he observed that "it was very difficult for any lawyer to argue that there had not been a revolution",[105] because it imposed a structure and distribution of public power *outside* of the prior constitutional arrangements. The imposed institutions and distribution of power were, therefore, new, autonomous and independent of the prior regime; they were structurally unconnected to the prior regime although the constitutional vocabulary (of King, Parliament, Lords, Commons), geography (Westminster) and architecture (Westminster Hall) were the same.

Today, we continue to refer to the idea of the King or the Crown in Parliament. For several leading constitutional theorists this idea is at the heart of the formation of the British political constitution,[106] but we forget that the basic structure of the UK's constitution was formed by an event involving *no parliament* and where there was *no King* to be in that non-parliament at the time *it* appointed him and set forth the conditions of his appointment.

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[102] See Kay *supra* note 37, for an illuminating discussion of this issue. The Bill provided that: "It is enacted by the authority of this present Parliament that all, and singular, the Acts made in the last Parliament were laws." (*Debates of the House of Commons from the Year 1667 to the Year 1694* Volume X (London: 1763), at 52).

[103] *Ibid at* 50. The *Debates* records that Somers spoke with "much zeal and such and an ascendant of authority that none was prepared to answer it [and so] the [amended] bill was passed without opposition" (at 50). Somers was appointed Lord Chancellor by William III in 1697.

[104] *Ibid* at 47 *per* Sir John Lowther: "I am satisfied with what the last parliament did: I acquiesce in their authority, as the whole Nation has done".

[105] *Supra* note 35 at 284. He argued further that: "Had it failed those who attempted it would have suffered as traitors, and I do not think that any lawyer could have maintained that their execution would have been unlawful."

[106] *See*, generally Loughlin, *supra* note 42.

2. AN ELECTIVE MONARCHY

As a result of the Revolution, the monarchy became an elective rather than a hereditary monarchy; elective in the sense that the Monarch is appointed by a set of statutory rules of settlement enacted by Parliament acting on behalf of the people. Today we think of the Monarch as a hereditary monarchy, but it is only hereditary as determined by Parliament. Whereas under the pre-1689 constitution—whether through a Jacobite or ancient constitutionalist lens— the monarch was a hereditary monarch and Kingly power transferred automatically and instantaneously to the King's heir on his death pursuant the non-statutory rules of succession. The hereditary claim was an "'indefeasible right' and an incontestable, if unwritten, law of the realm".[107] The King as an individual died, but the King as a separate legal person or capacity never died. Kantorowicz's seminal *The Kings Two Bodies*, details meticulously how the concepts of "the crown", the "royal dignity", the King as a body politic or corporation sole interacted to form this separation idea. "The King is dead; long live the King" evidenced the unbroken continuity of hereditary Kingly power. As Coke observed, the Crown's descent was "by birth-right inherent…[rendering] the Coronation…but a royal ornament and solemization of the royal descent".[108]

Of course, as William Stubbs observed, "the law of royal succession, except where it has been settled by parliament, has never been very certain."[109] Succession claims were often, therefore, not clear-cut[110] and the succession was often manipulated by might, most infamously when Richard III illegitimized and (may have) murdered his nephews to establish his hereditary right to the Crown. And at times the succession claim was clearly suspect, as in the case of Henry VII's disposition of Richard III, although not implausible.[111] Parliament was, therefore, periodically deployed to legitimate a succession claim or to settle the future line of succession. For example, Parliament was involved in supporting Richard III's claim through a declaration of allegiance in Parliament by the "three estates,"[112] and it affirmed Henry VII's claim in an Act of Parliament.[113] Moreover, during the reigns of Henry VIII and Elizabeth I the succession was settled and resettled with the assistance of Acts of Parliament.[114] However, prior to 1689, Parliament had never before acted alone without the involvement (albeit the sometimes coerced involvement) of a "rightful" Monarch to choose a successor or to determine the line of succession.[115] Under the pre-1689 constitutional order, therefore, Parliament had no power to act, nor

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[107] E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: 1957), quoting S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge: 1936) at 333.
[108] *Ibid* at 107.
[109] W. Stubbs, *Seventeen Lectures on the Study of Medieval and Modern History and Kindred Subjects* (Oxford: Clarendon, 1887) at 394.
[110] *See* further kingly depositions discussed below in section C.4.
[111] *See* W. Stubbs, *Seventeen Lectures on Medieval and Modern History* at 342-5. *See* also text to note 160-161.
[112] *See* Dunham and Wood, *supra* note 43 at 759.
[113] "Be it ordained, established and enacted *by authority of this present parliament*, that this inheritance of the crowns of the realms of England and of France, with all the pre-eminence and dignity royal to the same pertaining…be, rest and abide in the most royal person of our now sovereign Lord King Harry the VIIth" (RP. 6 270 *Statutes of the Realm*).
[114] See, the Act of Succession 1544. See also, generally, Nenner, *supra* note 36 at 179 noting also that Henry VIII's attempts to bypass hereditary succession of the Stuart in his will of 1546 failed.
[115] *See* Dunham and Wood, *supra* note 43.

was there any historical precedent for it acting, alone to remove or appoint the King or to determine the succession. And, as noted, the Convention Parliament was no parliament nor did it view itself as a parliament.

Once James II had fled to France on William's entering London, the first question for the Convention Parliament was whether James II could be deemed to have abdicated and therefore have vacated the throne. Although a few Parliamentarians "owned" the idea of "driving King James out",[116] most settled on a self-deluding notion of voluntary abdication and vacation of the Crown.[117] However, even if abdication was possible and deemed to have happened it did not follow that there could be an election by a parliament of an alternative monarch. Under prevailing succession principles on its vacation the Crown would pass to James II's son, the Prince of Wales, who, as he was only a baby at the time, would have taken the throne subject to a regency arrangement.[118] More problematic for the Convention Parliament than the infancy of the Prince, was the fact that he also, like his father, was a "papist"[119] and James II's pro-catholic actions was one of the central causes of the Revolution.[120]

The Convention Parliament debates reveal the tension and difficulty experienced around this point. To decide that the Crown had been vacated and then to ignore the succession amounted to creating an elective monarchy. As members of the Convention Parliament observed:

> Whatever is said, whether the Kingdom is elective or not, if you adhere to this conclusion [that the Throne was vacant], you conclude that the Government is an elective monarchy…For us to limit the succession is plainly to say we choose a King: And is called that prudence we ought to act with, to destroy that Constitution of the Government, we came here to maintain.[121]

> Gentlemen, I would know of you, if the throne be vacant, whether we are obliged to fill it? If we be, we must fill it either with our own laws, or by the humour of those that are to chuse (*sic*); if we fill it by our own laws, they declare, that it is a hereditary kingdom, and we are to take the next to whom the succession would belong…if we are to fill it according to the humour of the times, and of those that are to make the choice, that diverts the course of inheritance, and I do not know by what authority we can do that, or change our ancient constitution.[122]

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[116] *Debates*, supra note 72 at 64 *per* Mr Wharton.

[117] This is contrasted with the actions of the Scottish Convention. On 4 April 1689 the Scottish Convention Parliament removed the King by vote, with only 5 dissenters.

[118] One argument made in objection to the Prince of Wales succession was that it did not follow as James II was not dead. This was forcefully dealt with by the argument that James II abdication amounted to his civil death which would trigger the succession. *See* in particular the Earl of Nottingham's Convention Parliament interventions—*Corbett's Parliamentary History of England 1688-1702 Volume 5* (London: 1809) at 91.

[119] Sir Richard Temple observed that "and you have a pretended Brat beyond sea, *whom you cannot set aside*...but if Parliament have no authority to make it otherwise, you have no way to prevent it falling under a popish successor" (emphasis added) *supra* note 72 at 62. See Nenner, *supra* note 36 on the Convention's conscious refusal to even discuss the young pretender's hereditary claim. He refers to this as the fiction of the "non-existent child" (at 188).

[120] See generally, Pincus, *supra* note 83.

[121] *Supra* note 72 at 61 *per* Mr Finch.

[122] *See*, Corbett's *Parliamentary History of England 1688-1702* (London: 1809) at 91, *per* the Earl of Nottingham.

But to follow the prevailing hereditary principle and to recognise the Prince of Wales's claim, would have meant that William would "be gone"[123] and it would all have largely been for nothing, with, in the opinion of many parliamentarians, catastrophic consequences both for the nation, not to mention for the would-be "traitors".[124] Given this irresolvable difficulty, some members of the Convention Parliament were willing to treat the monarchy as an elective monarchy:

> I will conclude that that power of disposing of the Crown is in the Lords and Commons, and by virtue of that power fill the vacancy.[125]
>
> To say 'that the Crown is void' is a consequence of extraordinary nature. The consequence must be, we have power to fill it, and make it from a successive monarchy an elective.[126]

Others held onto fragments of the hereditary principle by suggesting it would be roughly maintained if Princess Mary, James II first daughter and a protestant, were crowned,[127] with William acting as her regent. But for these Convention Parliamentarians to pass the Crown to William as King rather than as consort and regent could not be supported by the prevailing ideas about hereditary succession. Sir Robert Sawyer, former attorney general and MP for Cambridge University observed:

> No man can question that the Kingdom of England is successive…at all times in history you found the succession did prevail…Can either or both houses without the King alter that right? Can either or both the Houses without the King, alter *the fundamental constitution of the kingdom*? It will be a great injury to the successor to give away the crown from her; you'll sully all the Prince of Orange's glory. He came hither not to break through all your constitutions; he deserves all you can possibly do for him, but to give him what we cannot do![128]

Expressing a similar sentiment, Sir Joseph Tredenham observed:

> But when you *eradicate the succession*, all the crowns in Christendom will concern themselves. It will make such an earthly quake, that all the protestants in the world will fare the worse for it. The prince will lose all the glory his generous conduct has

[123] *Supra* note 72 at 62 *per* Sir Robert Howard: "if you use the hand that delivered you thus, you invite him to be gone".
[124] *Ibid.* "if we neglect this opportunity put into our hands tis probable we may be no more a people". On treason *see* Maitland, *supra* note 91.
[125] *Ibid.* at 60 *per* Col. Birch.
[126] *Ibid.* at 15 *per Sir Thomas Clarges*.
[127] This was also supported the idea that there was a "legal incapacity as well as a natural" in relation to the Prince of Wales (*ibid.* at 56 *per* Sir Joseph Tredenham who opposed making William king because "the crown was always successive never elective" (at 55)).
[128] *Ibid.* at 58.

> obtained. There is no other way to have peace and quiet, but by recognising the princess who has no legal or natural impediment.[129]

It is noteworthy in this regard that although William was fourth in line to the English throne at the time (assuming neither 27 year old Mary nor 24 year old Princess Anne had any children), this remote claim was not close enough for members of the Convention Parliament to even refer to William's claim in adjusted succession terms. There was no Convention Parliamentary pretence that he had a plausible succession claim according to the English law of royal succession. As Nenner has observed in this regard "there was no way to seat William on the throne without undermining the principle of hereditary monarchy".[130] To maintain a veneer of a continued commitment to the hereditary principle he would have had to be appointed as Mary's regent. Nevertheless, just over a week after this debate, on February 13 1689, the Lords and Commons of the Convention Parliament (*not parliament*) "eradicated" the succession by agreeing that "the Prince and Princess of England should be proclaimed King and Queen of England", with William King in his own right. This decision rendered the English monarch an elective not a hereditary monarch; a position which, when the Convention Parliamentary record is combined with the outcome, both Tory and Whig alike could not plausibly have disagreed with. This alone fissured the relationship between pre- and post-1689 kingly power.

3. The Proto-Corporate Crown: The Dignity Does Die

Prior to 1689, regal power was held by the King and passed automatically according to the line of succession, which was why the King never died. As noted above, this idea of the kingly body and its powers took a proto-corporate form; a form contained in the constitutional concepts of crown, royal dignity, body politic and corporation sole.[131]

Central to the formation of the idea of kingly power as, effectively, a separate legal person was the concept of "royal dignity". Today we understand dignity as a positive personal quality which garners respect. Whereas, a dignitary, derived from dignitas, is a person holding a high office. The term dignity, however, has an ancient, broader and constitutional significance in relation to both spiritual (*sacerdotal dignity*) and temporal (*royal* dignity) sovereignty.[132] It is, as Kantorowicz observed, a "mistake…to understand the word…only in its moral or ethical qualifications, that is, as something contrary to 'undignified conduct'".[133]

"Dignity" in its constitutional sense encapsulates notions of position and office, authority and power, combined with its more modern signification of honour and due respect associated with position. It is in this former sense that the term is included in the

[129] *Ibid.* at 56.
[130] Nenner, *supra* note 36 at 189.
[131] Scholars and judges have long bemoaned the amorphous and protean nature of these corporatist ideas. In this regard, *see*, J.G. Allen, 'The Office of the Crown' (2018) 77 *Cambridge Law Journal* 298.
[132] See S. Lahey, *Philosophy and Politics in the Thought of John Wyclif* (CUP: 2003) at 171 on Wyclif's distinction between sacerdotal and royal dignity.
[133] *Supra* note 107 at 383.

definition of the Anglo-Saxon word "cynedom" which also refers to ideas of kingdom, realm and government.[134] Maitland in his *The Constitutional History of England* refers to the term only twice, in relation to Richard II's removal/resignation in 1377, "who was deposed of all royal dignity", and in relation to the powers of the Lord High Steward to appoint a Court of the Lord High Steward being "merged in the royal dignity" of Henry IV (1367-1413).[135] Earlier references to the 'royal dignity' encapsulated, *inter alia*, the Kings' prerogative. Edward I (1272-1307), for example, sent a letter to the Bishop of Coutance asserting both his right to the temporalities of the Abbot of Marmoutier and that such a right could not lapse for failure to assert it, in which he noted that "in such cases time does not run against the king…in accordance with the prerogative *of* his royal dignity",[136] where prerogative refers to these rights and the status of the right. The connection of "royal dignity" to exercised power is also present in the 1539 Act *For the Placing of the Lords* (the only prior statutory reference to "royal dignity"), which *inter alia* appointed Thomas Cromwell as Henry VIII's Vicegerent for "the good *exercise* of the said most Royal Dignity".[137] Blackstone explained royal dignity, in similar terms:

> First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand; yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. *The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue*, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. *This is what I understand by the royal dignity*, the several branches of which we will now proceed to examine.[138]

As part of the "several branches of royal dignity" Blackstone proceeds to consider, *inter alia*, sovereignty, perpetuity and prerogative power and later observes "having, in the

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[134] J.R. Hall, *A Concise Anglo-Saxon Dictionary* (Swan Sonnenschein & Co: 1894).
[135] *Supra* note 35 at 192, 170.
[136] A. Deeley, 'Papal Provision and Royal Rights of Patronage in the Early Fourteenth Century' (1928) 43 *The English Historical Review* 498 at 513 (emphasis supplied). See also George Garnett's investigation into the origins of the crown in relation to early medieval uses of the term dignity and dignitas in relation to regal power and the overlap between crown and dignity (G. Garnett, "The Origins of the Crown" (1996) 89 *Proceedings of the British Academy* 171 at 174, 175, 183 and 191).
[137] Anno. 31 Hen. VIII and Anno Dom 1539.
[138] W. Blackstone, *Commentaries on the Laws of England in Four Books*, vol. 1. Chapter VII *Of the King's Prerogative* (1753), 249 (emphasis supplied).

proceeding chapter, considered at large those branches of the King's prerogative, *which contribute to his royal dignity*, and constitute the executive power of the government".[139]

Kantorowicz provides the most comprehensive account of the term's medieval foundations. For Kantorowicz, the notion of Royal Dignity "referred chiefly to the singularity of the royal office, to the sovereignty vested in the king by the people, and resting individually in the King alone".[140] He shows how the term is central to the idea of the King's two bodies and to the notion of the crown as a corporate body politic.[141] It is through the dignity, as an emerging "corporation by succession",[142] that in medieval constitutional law the office and power of the monarch is transferred on the death of the monarch to his or her rightful successor, which was why it was said that the "dignity does not die".[143] The "dignity" then was an embryonic legal person fused with the line of succession, which enabled the transfer of regal office and power on the death of the Monarch.[144] We see an early articulation of this idea from *The Case Against the Prior of Kirkham* in 1313, quoted by Kantorowicz, where Justice Inge observed:

> Abbot and Prior are names of Dignity: *and in virtue of the Dignity* the *right* that was in the predecessor *will so wholly vest itself in the person of the successor* after his creation that none other than he can defend the rights of his church.[145]

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

To modern observers, the change in the head of a corporate body is straightforward: one power/officer holder is replaced with another, leaving in place, untouched, the corporate body and all powers and assets of that body. However, all such modern observers would also clearly understand that the change of office holder must take place

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[139] *Ibid.* Vol.1. Chapter VIII *On the King's Revenue*, 282 (emphasis supplied).
[140] *Supra* note 107 at 384.
[141] *Ibid.,* at 406-408.
[142] *Ibid.* at 385, 387. Kantorowicz observed that the "principles…of continuous succession of individuals and that of corporate perpetuity of the collective…seem to have coincided in a third notion without which the speculations about the king's "two bodies" would remain almost incomprehensible: the *Dignitas*" (emphasis in the original) *ibid.* at 383.
[143] *Ibid.*, at 386.
[144] Note that although Kantorowicz acknowledges Maitland's "parson-ification" of the Crown (see F.W. Maitland, 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131), he attributes the corporate characteristics of the parson and the crown to the dignity (*ibid.* at 449).
[145] *Year Books, 6-7 Edward II* (1313). *Ibid* at 402.

within the constitutional rules of the separate legal person in order for there be effective continuity and transfer of power. This is true of a corporation sole as it is of a corporation aggregate. A person who is appointed by a group of non-shareholders to be a director and chair of Shell Plc is not a director and chair of Shell Plc. That person has the powers that the group of non-shareholders has delegated to her, but, quite obviously, *no matter what the non-shareholder group claim they have done*, she does not exercise any corporate power which has been delegated to the directors and to the chair of Shell Plc by the general meeting of shareholders of Shell Plc in accordance the constitution of Shell Plc. Building on this analogy, the transfer of power to William did not take place within the constitutional rules which provided for the transfer of the Crown and the Royal Dignity possessed by James II. There are three reasons for this. First, pursuant to the prevailing constitutional position, although the King had two bodies they were inseparable other than on the death of the King as an individual, upon which his kingly body and the royal dignity instantaneously passed to and fused with the King's rightful successor. As Bacon observed, "with great emphasis"[146] the King's individual personhood and the Crown "were *inseparable* though distinct".[147] The King's proto-corporate official body fused "the perpetuity of the dynasty, the corporate character of the crown and the immortality of the royal dignity".[148] The law of royal succession then was an elemental component of the pre-1688 kingly corporate body; compliance with which was an inescapable precondition for the transfer of the powers contained within dignity. This is why Hobbes referred to an "artificial eternity…which men call the right of succession".[149] It followed, therefore, as Kantorowicz observed, that "no theory…had any chance to prevail in England which attempted to isolate the Crown from its components".[150] Second, prior to 1689 a Parliament did not, acting alone, have the power to alter the succession or to transfer existing proto-corporate regal power and the royal dignity to a designated person; and third, the Convention Parliament was "not a parliament" and was precisely analogous the non-shareholder group above.

Accordingly, when the Convention Parliament, an unauthorised body, acted to appoint a King who had no credible claim within the existing royal dynasty, their actions had no effect on James II's kingly body, *and the royal dignity* which he occupied and had fused with him on the death of Charles II. When the Nation implicitly consented to the authority and legitimacy of the Convention Parliament, James II's royal body and his royal dignity did *in effect* die; at least until he or his successor by force or acquiescence could take back the throne. As a proto-corporation the "Crown and Royal Dignity" which were embodied within and exercised by him were effectively dissolved. It followed, therefore, that to operate as King and Queen, William and Mary had be empowered outside of the pre-1689 constitutional structures; regal power contained with a corporate royal dignity had to be fashioned anew. Many in the Convention Parliament understood this and, as

[146] *Ibid.* 365.
[147] Quoted by Kantorowicz at 365 (emphasis supplied); see also of this period making a similar argument: E. Bagshaw, *The Rights of the Crown of England is Established by Law* (A.M.: 1660).
[148] *Ibid.*, at 316. As Hobbes observed in 1651 "this artificial eternity, is that which men call the right of succession" (T. Hobbes, *Leviathan* (Oxford: OUP: 1996) at 129).
[149] *Ibid.* at 129.
[150] Kantorowicz, *supra* note 107 at 364.

shown in Section D below, provided for it. But even if the Convention Parliament had not understood this, its actions effectively dissolved the dignity which meant that it had to be remade by *its* actions.

4. The Problem of Kingly Deposition and the de facto King

An important objection to the position that a hereditary kingly principle was an intrinsic component of the pre-1688 proto-corporate English crown is that prior to 1688 there had been multiple kingly depositions,[151] some of which involved suspect hereditary claims, and yet the crown and the nature of its powers were taken to be unaltered by such depositions, even if the extent of kingly power was subject to intermittent contestation. It is around these depositions that the distinction between *de jure* and *de facto* kingship arose, which sought to explain the lawfulness of both the actions of kings who took the throne outside of the lawful (*de jure*) succession hierarchy and of the allegiance given to such kings.

However, to explain a transfer of existing regal power to the *de facto* king from the deposed *de jure* king there must have been embedded within the proto-corporate English crown the means to manage non-hereditary kingly transition without the disintegration of the crown and the remaking of kingly powers in an historical first constitutional moment. Implicitly, for such a transfer to be possible, one must presume that the five kingly depositions between 1327 and 1461 generated a rule that rendered the proto-corporate English crown and dignity, and its associated regal powers, only conditionally hereditary. That is, regal power would be transferred through the kingly body within a line of succession but only if the hereditary pathway was not altered by conquest or "popular" deposition by the governing class of prelates, earls, barons and knights. If this is correct, the proto-corporate royal dignity and its prerogative powers must be understood as being detachable from the body of the king and not fused with the perpetuity of an incumbent dynasty.

Although this position is immanent within the orthodox assumption of the continuity of regal power, it faces several theoretical and historical difficulties. First, as outlined above, as of 1688 few questioned that the monarchy was hereditary and that the perpetuity of the dynasty was an elemental component of the English constitution. This view was shared by James II and his supporters as well as by prominent ancient constitutionalists from Edward Coke in the early seventeenth century to William Petyt at the end of the century. Moreover, as discussed above, the members of the Convention Parliament were clearly of the view that appointing William—whether they were in favour or against—was not consistent with the constitution as they understood it, because his claim to the throne was too remote from the line of succession. As Robert Sawyer put it, "no man can question that the Kingdom of England is successive".[152] Accordingly, to claim that the hereditary

[151] Of course, deposition alone is unproblematic for a proto-corporate crown fused to the dynasty, as resignation, abdication or removal can be treated as a public or civil death. As Maitland observed in relation to these depositions "the idea of an heir inheriting whilst his father is physically alive was not unfamiliar to our medieval law". *Supra* note 35 at 191 note 1.

[152] *See supra* note 128.

perpetuity of the dynasty was not the basis of the proto-corporate English crown in 1688 is to posit a constitutional rule that would have found close to no support amongst advocates or opponents of seventeenth century kings; a very steep claim of legal false consciousness.

Close attention to the prior Kingly depositions also problematizes this contingent hereditary idea because succession claims (more and less plausible) were a central component of the justification given for deposition. As noted above, William Stubbs observed that the law of succession "except where it has been settled by parliament, has never been very certain".[153] These rules, although fused with the notion of the King's two bodies and the proto-corporate transfer of the dignity, were contested and indeterminate. However, such indeterminacy in itself is not problematic for a corporate transfer of power provided that means exist to determine whether or not the constitutional rules have been complied with. The rules of any corporate person necessarily incorporate reliance on a final arbiter of whether or not the rules have been complied with. They are deemed to be complied with and the transfer or exercise of power is deemed to be effective, even in conditions of uncertainty, where the designated arbiter so provides.

Consider first the cases of Edward II in 1327 and Richard II 1399. Edward II was deposed by his fourteen year-old son Edward III.[154] The deposition combined a direct succession claim with (coerced) resignation/consent of the deposed monarch and broader approbation by the "estates of the realm". Henry IV's disposition of Richard II in 1399 also involved a similar combination of Richard II's coerced resignation and consent, a strong and direct succession claim ("by right line of the blood"[155] as the son of John of Gaunt, Edward III's third son), and parliamentary approbation. The family of Edmund Mortimer, Earl of March, although eight years old in 1399, claimed that he was Richard II's presumptive heir—as the great grandson through his grandmother, Philippa of Antwerp—of Edward III's second son, Lionel of Antwerp, and violently and unsuccessfully contested Henry IV's reign. But as Maitland clarified, it was not established at the time that a claim to the throne could pass through a woman.[156] Edward IV deposed Henry VI in battle in 1461, but he also asserted a strong succession claim, the claim his father, Richard 3rd Duke of York asserted through the same line as Edmund Mortimer, namely though his great, great grandmother Philippa, daughter of Lionel of Antwerp; a succession claim that Henry VI himself, prior to his deposition had accepted when on October 1461 he contracted with the Duke of York that he should be his heir and successor, a "superior" claim that was affirmed by Parliament.[157]

Richard III's deposition of the uncrowned Edward V in 1482 and his deposition by Henry VII in 1485 are more problematic, however, both can be understood through a succession lens. Richard imprisoned Edward in the Tower of London and may have ordered his death, which affirmed his Kingship by right. However, prior to Edward V's

[153] W. Stubbs, *Seventeen Lectures on the Study of Medieval and Modern History and Kindred Subjects* (Oxford: Clarendon, 1887) at 394.
[154] *See*, generally, Dunham and Wood *supra* note 43 at 739-741.
[155] *Rotuli Parlimentorum* Vol. 3 422-423 in Dunham and Wood *supra* note 43 at748.
[156] Maitland, *supra* note 35 at 193.
[157] Dunham and Wood, *supra* note 43 at 748.

unlawful or natural death, Richard claimed his right to his throne through an elaborate account of Edward's illegitimacy arising from both the illegitimacy of his father, Edward IV, and the claim that Edward IV had entered into a pre-contract of matrimony with another woman prior to marrying Edward V's mother.[158] In succession terms Henry VII's claim to the throne is the arguably the weakest of all. Although he claimed in his first parliament that "he had come to the crown by just right of inheritance",[159] B.P. Wolfe observed that "his hereditary claim was as weak as any put forward since the conquest".[160] However, others such as William Stubbs, have argued that according to the understanding of the succession rules at the time, "it is quite possible to maintain that he was King of England by hereditary right".[161]

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

The doctrine of *de facto* kingship was formed to take account of the succession uncertainties associated with these depositions. The doctrine provided a clear acknowledgment that the kingship could be occupied by a usurper outside of the succession hierarchy. But equally, those who theorised the *de facto* kingship in the seventeenth century, such as Matthew Hale,[162] focused extensively on the validity of the exercise of the *de facto* king's powers, which in certain instances were not deemed to be effective against a rightful king. For example, a *de jure* King who reclaims the kingship is bound by "acts that tend to the diminution of the royal power or revenue…no more than the true lord is bound by the original grants by copy or otherwise of the disseisor".[163] Even if confirmed by an Act of Parliament, the *de jure* king was not bound in this regard because such a "parliament" had been called by the usurper, who did not have the power to call it into session.[164] Implicitly, this position assumed that the *de facto* king was not exercising *de jure* legal power; that is, there was no transfer of the existing kingly power to the *de facto* king. This assumption was also implicit in the steps taken by victorious "*de jure*" kings to affirm the statutes produced during the reign of a usurper.[165] If an exercise of *de facto* kingly power involved an exercise of transferred power by a lawfully legitimate holder of that

[158] Dunham and Wood, *supra* note 43 and 755 and 757.
[159] W. Stubbs, *Seventeen Lectures on the Study of Medieval and Modern History and Kindred Subjects* (Oxford: Clarendon, 1887) at 394.
[160] B.P. Wolfe, 'Henry VII's Land Revenues and Chamber Finance' (1964) 79 *The English Historical Review* 225 at 230.
[161] Stubbs, *supra* note 159 at 394.
[162] D.E.C., Yale (eds.), *Sir Matthew Hale's Prerogatives of the King* (London: Seldon Society, 1976).
[163] Of course, several acts of a *de facto king* were deemed to be enforceable (see, for example, the case of John Bagot (Y.B. Pasch. 9 Edw.) discussed in Kay *supra* note 37 at 149. However, note that legal provision is often made for the enforceability of acts that do not involve an actual exercise of power – for example, the apparent authority doctrine.
[164] *Ibid.*
[165] For example, Rot. Parl. V, 489a passed during the reign of Edward IV.

power then it would require no confirmation and would be binding in all respects on the return of the *de jure* king, just as the validity of a contract entered into by a corporation cannot be questioned because the entire board and shareholder membership have changed. Necessarily, therefore, the doctrine of the *de facto* king assumed that the powers exercised by *de facto* king were different than those exercised and transferred between *de jure* kings.

This begged the question: what was the source of those *de facto* powers? One option, consistent with ancient constitutionalism, is that custom and the common law provided for such a parallel system of power triggered by claiming the title outside of the line of succession; that is, *a common law doctrine* of the *de facto* king empowered the King. Indeed, Kay makes an argument that this is how many understood William III's empowerment in the Glorious Revolution.[166] However, this idea falls quickly at the hurdles of coherence and authority. How can we posit the idea of a legal system which provides for two systems of power–one of which it labels lawful the other *de facto*—when the recognition of the parallel system of *de facto* kingship renders the *de jure* kingship effectively legally irrelevant. As D.E.C. Yale put it in his consideration of the *de facto* doctrine: "it is not to be expected that that a legal order can provide for the event of its own overthrow and supersession."[167] Moreover, the deposition examples themselves, with their close engagement with the *de jure* succession hierarchy hardly, serve as a basis for a legal system of *de facto* power. As Kay also notes separately, Hale observed that "it is impossible to prescribe certain rules out of former [deposition] examples".[168] The compelling alternative is that any such *de facto* king is empowered by the circumstances of the deposition, such as conquest. As the Yearbook of 1485 observed in relation to the effect of Henry VII's attainders "he took on himself the royal dignity";[169] that is his conquest and the circumstances around it fashioned it anew. Should the *de facto* king establish himself and his heirs as King this understanding of *de facto* kingly power implicitly posits a historically first constitutional moment and the formation of a new set of kingly powers, the source and nature of which are a product of the circumstances of the deposition. Honoré made this point in similar terms to the thesis of this article in relation to his consideration of the question of allegiance to a usurper:

> It may be asked: what if the King of Poland or Morocco, or an upstart Harold Warbeck, should firmly establish himself in the realm. The answer which Kelsen has taught us to analyse correctly, is that the old legal order should give way to the new, *which might happen to coincide largely in content with the old*.[170]

[166] Kay *supra* note 37 at 151.
[167] D.E.C. Yale, 'Hobbes and Hale on Law: Legislation and the Sovereign' (1972) 31 *CLJ* 121 at 148.
[168] Matthew Hale observed in relation to the effects of the depositions that "the competition for the crown is a tender nature and interest and successes and reasons of state carry parties beyond the limits of settled rules…*And therefore it is impossible to prescribe certain rules out of former examples*." (emphasis supplied) (Lincoln's Inn Library MS 579 f.25, quoted in Kay *supra* note 37 at 151).
[169] YB Mich 1 Hen. 7 (1485).
[170] A.M. Honoré, 'Allegiance and Usurper' (1967) 25 *Cambridge Law Journal* 214, 223.

D. PREROGATIVE POWER AS DELEGATED STATUTORY POWER

1. The Parliamentary Delegation of Regal Power

As Maitland observed, "it was no honorary president of the republic the nation wanted, but a real working governing King, a king with a policy, and such a king the nation got".[171] The powers provided to enable this "real working governing King" were very similar to (in significant part identical to), and bore the same power-labels ("prerogative and regal powers" and "royal dignity") as James II's executive powers but they were the product as of 1689's new constitutional structure; they were not and, as explained above, could not be the same powers that were exercised by James.

How then are we to understand the empowerment of William and Mary and their successors? Two secular options present themselves. The first, a theory of power created through invasion and conquest, can be quickly discarded. As William's supporter Lord Delamere put it, a theory of invasion was "lunacy".[172] The Convention Parliament had a choice; had they had refused to support William's claim or even made him Mary's regent, he would have left.[173] The second option is that executive authority although rooted in the authority of the people, was mediated through the Convention Parliament which delegated power, explicitly and implicitly, to the kingly executive.

The second idea is the most compelling. It is logical and straightforward: the body that takes it upon itself to act on behalf of the people to appoint the Monarch outside of existing constitutional rules and structures, empowers the Monarch: with appointment comes empowerment. Moreover, the Declaration of Rights and its codification in the Bill of Rights 1689 addressed kingly power in several ways, all of which support an idea of the delegation of power by the Convention Parliament to the King of the constituted power vested in the Convention Parliament. First, as is well known, the Act draws boundary lines on the extent of prerogative power, some of which—such as the prohibition of excessive bail or cruel and unusual punishment[174]—reflect certain of the "ancient liberties" of Englishmen, others responded to James II's perceived excesses such as a prohibition on the use of the prerogative to suspend laws or its use to dispense with the laws "as it hath been assumed and exercised of late".[175] Secondly, and for our purposes more importantly, the Act explicitly addresses the positive empowerment of the King and Queen. Indeed in the Declaration and then the Bill of Rights, and in subsequent legislation in the early 1690s, the distribution of power transferred to the King and the Queen by the Convention Parliament (and Parliament thereafter) was carefully calibrated to empower their majesties and to address the power distribution problems arising from having a dual monarch.

In the Declaration of Right and then the Bill of Rights, power was transferred to William and Mary in three different ways: first, through the transfer of "the Royal Dignity";

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[171] *Supra* note 35 at 388.
[172] See Pincus *supra* note 83 citing Delamere's view that the idea of invasion was "a piece of lunacy" and see also the discussion at *supra* note 84.
[173] See Pincus *supra* note 83 at Loc 3881 and also note 122.
[174] Article X of the Bill of Rights 1689.
[175] Article II of the Bill of Rights 1689.

second, through the explicit joint-vesting of prerogative powers in both Monarchs; and third, by explicitly empowering William to act alone on behalf of William and Mary.

As discussed in C.3 above, the term "the royal dignity" as a medieval legal concept referred not only to honour and position but also to authority and prerogative power. The Declaration and Bill of Rights transferred the "royal dignity" to William and Mary:

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

As we observed above, the Royal Dignity and regal powers held by James II were the product of a prior constitutional regime, which provided for the proto-corporate transfer of power to a hereditary monarch; a proto-corporate phenomenon which was umbilically connected to dynastic succession in accordance with the rules of royal succession. There were no means for anyone, including Parliament, to take possession of those rights under that prior order. The effect of the Convention Parliament (at the time a constitutionally unauthorised body) both deeming the throne to be vacated and then eradicating the succession was, as noted, to effectively dissolve this proto-corporate bundle of powers, or at the very least to leave them ineffective and powerless until James II or his successors were invited back, without conditions, to take the throne. The Dignity referred to by the Convention Parliament was necessarily, therefore, a Dignity formed by it from its constituted power. Clearly, in not detailing the precise nature of those powers (apart from the limitations referred to above), the Convention Parliament created a structure of power and a Royal Dignity that, by implication, in large part replicated the Royal Dignity held by James II; just as it, by implication, created a structure of power between King and Parliament that in several respects replicated the power structure under James II. These were the forms and structures of power with which they were familiar, but also for many they were viewed as being necessary for the effective functioning of parliament and government. Most importantly in this regard were the power for the King to dissolve parliament[176] and the requirement for Royal assent of parliamentary legislation, giving the King a veto on any future attempts to alter the balance of power, which William exercised two times during the 1690s.[177]

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

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[176] J. Locke, *Two Treatises of Government* (London: 1689) at [156] observing, *inter alia*, that "the power of assembling and dismissing the legislative" which is "placed in the executive" is necessary because it is not "possible that the first framers of government [who Locke understood to be a (not the) convention parliament – see *infra* note 210] should by any foresight be so much masters of future events as to be able to prefix so just periods of return and duration of the assemblies of the legislative".

[177] The Independent Judges Bill 1691 and The Triennial Bill 1693; see R.J. Frankie, 'The Formulation of the Declaration of Rights' (1874) 17 *The Historical Journal* 265 at 278.

> [T]heir majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, are and of right ought to be by the laws of this realm our sovereign liege lord and lady, King and Queen of England…in and to whose princely persons the royal state, *crown and dignity* of the said realms *with all* honours, styles, titles, regalities, *prerogatives, powers*, jurisdictions and authorities *to the same belonging and appertaining*[178] are most fully, rightfully and entirely *invested and incorporated*, united and annexed.

Here, "prerogatives" and "powers", which "belong and appertain" to the royal dignity, are "invested" and "incorporated" in the Monarch by the statute and, therefore, *by the Convention Parliament/Parliament.*[179] The etymology of the term "invest" is of particular note. The word stems from the Medieval Latin word *investire* meaning to clothe. The Concise Oxford Etymology Dictionary provides that "invest" stems from the notion of the endowment of power;[180] for the Merriam-Webster dictionary it is "to furnish with power or authority" or to "*grant* someone control or authority over".[181] Note also the use of the word "incorporated", which can be read as providing for the statutory incorporation of the crown and the dignity; a corporate dignity wedded to a statutory line of succession. As Coke observed in *Sutton's Hospital* a century earlier "the words fundo, erigo, incorporo, and such other like words are sufficient to make a corporation".[182] Moreover, the term invites comparison between the role of the Bill of Rights and the corporate nature of the crown and the incorporation of the Duchy of Lancaster in 1461 by an Act of Parliament during the reign of Edward IV, where the "possessions of the Duchy of Lancaster" were "incorporated" to be held by "the king…and his heirs King of England";[183] also a statutory corporation wedded to the royal succession.

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

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

Note that pursuant to the Declaration and the Bill of Rights regal power is "*in* and executed by the said Prince of Orange". Accordingly, "Royal Dignity" is transferred to William and Mary, but the "regal power" that is a constituent part of the Dignity is only to be exercised by William on their joint-behalf. Moreover, the Bill of Rights provided that William and Mary and any of their successors settled by the Act forfeit that "regal power" if they

[178] "Belonging and appertaining" to the royal dignity.
[179] By the time the Bill of Rights was passed, as discussed above, the Convention Parliament had converted itself into a Parliament.
[180] The Concise Oxford Dictionary of English Etymology (T.F. Hoad, eds, OUP: 1996): "clothe, spec, with the insignia of office, establish in possession, endow with power."
[181] Merriam Webster Dictionary at https://www.merriam-webster.com/dictionary/invest.
[182] (1597) Jenkins 270.
[183] W. Hardy (eds), *The Charters of the Duchy of Lancaster* (London: 1845) at 279.

convert or Catholicism or marry a Catholic.[184] That is, power was transferred and the terms of its maintenance and exercise are rendered conditional *by the Act*. It is clear from the literature on the Declaration of Rights that William III was very concerned about attempts to further limit and constrain these powers in the Declaration. His successful behind-the-Convention-scenes efforts to prevent such limits,[185] evidenced that he clearly understood that the nature, extent and scope of his kingly power were solely within the Convention Parliament's gift.

That the Convention Parliament and parliaments thereafter during the 1690s saw Kingly power as the product of parliamentary action is evident from the Convention Parliamentary debates but also, and very clearly, the debates and resulting statute dealing with the Kings and Queen's powers when William left for Ireland to fight James II. The Convention's debates evidence great conflict and disagreement about the powers and actions of this Convention body; there is, therefore, no definitive conclusion about the Convention's intent that we can draw from these debates. But what we can see is evidence that some Parliamentarians were of the view that the transfer and distribution of kingly power were to be determined by Parliament, which when juxtaposed next the Declaration of Right and then the Bill of Rights provides compelling support for the position that kingly power is delegated parliamentary power. A selection of examples, from Whig and Tory members of the Convention Parliament serve to establish this point. On January 29, 1689 in the debate on the State of the Nation, Mr Wharton, a Whig, observed that:

> You resolved yesterday 'That the Throne was vacant;' and I suppose every Gentleman, and those few that were against the vote, are now for filling the throne, *and resettling the* Government; and *I hope it will be done as near the ancient Government as can be*.[186]

The Tory, Lord Falkland observed that the foundation of Government was the powers provided to the King by Parliament:

> The Prince's Declaration is for a lasting foundation of the Government. I would know what our foundation is. Before the question be put, who shall set upon the Throne, I would consider *what powers we ought to give the Crown*, to satisfy them that sent us hither….Therefore, before you fill the throne I would have you resolve, *what power you will give the king* and what not.[187]

For the Whig, John Hampden:

[184] "Bill of Rights 1689: "Every person [who]…shall profess the popish religion, or shall marry a papist shall be...incapable…to have, use or exercise any regal power, authority or jurisdiction".
[185] *See*, *supra* note 177.
[186] *Supra* note 72 at 29 (emphasis supplied).
[187] *Ibid.* at 30 (emphasis supplied).

> The time presses hard on many accounts; and to rise without doing more than filling the Throne that is vacant is not for the safety of the people. Tis necessary to *declare* the Constitution and Rule of the Government.[188]

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

> Shall not the administration [etc] then be in the princess during that time[189]… [and] consider then whether it may not *be enacted*, that the Queen be *custos* [short for custos regni meaning custodian of royal power] in her own right.[190]

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

> I have thought it most convenient to leave the administration of the Government in the hands of the Queen, during my absence and, if it shall be judged necessary, to have an Act of Parliament for the better confirmation of it to her, I desire that you would let such a one be prepared to be presented to me.[191]

The House of Lords' initial Bill provided for the transfer of "regal government" to "the Queen" in the King's absence.[192] This issue tied the newly convened Parliament in regal knots. At the root of the problem were the uncertainties about the nature and effects of a parliamentary distribution of power: was the original distribution of power in the Declaration and Bill of Rights limited to the King's residency in the Kingdom?; did the original distribution of power in the Declaration and Bill of Rights entitle the King to delegate that power?; and if he or Parliament provided for a transfer of power what happened to the effects of the existing exercises of his power—would, for example, all his commissions to Justices of the Peace lapse and disappear as his power was temporarily removed?

At the forefront of the debate was Sir Robert Sawyer. He observed that "the King cannot delegate this power, because the King and Queen must not give this power away, *but by Act of Parliament*…the Crown and Royal authority are *vested* [by Parliament] in the King and Queen".[193] William Putney's speech to Parliament similarly gives a clear sense

[188] *Ibid.* at 36.
[189] *Ibid.* at 77.
[190] *Ibid.* at 78.
[191] *Debates in the House of Commons from the year 1667-1694* (Grey eds) Vol X at 3.
[192] *Ibid.* at 99 *per* Sergeant Tremaine.
[193] *Ibid.* at 105.

that regal power and its transfer were a function of parliamentary action, that such regal power covered all powers (including the war power), and also of the confusion and torment that the proposed distribution of power to the Queen generated in Parliament:

> It was never before in the World. Here are a King and Queen, and a King *invested* with Regal Power, and you [Parliament] *divest him and put it into the Queen*. The King can take no notice of what he does here. In the Queen is the Regal Power, as our Queen can do, she may dissolve this Parliament, raise an army, set out a fleet. I know not how to quality these things, but I see terrible consequences. When an Act of Parliament comes to terminate his power, I know not how that will operate on all Commissions.[194]

In Committee, William Whitlock offered a solution, and one that made it clear that regal power is *conferred* by Parliament:

> I find that everybody believes the King intends to go into Ireland, and that it is necessary the *Administrative-power*, in his absence, be in the Queen. The objection made is the danger of the trust in the Queen; but you may trust either, or both *in the power you have conferred upon them. If Parliament have trusted them with the powers you may trust them with the administration of them*….the King may by Act of Parliament exercise regal power in Ireland, and the Queen in England, and when the King returns he returns to former Administration. If he die there is an end to the whole.[195]

The Act provided for the solution which Whitlock described. It provided that whenever "and so often as it shall happen that his majesty shall be absent out of this Realm of England it shall and may be lawful for the Queen Majesty to exercise and administer the regal power and government of the Kingdom of England". On William's return "the sole administration of the regal power and government…shall be in his majesty only as if this Act had never been made."[196]

2. JOHN LOCKE AND DELEGATED PREROGATIVE POWER

Attention to John Locke's influential *Second Treatise of Government*,[197] published in the year of the Revolution, provides further support for the delegation argument presented in this article. Contrary to the position of some contemporary scholars, Locke did not view kingly power (executive and prerogative power) as an "original power", "intrinsic to the office of the ruler".[198]

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[194] *Ibid.* at 104.
[195] *Ibid.* 114.
[196] 1 W.&M. Sess.2.C.2.
[197] J. Locke, *Two Treatises of Government* (London: 1689).
[198] Loughlin, *supra* note 42 at 387 (Kindle eds.).

The Convention Parliament clearly did not codify Locke's political philosophy. Indeed a body of historical scholarship testifies to his lack of influence.[199] However, more recent scholarship has foregrounded his connections to several important revolutionary activists and members of the Convention Parliament, suggesting that his ideas are likely to have had traction and influence and are, therefore, of some relevance for understanding the constitutional significance of the Revolution. Schwoerer documents Locke's relationship to several prominent Convention members including John Somers, "a leader of the Convention and chairman of two committees that drafted the Declaration of Rights". She concludes that "Lockean ideas…played a part in the Revolution, whatever the negative attitude towards his *Two Treatises* thereafter".[200]

For Locke "in a constituted commonwealth…there is but one supreme power, which is the legislative, to which all the rest [DK-of the powers] are subordinate…and *all* other powers in any members or parts of society [are] *derived from* and subordinate to it".[201] The legislature's supreme power is constituted through the "trust reposed in them"[202] by the people; rendering this supreme power a "fiduciary power to act for certain ends".[203] [A]ll power" he observed is "*given with trust for the attaining an end being limited by that end*", with the broad ends of legislative supreme power being the preservation of society and the protection of the liberties and property of the subject.

Executive and prerogative power for Locke is best understood as delegated power from parliament or from the framers of the constitution. Two parts of the *Second Treatise* make this clear. The first has an uncanny resonance with the facts of the *Miller II* litigation. Locke observed:

> The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, *but it is a fiduciary trust placed in him* for the safety of the people in a case where the uncertainty and variableness of human affairs could not bear a steady fixed rule. For it not being possible that *the first framers of the government* should by any foresight be so much masters of future events as to be able to prefix so just periods of return and duration to the assemblies of the legislative, in all times to come, that might exactly answer all the exigencies of the commonwealth, the best remedy *was to trust* to the prudence of one who was always to be present, and whose business it was to watch over the public good….
>
> Thus, supposing the regulation of times for the assembling and sitting of the legislative not settled by the original constitution, it naturally fell into the hands of the executive not as an arbitrary power depending on his good pleasure, but *with this trust always to have it exercised for the public weal* as the occurrences of time and change of affairs might require.

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[199] J. Dunn, *The Political Thought of John Locke. An Historical Account of the Argument of the Two Treatises of Government* (Cambridge: 1969) 111.
[200] L.G. Schwoerer, 'Locke, Lockean Ideas and the Glorious Revolution' (1990) 51 *Journal of the History of Ideas* 531, at 532-533 and 548.
[201] *Ibid.* at [149] and [150].
[202] *Ibid.* at [149].
[203] *Ibid.*

Note first in this regard that, as in the context of legislative power, the notion of trust is used by Locke to denote the transfer or delegation of a fiduciary power; that is, a power to be used according to the end identified by, or imputed to, the transferor. Second, that powers of assembling and dismissing (of dissolution and proroguing) the legislature were placed "in trust" with the executive not directly by the people, but by the "framers of the constitution", which in 1689 was the Convention Parliament. Note also that the delegation of power has a purposive limitation, namely to be used for the "public weal".[204] Such power, like "all powers" was, as Locke previously observed, "limited by that end". For Locke, the use of this power "to hinder the meeting and acting of the legislative" did not invoke recourse to judicial review but did amount to a declaration "of war with the people" and justified the use of force by the people in response.[205] Be that as it may, what matters here is not the remedy but the structure of delegated fiduciary power.

The second example comes from Locke's subsequent consideration of the prerogative. For Locke, discretionary prerogative powers are required to deal with the problems and injustices arising from legal rigidity as well as the impossibility of legislating for all future events.[206] This latter concern was also central to Locke's consideration of powers of dissolution and prorogation, although note that Locke addresses these as executive powers rather than prerogative powers. For Locke, powers of dissolution and prorogation have a narrower purpose than those which he refers to as prerogative powers, which are discretionary powers to act for the public good, including powers of mercy and dispensation of the application of the laws. In a pre-echo of A.V. Dicey,[207] for Locke these powers are "left to the discretion of him that has the executive power".[208] But what did Locke mean by "left"? Is it power that has always been held by the king and which the Supreme powers elect to leave with him, analogous to when a creditor has a right to seize an asset to satisfy a debt but elects instead to leave the debtor with the asset? Or does it mean it "left" it to him in the way that that he receives something he did not previously have. For Locke it is the latter. In his "constituted commonwealth"[209] it is the constitutional structure of the commonwealth that constitutes power; such powers have no relation to any prior commonwealth. The question that then follows is who does the "leaving": the people or parliament?

A strong reading of Locke is that it is the people who constitute prerogative power. He observes that "prerogative can be nothing but the people's permitting their rulers do several thing of their own free choice" and the extent of these powers are a function of what is done and what is acquiesced in by "the people".[210] The powers can always be removed or taken back:

[204] *Supra* note 195 at [156].
[205] *Ibid.* at [155].
[206] *Ibid.* at [159].
[207] See quote at *supra* note 8.
[208] *Ibid.* at [159].
[209] *Ibid* at [149].
[210] *Ibid.* at [164].

> *The people* therefore finding reason to be satisfied with these princes, whenever they acted without, or contrary to the letter of the law, *acquiesced in what they did*, and without the least complaint, *let them* enlarge their prerogative as the pleased, judging rightly that they did nothing therein to the prejudice of their laws, since they acted conformably to the foundation and end of all laws- the public good.[211]
>
> And therefore they have a very wrong notion of government who say that *the people* have encroached upon the prerogative when *they have got any part of it to be defined by positive laws*. For in doing so that have *not pulled* from the *prince anything that of right belonged to him,* but only *declared* that the power that *they* indefinitely *left* in his hands, to be exercised for their good, was not a thing *they intended him* when he used it otherwise.[212]
>
> For a good prince, who is mindful of the trust put into his hands and careful of the good of his people, cannot have too much prerogative…so a weak and ill prince, who would claim that power his predecessors exercised, without the direction of law, *as a prerogative belonging to him by right of office*, which he may exercise at his pleasure to promote an interest distinct from that of the public, give the people an occasion to *claim their right and limit that power*, which whilst exercised for their good, *they were content should be tacitly allowed*.[213]

These paragraphs suggest the direct empowerment of the King by the people through their "leaving", "acquiescence" and "tacitly allowing". However, such empowerment lacks a theory of agency, the identification of which reveals a structure of power contained within Locke's notion of "the people". Locke's account of the formation, extent and contingent nature of prerogative power in the above extracts requires an active institutional agent, or at least an agent who is capable of acting. Who on behalf of the people is doing the "permitting"; who is "deciding", who is forming an "intention", who is "letting" the King enlarge his powers, who is "getting" parts of the prerogative to be defined by positive laws; who is "pulling" from the prince powers that which did not belong to him. Locke does not offer any account of that institutional agent, which could take many forms although he does, as noted above, use the term the "framers of government", suggesting that such an agent could take the form of a constitutional assembly or convention. In the context of the Glorious Revolution, the only plausible agent, acting on behalf of the people was the Convention Parliament. Schwoerer observes in this regard that in 1689 "in effect, [Locke] equated the Convention with the "people" and assigned to it the role of reconstituting a government when a dissolution of government occurred";[214] a position that supports the view that in Locke's work "the people" in relation to prerogative power is mediated by an institutional agent who delegates power to the executive. Thereafter the supreme legislative power—following the conversion of the Convention Parliament into a Parliament—permits, acquiesces, lets,

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[211] *Ibid.* at [165] (emphasis supplied).
[212] *Ibid.* at [163] (emphasis supplied).
[213] *Ibid* at [164].
[214] *Supra* note 200 at 535.

gets and pulls; a position which is consistent with Locke's observation in relation to non-legislative power, namely that "*all* other powers in any members or parts of society [are] *derived from* [supreme legislative power] and subordinate to it".[215]

E. MILLER II AND THE PURPOSE OF DELEGATED PREROGATIVE POWER

When prerogative powers are understood as powers which were delegated to the crown by parliament through statute, the basic building blocks upon which the case law on the justiciability of the exercise of prerogative power has been fashioned are removed, and the substantive legal edifice collapses. There is only space here to deal with these effects in brief outline.

Following *CCSU* and prior to the Supreme Court's decision in *Miller II*, to determine the justiciability of an exercise of prerogative power courts would look to the subject matter area in which the prerogative was exercised. Where the subject matter involved issues of "high policy" or "politics" the exercise of the power was not justiciable. For the Divisional Court in *Miller II*, for example, as the exercise of the power of prorogation in this case involved "intensely political considerations" it was not reviewable.[216] The Divisional Court, as well as leading commentators,[217] argued that the underlying reason for the subject matter test was that there are no judicial standards to review the prerogative when exercised in a politicized context. This claim has merit where the power is an original power, but not because the subject matter area in which the power is exercised is politicized but because as there is no end or purpose of an original power which can serve as the basis for the review. This is why aside from where the prerogative power interferes with an identified legitimate expectation its exercise is (*as an original power*) not reviewable.

However, such standards are readily available where the power is correctly understood as a delegated power. As delegated powers, like any statutory powers, they can only be exercised for the purposes for which they were conferred, and not for an improper purpose. Like other statutory powers, they can be reviewed to ensure that they have been used for such a proper purpose and that their use is rationally connected to such purpose. Such standards are a corollary of delegation: failure to exercise power for the conferred purpose is "equivalent to the departure from the remitted area";[218] outside of that area the Crown, the executive and the minister, *have no authority*. Moreover, as delegated powers are commonly reviewed where the subject matter question to which they relate is highly-politicized,[219] what reason could there be for imposing subject matter / political

[215] *Ibid* at [150].
[216] *Miller II*, *supra* note 3 at [51].
[217] See Endicott and Loughlin *supra* note 4.
[218] *Anismimic* v. *Foreign Compensation Commission* [1969] 2 AC 147, 207 *per* Lord Wilberforce.
[219] For an example of courts willingness to review a highly politicised issue arising from the exercise of a delegated power (delegated through an Order In Council) see *R. (Bancoult)* v. *Secretary of State for the FCO* [2000] All ER (D) 1675 (*Bancoult No. 1*) where the exercise of power relating to the creation of a US/UK military base was quashed.

restrictions on the review of prerogative powers when such powers are merely a different, if grander, version of statutory delegated powers? From this vantage point, with the Supreme Court's decision in *Miller II* in sight, if a power, such as the power of prorogation is a purposefully limited delegated power, one does not need to engage in the identification (for some, creation)[220] of constitutional principles which limit that power. Again, a more straightforward and traditional approach to judicial review of the exercise of the power is available, namely, whether the powers were used for proper purposes; the purposes for which they were delegated.[221]

However, in order to be able to review the exercise of prerogative powers purposefully, we need to be able to identify the purposes or ends for which they were delegated by the Convention Parliament. Such a determination is clearly difficult in relation to prerogative powers where the delegation through the Bill of Rights is broad and implicit and the individual powers are not demarcated. Moreover, in relation to many of these powers there will be no identifiable purpose of the power other than to further the interests of the nation, what Locke referred to as the "public weal". Such a broad purpose is unlikely to alter longstanding judicial deference in relation to the executive's determination of the national interest in foreign affairs and security[222] or result in judicial intervention apart from in relation to the most egregious, irrational and corrupt uses of a power. However, in relation to certain powers narrower purposive limitation will be deducible from the nature of the power and the fact of delegation. The power of prorogation is one such prerogative power.

A corporate law comparison is instructive in this regard. Prior to the Companies Act 2006,[223] the purpose for which corporate power was delegated from the general meeting of shareholders to the directors was not specified in the corporate statute or the corporate constitution. Nevertheless, purpose performed a central regulatory function. Courts understood the purpose of delegated corporate power in two ways. First, in a way analogous to the "public weal", as a function of the broad interests of the power giver, namely the shareholders as a constituency of present and future members.[224] Some commentators appealed to a broader purposive orientation, to take account of the interests of other stakeholders. In doing so they appealed both to the role such stakeholders play in corporate life but also to the idea of the interests of the ultimate power giver—the state. Second, purpose in the corporate context is also defined narrowly in relation to the exercise of powers that have the scope to interfere with the basic structure of shareholder power. Here courts do not allow ostensibly unlimited directorial power to be used in a way that interferes with the shareholders' fundamental interests or "rights" (voting power and the right to accept or reject a takeover offer).[225] Such purposive limitation flows logically

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The politically-charged environment did not prevent the review and invalidation of the exercise of the power applying Wednesbury reasonableness.

[220] *See supra* note 4.

[221] An approach which is very similar to that taken in *Cherry*, *supra* note 1, although rendered unpersuasive in *Cherry* (*supra* note 1) as the Inner House does not challenge the original power presumption—see text to notes 21-25.

[222] See, for example, *CCSU supra* note 9.

[223] We consider here the common law position and commentary prior to 2006 as Section 172 CA 2006 specified that the purpose of the company was to promote the success of the company for the benefit of the shareholders.

[224] *Gaiman v National Association for Mental Health* [1970] All ER 363; *Brady v Brady* [1988] BCLC 579.

[225] *See*, for example, *Hogg v Cramphorn Ltd* [1967] Ch. 254 and *Howard Smith v Ampol* [1974] A.C. 821.

from a basic fact of delegation: *without the express consent of the power giver*, we presume that the delegator did not intend that delegated power could be used to by the delegatee to undermine the power of the delegator.

The idea that without express consent delegated power cannot be used to undermine the power of the delegator, enables a more precise purposive delineation of the power of prorogation. The purpose of the powers to prorogue, to dissolve (prior to the Fixed Term Parliament Act 2011), and to recall parliament is to facilitate the governance and operations of Parliament and cannot consistently with that purpose be used for the purpose of interfering with or inhibiting an exercise of power (or inhibiting the consideration of an exercise of power) by Parliament. To use the power for such a purpose would be an improper purpose—a departure from the remitted area of the power and, accordingly, an invalid and void exercise of the power. This would have been a more substantial basis for reviewing the prorogation of Parliament in September 2019. But it is a basis that has been obscured by our failure to pay close attention to the precise corporate nature of the crown and the royal dignity prior to 1688, the statutory imperative to remake it following its dissolution, and the resulting statutory and delegated nature of prerogative powers.