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PRESCRIPTION AND EMPIRE FROM JUSTINIAN TO GROTIUS*

EDWARD CAVANAGH
Downing College, Cambridge

ABSTRACT. *Europeans have long justified a right to something or other by invoking 'prescription' (that is, the creation of a legal entitlement by the passage of time). Yet for all the importance of prescription in the creation of international geopolitical order, no genealogy of the idea has emerged from historical or legal scholarship. This article will explore the relationship between prescription and empire within private, public, corporate, and ecclesiastical legal contexts. The idea of prescription is then considered within the specific ideological context of European imperialism between 1580 and 1640, when a series of diplomatic disputes and intellectual debates were had in Europe principally regarding maritime navigation and foreign dominion by 'donation'. The metamorphosis of prescription in legal and political thought from Justinian (483–565) to Hugo Grotius (1583–1645) is therefore explored. Additional colour is given to this intellectual history by contrasting how corporate interests in North America attempted to justify their foreign land holdings in forts, ports, and hinterland by invoking 'prescription' during the early stages of colonial expansion. The case will be made for historians of early modern imperialism and international law to take closer notice of the opportunism of those prepared to justify prescription in theory and practice.*

Time is essential to any claim. Such is the basis of prescription, one of the most transformative and dynamic ideas in the history of political thought. Distinct from the two modern senses of the word – conveying an authoritative recommendation, and that which one seeks from a medical practitioner – prescription, in classical and medieval legal terminology, conveys the acquisition of the ownership of something through possession after a set period of time. Emerging humbly from the Roman private law of property, today prescription has its strongest purchase in public international law. During the nineteenth century, it was fairly well

Downing College, Regent St, Cambridge, CB2 1DQ ec613@cam.ac.uk

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accepted that internationally recognizable claims could be laid to territory based upon long-standing occupation from 'time immemorial', even though few were prepared to call this prescription (or, as the idea was qualified from the mid-nineteenth century onwards, *acquisitive prescription*, and contrasted with *extinctive prescription*). It would not be until the publication and reception of Sir Hersch Lauterpacht's *Private law sources and analogies of international law* (1927), which presented a thoroughly original interpretation of public international law as private law writ large, that the international juristic community became accepting of this new application of prescriptive reasoning. In Lauterpacht's lifetime (1897–1960), acquisitive prescription and extinctive prescription were developed into sophisticated rules for the arbitration of territorial disputes in international law, and thus they remain today, if however contested.[1]

Readers unmoved by the legalese of modern public international law may find it more heuristic to reflect briefly upon the historical importance of prescription in the English corporate and political tradition by way of entrance into the topic. When ant-size Anglo-Saxon kings took their departure from the Roman Empire to exercise sovereignty locally, they were soon superseded by a consolidated kingship which gained in legitimacy with the passage of time. By the age of Edward I, this legitimacy had fortified to become 'prerogative, against which no prescription of time could run'.[2] This king was, in other words, the product of prescription but remained insulated, optimistically, from the same against himself. This very same king, it turned out, was famously sceptical towards the claims of his nobility to their own titles by prescription during the *quo warranto* inquiries after 1278, when all magnates of the realm were demanded to relinquish those of their privileges which could not be proven to have come from a legitimate royal grant. Denying rights of prescription (claims usually invoked in relation to 'the time of conquest') turned out to be bold, however; exception had to be allowed, after 1290, for titles older than a hundred years: 'all who say they have had undisturbed possession of liberties before the times of king Richard and since without interruption and can show this by good inquest may enjoy the things thus possessed'.[3] Meanwhile, ecclesiastical and municipal corporations, from roughly around this period,

[1] Hersch Lauterpacht, *Private law sources and analogies of international law (with special reference to international arbitration)* (London, 1927); D. H. N. Johnson, 'Acquisitive prescription in international law', *British Yearbook of International Law*, 27 (1950), pp. 332–54; Randall Lesaffer, 'Argument from Roman law in current international law: occupation and acquisitive prescription', *European Journal of International Law*, 16 (2005), pp. 25–58.

[2] *Year books of the reign of King Edward the first, years XX and XXI*, ed. and trans. Alfred J. Horwood (London, 1866), p. 69: 'Le Roy est prerogatif; par quey nul prescripcion de tens ne court encontre ly.'

[3] 18 Edward I Stat. 2 (1290), in *English historical documents*, III: *C. 1189–1327*, ed. Harry Rothwell (Abingdon, 1996), p. 465. For custom and prescription in medieval England more generally, see David Ibbetson, 'Custom in medieval law', in Amanda Perreau-Saussine and James Bernard Murphy, eds., *The nature of customary law: legal, historical and philosophical perspectives* (Cambridge, 2007), pp. 151–75.

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sprouted across the country, each proudly attached to their exceptional juridical personalities and sustained on no other authority, sometimes, but 'time whereof the memory of man runneth not to the contrary', and so, 'in law', were 'well created'.[4] Such were the historical reflections of Sir William Blackstone (1723–80) on the formation of English 'corporations by prescription', and he would have more to say about the use of prescription to claim incorporeal things more generally in the common law, in his chapter 'On prescription', in the *Commentaries* (1765–9): 'as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it'.[5] Prescription was a topic Blackstone could hardly afford to avoid given the scrupulous if unmethodical examination of prescription provided by Sir Edward Coke (1552–1634) in the almighty *Institutes of the laws of England* (1628), which Blackstone read in his youth at the Middle Temple. The pre-eminent English legal textbook during the turbulent political period leading up to the Glorious Revolution of 1688, Coke's commentaries on Littleton provide abundant examples of incorporeal prescription in English law.[6] In these decades, the concept of prescription was important not only in the common law; prescription (albeit sometimes indistinguishable and even interchangeable with *custom*) was seductive to English political thinkers of diverse persuasions as they set about inventing the enduring idea of an 'ancient constitution' as a kind of watchdog over petulant kings and renegade assemblies alike.[7] The subsequent amplification of parliamentary authority – which despoiled little of the prescribed royal prerogative but gave elected members of the Commons something akin to the same – saw radical changes to the makeup of the English state, yet its key institutions could still be justified by prescription. '[O]ur Constitution', declared Edmund Burke (1729–97) in his speech on the reform of the Commons in 1782, 'is a prescriptive Constitution':

> it is a Constitution, whose sole authority is, that it has existed time out of mind...Your King, your Lords, your Judges, your Juries, grand and little, all are prescriptive; and what proves it, is, the disputes not yet concluded, and never near becoming so, when any of them first originated. Prescription is the most solid of all titles, not only to property, but, which is to secure that property, to Government. They harmonize with each other, and give mutual aid to one another.

[4] William Blackstone, *Commentaries on the laws of England* (4 books, Oxford, 1765–9), bk 1, ch. 18, pp. 460–1. See also William Searle Holdsworth, *A history of English law* (5th edn, multiple vols., London, 1936–72), III, pp. 475–9; Ernst H. Kantorowicz, *The king's two bodies: a study in medieval political theology* (Princeton, NJ, 1957), pp. 143–92.

[5] Blackstone, *Commentaries*, bk 2, ch. 17.

[6] Edward Coke, *The first part of the institutes of the laws of England; or, a commentary upon Littleton*, ed. Francis Hargrave and Charles Butler (19th edn, 2 vols., London, 1832), I.

[7] Janelle Greenberg, *The radical face of the ancient constitution: St. Edward's 'laws' in early modern political thought* (Cambridge, 2001), pp. 1–35, 169–74, 222–9. See also Michael Lobban, *A history of the philosophy of law in the common law world, 1600–1900* (Dordrecht, 2007), pp. 86–99; J. G. A. Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge, 1987), pp. 1–69, 229–305.

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> Now, if the Crown and the Lords, and the Judicatures, are all prescriptive, so is the House of Commons of the very same origin, and of no other...The House of Commons is a legislative body corporate by prescription, not made upon any given theory, but existing prescriptively...for at least five hundred years.[8]

Thus had prescription nestled its way into English political thought between Edward I and Edmund Burke. Here, as in many other ideological settings, it was an exogenous and malleable idea, as this article will show with respect to late medieval law, and also the early imperial endeavours beckoned by the age of discovery. These particular contexts warrant serious investigation because these were the contexts which allowed prescription to transform from a jurisdictionally specific quirk of private law into an internationally potent means of determining supremacy over territories and seas, not only in English legal thought but also, and more importantly, in European legal thought.

The need to justify foreign acquisitions made a number of demands of European ideologies of empire, as is well known. For the most part, however, prescription looms small in the historiography of early modern imperialism, and the meaning of the word has often been misunderstood.[9] Historians have generally gone digging in different pits; in particular, it has become the norm over the last two decades to explain how a few great omnipotent doctrines, like 'terra nullius' and 'discovery', held huge ramifications in store for dispossessed indigenous communities, *arriviste* settlers, and corporate polities.[10] One looks, however, in vain through the writings of medieval canon and civil lawyers, as indeed one does through the natural law scholarship, for any proof that these doctrines even existed. The *ius gentium* can present something of a boon to more imaginative historians, for it is not generally considered to have been a body of positive law. For some, this allows for its tatters of jurisprudence to be stitched together in order to make it *seem* as though general principles resembled a doctrine of this or a doctrine of that, irrespective of how diplomats and jurists thought of these principles at the time. Recent scholarship

[8] Edmund Burke, *Select works of Edmund Burke: a new imprint of the Payne edition* (4 vols., Indianapolis, IN, 1999), IV, pp. 20–3.

[9] For brief but thoughtful considerations of prescription, see Anthony Pagden, 'Law, colonization, legitimation, and the European background', in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge history of law in America*, I: *Early America (1580–1815)* (Cambridge, 2008), pp. 22–3; Lauren Benton and Benjamin Straumann, 'Acquiring empire by law: from Roman doctrine to early modern European practice', *Law and History Review*, 28 (2010), pp. 11–12. Patricia Seed, by contrast, takes prescription to mean 'by declaration or decree'. Patricia Seed, 'Taking possession and reading texts: establishing the authority of overseas empires', *William and Mary Quarterly*, 49 (1992), pp. 197–8.

[10] See, for example, David Boucher, 'The law of nations and the doctrine of *terra nullius*', in Olaf Asbach and Peter Schrader, eds., *The state and international law in seventeenth-century Europe* (Farnham, 2010), pp. 63–82; Robert J. Miller et al., *Discovering indigenous lands: the doctrine of discovery in the English colonies* (Oxford, 2010).

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by Andrew Fitzmaurice promises to redirect historians towards a more faithful appraisal of the languages used to justify and critique the appropriation of territory. This approach has fruitfully culminated in his historical study of the idea of occupation in Western political thought, *Sovereignty, property and empire, 1500–2000* (2014). In this ambitious book, Fitzmaurice traces *occupatio* from its origins in the Roman law of property through to its deployment in a number of different contexts. Given the global span of this disciplined inquiry, Fitzmaurice must necessarily avoid taking detours through the Roman law of property to shed light on prescription specifically, beyond offering a few brief and telling observations.[11]

This article contributes to our understandings of European ideologies of imperialism by showing how prescription became crucial to sovereignty, property, and empire in the early modern period. To do this, a thorough genealogy of the idea is presented. Born in the confines of Roman private law, the idea went in two divergent directions after the twelfth century. Canonists used prescription to settle positions of authority and access to rights of tithe and the like. Civilians used prescription as it had been used in Roman law, but they also used prescription and amplified the Roman concept of custom (*consuetudinis*) to decide upon the legitimacy of new kingdoms and city-states amid the painstakingly slow abandonment of the *Imperium Romanorum*. Prescriptive reasoning therefore had found a strong place in both the *ius commune* and the English common law by the time Fernando Vázquez de Menchaca (1512–69) emerged to present his highly elaborated and nuanced account of prescription in his *Controversies* (1564). The importance of Vázquez's treatment of prescription has for a long time been overlooked, with Annabel Brett's expert study of individual rights in later scholastic thought offering a recent and welcome salve.[12] His contributions to the natural law tradition, as it began to thrive, are now better understood. Vázquez remains an obscure figure in the history of international law, however, notwithstanding the one-off contribution of Camilo Barcia Trelles to The Hague's *Recueil des Cours* in 1939.[13] My purpose here will be to approach Vázquez with empire in mind, and also to observe how his take on prescription was legally innovative and subsequently influential to scholars immediately after him. Few were so enamoured of Vázquez as Hugo Grotius, as he compiled his tracts in defence of the actions of his Dutch employers, the Vereenigde Oostindische Compagnie. Grotius's lifetime (1583–1645),

[11] Andrew Fitzmaurice, *Sovereignty, property and empire, 1500–2000* (Cambridge, 2014), pp. 43–4, 67, 110–11, 116.

[12] Annabel S. Brett, *Liberty, right and nature: individual rights in later scholastic thought* (Cambridge, 1997), pp. 186–92.

[13] Camilo Trelles, 'Fernando Vázquez de Menchaca (1512–1569): l'école espagnole du droit international du XVIe siècle', *Recueil des Cours* (1939), pp. 430–534. This summarizing piece has several merits, not least of which being the appraisal of those parts of Vázquez considered important within the context of scholarship on public international law in the interwar years.

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it will be shown here, was the pivotal period which saw the deployment of prescription for numerous imperial and corporate purposes.

As this article branches out from the legal and political thought of Europe to consider the extra-European world, it is interesting to observe which particular contexts allowed for the adoption of prescription as an idea. In the North American New World, prescriptive reasoning was adopted among Europeans – as they claimed *from* one another, or otherwise as they developed arguments *against* an equally new peripheral claim – but it was not applied in explicit contemplation of indigenous property rights. This is an important disclaimer to offer before proceeding. It was often easier for thinkers both in Europe and in America to justify foreign territorial acquisitions by considering native communities bereft of the sophistication necessary to enjoy full rights to immoveable property in these regions. Such a deficit allowed these communities to be removed from consideration within the Roman law of things, and deferred them instead to more uncertain treatment at the hands of thinkers in the more fluid *ius naturale* or the more nebulous *ius gentium* traditions. Crucially, when and where it became no longer possible to deny outright the rights of pre-existing non-European communities in the New World, the law of prescription was sensibly abandoned, for time in such contexts worked against the favour of newcomers. That time could still work *with* newcomers in America at the same time – and indeed right up to the mid-nineteenth century – will be one of the key findings of the article that emerges towards conclusion.

I

Property or things (*res*) touched just about everything in Roman law. *Res* therefore had to be classified, disaggregated, and regulated by ancient jurists, and likewise, but only where necessary, by the medieval scholars who resurrected them. These typologies of property remain largely with us today: it is, for example, to the Romans that we can trace the distinctions, sometimes subtle and at other times blatant, not only between properties *mobilia* and *immobilia*, but also between properties divisible and indivisible, sacred and secular, consumable and inconsumable, principal and accessory, ownable and unownable, corporeal and incorporeal, and private, common, and public. In practical application, however, the Roman law of property defied neat classificatory systems, and there is some inconsistency about these distinctions across ancient legal texts.[14] Though it is not for this study to provide a comprehensive overview of the Roman law of property, which would provide minimal relief to the

[14] See, for example, William L Burdick, *The principles of Roman law and their relation to modern law* (Rochester, NY, 1938), pp. 298–308; Paul du Plessis, 'Property', in David Johnston, ed., *The Cambridge companion to Roman law* (Cambridge, 2015), pp. 175–89; W. W. Buckland, *A text-book of Roman law: from Augustus to Justinian* (3rd edn, revised by Peter Stein, Cambridge, 2007), pp. 180–281.

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reader, what will be necessary here is some reflection upon the principal actions available in later Roman private law to establish a claim to immoveable property.

This was relatively straightforward in environments where no rival claimants could be identified. As Justinian (483–565) had set out in the *Institutes*, that which belongs to nobody, by natural reason, concedes to the earliest occupier ('quod enim ante nullius est, id naturali ratione occupanti conceditur').[15] Herein lies the basis of what has been called the rule of 'first taker', or the law of *occupatio*, which has appeared in a number of forms since the later Roman Empire.[16] Rare, though, were the environments in which such a rule could be applied. Multiple interests were often connected to a singular thing or *res*, and few circumstances provided for a perfectly uncomplicated expression of *dominium*.

This was especially true during the medieval period in which Roman legal ideas about property came to be reintroduced into customary land regimes under the increasing surveillance of bureaucratic and land-hungry sovereigns.[17] As the issuance of hereditary grants of land to handpicked noblemen became the most effective way to secure the loyalty of powerbrokers in different regions, the finitude of land became very apparent to rulers. Land rights became especially precious and politicized during the mendicant age.[18] Starting with the imposition of the first *amortissant* taxes by Henri II in 1191 right up to the dissolution of the monasteries by Henry VIII in 1540, the kings of France and England (especially but not uniquely) were anxious to revert empty estates to the royal demesne and thereby entrench their own power in the face of the encroachments of ecclesiastical corporations who sought to lock up property forever.[19] In competitive and closely monitored jurisdictions such as these, lands without some kind of claim attached to them were

[15] Justinian, *Institutiones*, II, 1: 12. Justinianic law cited in this article derives from the *Corpus iuris civilis*, ed. Theodor Mommsen and Paul Krueger (Dublin, 1968).

[16] Fitzmaurice, *Sovereignty, property and empire*, pp. 118–19, 259–60, 312n24. See also Alan Watson, *The law of property in the later Roman republic* (Oxford, 1968), pp. 62–74.

[17] Susan Reynolds, *Fiefs and vassals: the medieval evidence reinterpreted* (Oxford, 2001); M. T. Clanchy, *From memory to written record: England, 1066–1307* (2nd edn, Oxford, 1993).

[18] Between the rise of the mendicant movement and the beginnings of the papal schism (c. 1193–1378), thousands of ecclesiastical corporations fell upon the land from Kraków to Galway, variously attached to Rome but to each their own separate holding. The corporate form, for this reason so attractive to the canon lawyers and early conciliarists, allowed for a given church group to acquire titles, generally by purchase or gift, and hold these titles as a sole person with perpetual succession and a degree of separation from the pope. C. H. Lawrence, *The friars: the impact of the early mendicant orders on medieval society* (rev. edn, London, 2013); Brian Tierney, *Foundations of the conciliar theory: the contribution of the medieval canonists from Gratian to the great schism* (2nd edn, Leiden, 1998), pp. 89–142.

[19] Adhémar Esmein, *Cours élémentaire d'histoire du droit Français* (3rd edn, Paris, 1920), pp. 310–14; Theodore Evergates, *The aristocracy in the county of Champagne, 1100–1300* (Philadelphia, PA, 2007), pp. 76–81; Sandra Raban, *Mortmain legislation and the English church, 1279–1500* (Cambridge, 1982); Francis Aidan Gasquet, *Henry VIII and the English monasteries* (2 vols., London, 1888–9).

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hard to find. If, therefore, we may talk of the 'rule of first taker' after the fall of the Roman Empire, or even talk of the more specious public-law 'doctrines' analogized from such a rule by jurists during the demise of modern empires, then it is important to recognize the peculiarity of such a context between these epochs. The first takers in the history of private immoveable property were very few – across settled Europe, anyway.

So too in Late Antiquity. Instead, the establishment of a new private claim to *res* required the measurement of this claim against that of another potential claimant of the same *res* – a context in which the rule of first taker could not come into play. In such instances, time became the most crucial determinant for conflicting interests (the distinction of which was sometimes made between owner and possessor). In other words, the inquiry to be made in Ancient Rome, as it was later in medieval Europe, was less into *who was ostensibly there first* but rather into *who was effectively there for a sufficiently long period of time.* In classical law, the generation of ownership through continuous possession was called *usucapio.* This rule provided relief to a possessor against an owner who was not considered to be taking the appropriate steps to secure his ownership of property. For land ownership to divert to the possessor, the act of possession had to be performed in good faith, and it typically required a just cause (pertaining, perhaps, to an awry sale), over and above the passage of time (typically, ten or twenty years).[20] By the sixth century, the principles and procedures of *usucapio* were simplified, and the term was replaced by *praescriptio longi temporis,* which now referred to the acquisition of land ownership after a slightly longer period of possession.[21] This was a Justinianic construction, and its supersession of *usucapio* was ideal for the era later to beckon – relating not only the importance of time (*prae-*) but also the written legal process of instigating a suit (*-scriptio)* for the resolution of disputed property interests. Certainly, the passage of time (*longi temporis*) remained the most important element of prescription: for immoveable property, the period for uninterrupted possession was fixed at thirty or forty years depending on the relationship between the original owner and challenging possessor; the period for claimants of moveable property was much less, and usually only a matter of years (in a process which was sometimes still called *usucapio* rather than *praescriptio*). Although there were variations and exceptions in the law of prescription as it was resuscitated in the medieval period, what remained constant was the applicability of the rule only to the ownership of private property, and not to the ownership of public property or common property.

Such, at least, was how prescription developed in the *Corpus iurus civilis.* Canonists offered their own unique take on prescription after the twelfth century, such that, by at least the fourteenth century, 'the legal concept of

[20] Watson, *Law of property,* pp. 31–2, 48–61; H. F. Jolowicz and Barry Nicholas, *Historical introduction to the study of Roman law* (3rd edn, Cambridge, 1972), pp. 151–5.

[21] Justinian, *Codex,* VII, 31: 33–5. See also Jolowicz and Nicholas, *Historical introduction,* p. 506; Burdick, *Principles,* pp. 342–5.

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prescription', writes Kantorowicz, had become of 'capital importance' to the church.[22] Justinian offered only a brief consideration of prescription in relation to church matters in the *Codex*, but the passage is a remarkable one for its treatment of sacred and secular associations together in relation to property. Trusts and donated titles held by the Roman Church, as well as those held by charities, hospitals, monasteries, orphanages, and aged care facilities ('religiosissimis locis') and even those held by cities, were subject to exceptional rules of prescription: in a state of disuse, this property could only be reclaimed after the term of a natural life (that is, a hundred years), which for Justinian amounted to an 'almost perpetual right of recovery'.[23] Seen, much later, from the point of view of the canonists, here was a considerable deterrent to all natural prescribers, and maybe a means to prevent the alienation of church land.

Prescription was not only useful to protect ecclesiastical holdings. It could also be made to work *within* the church (if performed in good faith), which required a much wider applicability of the concept. In the *Decretum* of Gratian, pioneering inquiries were made as to whether ecclesiastical rights could be removed by prescription ('an iura ecclesiarum prescriptione tollantur').[24] Gratian's examples concerned the clergy of a particular church facing challenge by the claims of a neighbouring clergy, generally to lands and revenues through tithes, but the *Decretum* also contemplated the possibility of laymen impinging upon the same.[25] This would not be all. More innovatively, prescription appeared to provide a way to mete out rights generally in the church, and was put to work to settle disputes over the obedience of hierarchy within and across ecclesiastical districts. For example, the right to enjoy a particular representative position in the clergy might be encroached upon and superseded by another clergyman through prescription in good faith.[26] Thus, after Gratian and his followers, not only were ordinary rights in land (*temporalia*) and tithes (*spiritualia*) potentially determined by prescription, but ecclesiastical jurisdiction itself – the right to administer sacrament and pastoral care – could be determined by prescription too. Hereafter, in canon law, the coverage of prescription was broadly extended over both church and civil matters. According with, and amplifying earlier Roman legal guidelines, *bona fide* became a mandatory requirement for ecclesiastical prescription, following the decrees of Innocentius III (1206) and the meeting of the Fourth Lateran Council (1215).[27] Good faith would become the most enduring component of canonistic prescription in the wake of Johannes Andreae (1270–1348),

[22] Kantorowicz, *King's two bodies*, pp. 165.
[23] Justinian, *Codex*, I, 2: 23.
[24] *Liber extravagantium decretalium*, in *Corpus iuris canonici*, ed. Emil Friedberg (2 vols., Graz, 1959), C. 16, q. 3.
[25] A useful overview may be found in R. H. Helmholz, *The spirit of classical canon law* (Athens, GA, 1996), pp. 178–81.
[26] Helmholz, *Spirit of classical canon law*, 49.
[27] For canonistic prescription in good faith, see Noël Vilain, 'Prescription et bonne foi: Du décret de Gratien (1140) à Jean d'André (d. 1348)', *Traditio*, 14 (1958), pp. 121–89.

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who gave himself the job of synthesizing civilian prescription with church understandings of the same.[28]

Prescription, from around this time, came to be acknowledged by a number of prominent civilians, none more important than Bartolus de Saxoferrato (1313–57). Bartolus would imbue the idea of prescription with another function altogether, offering the suggestion that the public right of sovereignty could be affected by the passage of time. For Bartolus, the *de jure* sovereignty of 'Principem Romanum' might span the 'dominium totius orbis', but de facto rights of sovereignty (and, with that, exemption from imperial rule) could be established after an unspecific time through 'praescriptio' – or sometimes, in a telling construction, through 'consuetudine praescribi'. This, to be sure, was the reluctant blending of two ideas Bartolus otherwise strove to separate: elsewhere, a strong distinction is made between custom, which required the majority consensus of the *universitas*, and prescription, which concerned only those individuals affected or 'disposed'.[29]

Bartolus was a city-state civilian, a profession which came with a particular agenda. This gave him an eagerness to provide additional credibility to the corporate Italian *populus*, the political authority of its government, and also its claims to exercise jurisdiction over gulfs and bays.[30] His position on public prescription was never offered solely for the Italians, however; indeed, an example offered in his *Commentaries* on Justinian was a justification in favour of the sovereignty of the king of France. 'Credo enim regem Franciae non subjectum esse Imperio', he asserts, and in the process lends his endorsement to the legitimacy of all of the new splintering Christian polities of the late medieval period.[31] Later, Venetian and Genoan civilians who came after Bartolus took sufficient inspiration from him to justify their claims to exclusive control over

[28] Helmholz, *Spirit of classical canon law*, pp. 191–8; Vilain, 'Prescription et bonne foi', pp. 153, 163–4, 179.

[29] '[C]onsuetudo est jus disponens ex consensu populi vel majoris partis universitatis constitutum…praescriptio vero est jus dispositum…consentiunt in ea tamquam singuli, non tamquam universi.' From this basis, Bartolus offered that prescription embodied the principles of contract more so than custom, even if both prescription and custom required the passage of time for the creation of right. For these passages and their analysis, see Walter Ullmann, 'Bartolus on customary law', *Juridical Review*, 52 (1940), pp. 265–83.

[30] Walter Ullmann, 'The delictal responsibility of medieval corporations', *Law Quarterly Review*, 64 (1948), pp. 85–92; Joseph Canning, 'The corporation in the political thought of the Italian jurists in the thirteenth and fourteenth centuries', *History of Political Thought*, 1 (1980), p. 31; Magnus Ryan, 'Bartolus of Sassoferrato and free cities', *Transactions of the Royal Historical Society*, 10 (2000), pp. 65–89; Floriano Jonas Cesar, 'Popular autonomy and imperial power in Bartolus of Saxoferrato: an intrinsic connection', *Journal of the History of Ideas*, 65 (2004), pp. 369–81. See also Joseph Canning, *A history of medieval political thought: 300–1450* (London, 1996), pp. 161–73.

[31] 'Nota Principem Romanum esse dominium totius orbis…quia ibi loquitur de facto. Nam de facto aliquae provinciae non sunt subjectae, sed de jure omnes dibi subjectae sunt…Quod credo verum nisi per aliquod tempus sit secuta praescriptio…Praeterea hoc non videtur verum, cum enim Francia ab ejus dominio sit subtracta et rex Franciae sit exemptus…Credo enim regem Franciae non subjectum esse Imperio.' For this passage and an analysis, see Cecil

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maritime traffic within their respective gulfs, which culminated in the important defence of the practice in the *Tractatus de praescriptionibus* of Johannes Franciscus Balbus, published in several editions from the middle of the sixteenth century into the seventeenth.[32] In these discussions over the enjoyment of a public and sometimes exclusionary right, an important ambiguity developed as to whether prescribers required their claim to be measured against an antecedent entity (by implication, against the *Imperium Romanorum*) or none at all (by implication, through *consuetudo*).

Meanwhile, within English juristic thought, prescription, as we have seen, allowed for the generation of Edward I's prerogative through the passage of time. But the idea had other applications too. 'Bracton' (1225?–60), in *De legibus et consuetudinibus Angliae*, provides examples of the rule even before Edward's coronation. Prescription in this tract, as it was established in earlier Roman law, operated only in exceptional contexts to punish the 'negligence' of an owner, 'for time runs against the indolent and those unmindful of their right', as Bracton comments on the law of obligations.[33] Additionally, Bracton reveals a small but nevertheless distinct place for the rule in feudalistic relation to the usage of commons. If a man made use of land in the absence of vicinage, unburdened by any conditions of service, and lacking any donation or title which permitted him to use this land, his claim was made into *iure*, after a 'long time' and through 'long usage' (i.e., 'exceeding the memory of man').[34] Prescription therefore generated rights in the early common law, but these rights always fell short of actual ownership of immoveable property. Franchises (generally, jurisdictional rights) rather than actual sections of land (the security of which was still affected thereby) were the most important subjects of prescription in medieval England following the *quo warranto* exceptions of 1290.[35]

Over the next two centuries, English common lawyers borrowed only selectively from canon law and civil law, as they distinguished themselves from their continental counterparts, by elaborating a system made up of precedents and procedurally dependent upon the issuance of writs.[36] It is significant, therefore,

N. Sidney Woolf, *Bartolus of Sassoferrato: his position in the history of medieval political thought* (Cambridge, 1913), pp. 108–10, 137–9.

[32] See, for example, *Tractatus de praescriptionibus* (Cologne, 1590).

[33] *Bracton on the laws and customs of England*, trans. Samuel E. Thorne (4 vols., Cambridge, MA, 1968–77), II, p. 288: 'Currit enim tempus contra desides et sui iuris contemptores.' For situations in which prescription cannot apply, see ibid., II, p. 58.

[34] Ibid., III, p. 186.

[35] Thereafter, in the common law, writes Holdsworth, 'it came to be thought that prescription was based not so much on a personal law in favour of the person seised, as on the fact that such immemorial user was conclusive evidence of a grant made before the time of legal memory'. Holdsworth, *History of English law*, III, pp. 169–70. See, for a wider treatment, Thomas Arnold Herbert's Yorke Prize Essay of 1890, published as *The history of the law of prescription in England* (Cambridge, 1891).

[36] See David J. Seipp, 'The reception of canon law and civil law in the common law courts before 1600', *Oxford Journal of Legal Studies*, 13 (1993), pp. 388–420.

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that *praescriptio* became confused with *consuetudo* as it had in Italy over this period.[37] This appears to have owed to the application of prescription in English legal contexts seemingly lacking of any identifiable interests to prescribe *against*, which represented a departure from Roman tradition.[38] Only in the sixteenth century was this kind of prescription rethought of as *custom*, but not all that definitively, for these two concepts could still be clumped together and considered as one – as they were, for instance, in parts of Christopher St Germain's *Doctor and student* (1518) – until clarity was finally afforded by *Swayne's Case* (1609), which distinguished between prescription as *personal* and better pertaining to rights, and custom as *local* and better pertaining to law.[39]

II

A curious ambiguity regarding the distinction between custom and prescription had developed within European juristic thought by the sixteenth century. What one also sees in this period is the gradual appreciation of the idea's versatility by humanist scholars operating within and against the scholastic tradition. The important contributions of Fernando Vázquez de Menchaca, the 'renaissance legal humanist', to the natural law tradition are well known.[40] It is undoubtedly significant, of course, that prescription is the main tool used by Vázquez to pry open the distinction between natural and civil obligations, an objective which entirely consumes the second book of the *Controversies* (1564).[41] For the purposes of this article, though, the novelty of the legal arguments carried within 'On prescription' will be considered, as also will those instances where his ideas related to the experiences of the old Roman Empire and the new Spanish Empire. This reading offers a new way to understand the intellectual

[37] As David Ibbetson suggests, there was much 'terminological slippage between custom and prescription' in the medieval common law, and the precise meaning of 'prescription might once have been controversial'. Ibbetson, 'Custom in medieval law', pp. 166, 172.

[38] Ibid., p. 166; Alan Cromartie, 'The idea of common law as custom', in Perreau-Saussine and Murphy, eds., *The nature of customary law*, pp. 213–14. Both refer to an entry in the year book from Henry VI's time which established two kinds of prescription: 'one which extends throughout the whole realm, which is properly law; and another which some county, or some town, city or borough has had for time'.

[39] Christopher Saint German, *Doctor and Student*, ed. William Muchall (Cincinnati, OH, 1886 [1518]), pp. 5, 79, and esp. 290, where the superiority of the 'constitution' over 'prescription' is likened to that of the 'law' over 'custom'. *Swayne's Case* (1609), 8 Co. Rep., 64: 'And note a Difference between Prescription which is made in the Person of any, as he and all his Ancestors, &c. or all those whose Estate he hath, &c. and Custom which lies upon the Land, as *infra Manerium talis habetur Consuetudo*, &c., and this Custom binds the Land, as *Gavelkind, Borough-English*, and the like.'

[40] See Brett, *Liberty, right and nature*.

[41] D. Fernandi Vasqvii Menchacensis, *Controversiarvm illvstrivm* (Venice, 1564). This is the edition reproduced in the Cuesta publication of the *Controversies* (4 vols., Valladolid, 1931), from which the following passages are drawn.

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environment in which prescriptive reasoning began to flower in Western political thought.

Vázquez starts from the basis that in nature everything ('omnia') had originated in the state of commons. For *omnia*, he gives the specific examples of fields, plains, farms, and all things immoveable ('agri, campi, praedia, & reliqua immobilia'). Insofar as the presumption of a right of ownership to these things had to be proved to others, for Vázquez there was no better conceivable method than to make recourse to prescription.[42] Without competitors, land sat idle, ready to be claimed by an occupant; in the face of competition, the creation of the right of ownership required thirty or forty years of uninterrupted possession.[43] This is hardly radical. More unusual, however, is his natural law rendering of the rule of first taker (which, for Vázquez, could be generated through time and usage), and the contemplation of this idea under the broad head of 'Prescription'. That Vázquez did not consider this means of acquiring ownership to be prescription in the strictest sense is fairly (but not always entirely) clear in the *Controversies*, but the need for him to consider these ideas together, calling upon the same Roman legal terminology, is certainly noteworthy. Too much, however, should not be made of this, because this kind of acquisition attracts little attention within a much wider discussion of prescription. Upon establishing the particular contexts in which title ('titulus') is not needed to prescribe against, Vázquez then proceeds to explore the contexts in which title can be presumed after a long time and vested in an ancient possessor or user. These are exceptional contexts too, pertaining mostly to beneficial ownership, servitude, and obligations.[44] In other contexts, for Vázquez, a title is generally required for the possessor to initiate and sustain a claim by prescription.[45]

Spending much of the first book of the *Controversies* justifying the *imperium* of Spanish kings, Vázquez is then compelled to reiterate this endorsement within the frame of prescription, offering 'a new declaration of how the Spanish kings have the rights of Emperors'. It was a Spanish king, declares Vázquez, who liberated the Spaniards from the Moors and the Saracens, irrespective of the Roman Empire ('Romano posthabito imperio'), and this allowed for the requisite time ('tempus immemoriale') to pass in order to provide for the enjoyment of untrammelled sovereignty.[46] As a result, Vázquez concludes, no other king,

[42] Ibid., II, c. li, nos. 14–16.

[43] Ibid., II, c. li, nos. 20, 27; see also, c. lxxv, no. 3.

[44] Ibid., II, c. lxi, nos. 1–2; c. lxv, esp. nos. 1, 15–16, 19; c. lxviii; c. lxix; c. lxxviii.

[45] Ibid., II, c. lxvii, esp. nos. 5–7; c. lxxvii, no. 7.

[46] Ibid., II, c. lxxxii, no. 21: 'Ergo cum nostri potentissimi Hispaniarum reges Hispaniarum regiones, homines, populos a Maurorum Sarracenorumque imperio & ditione proprio suorumque civium sanguine effuso virtute bellica liberaverint, & per tempus cujus initii memoria non est supremae ditionis ac imperii jus reddiderint, Romano posthabito imperio, non dubium est quin id jure fecisse intelligantur…& tempore cujus initii, &c. hanc supremam potestatem Hispariarum reges quaesierunt…sed nos advertimus quod etiamsi tempus immemoriale non praeteriisset, & etiam si ea justa causa quod a Mauris virtute bellica hanc regionem reges

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prince, nation, subject, or church can prescribe against the Spanish king.[47] Similar independence from the Roman Empire, after the passage of time, may have been achieved by the *civitates* of Venice and Genoa, Vázquez concedes, albeit with more circumspection than the Italian civil lawyers before him.[48]

On the distinction between custom and prescription, Vázquez aligns himself entirely with Bartolus.[49] But this distinction is barely relevant to the question of most importance in Vázquez's mind relating to the city-states, namely, the very *character* of the thing at stake in controlling maritime jurisdiction.[50] It would be his reflection upon this question in the final and eighty-ninth capitulation of the second book that made Vázquez so attractive to later scholars over the next century. Here, his offerings often depart from those appearing elsewhere in the book, and the result is a highly original take on the relationship between prescription and empire.

In natural law, all things, for Vázquez, were common in the beginning. Humans after Adam individually came to enjoy the use of, and sometimes *dominium* over, these things. Hence, the right to use and/or own land (*terra*), a river (*flumine*), or a gulf (*gulfa*) can now, to various degrees, be prescribed with immemorial possession, subject however to procedural obligations. The sea is different, for it remains and always will remain a part of the commons. It cannot therefore be subject to prescription. The distinction here is basic. A river, the distinct parts of which have been subject to exploitation by fishermen since time immemorial, and the shores of which have been acquired and owned after prolonged usage, may be subject to prescription, but never to the extent of excluding the rights of peaceable passage. A sea, no part of which can be alienated or brought out of a primeval state through usage or time, remains in a state of commons and cannot, therefore, be prescribed against.[51] This assertion – stripping down the claims of the Italian city-states to maritime jurisdiction within their own gulfs, and reducing this right to a form of ownership that cannot prohibit the passage and communication of others – requires additional support, which leads Vázquez back to the first principles of prescription. As prescription in the strictest sense demands an interface between owner and possessor ('differentia inter agentem, & patientem'), there can be no opportunity to reject rights of maritime navigation on this basis, because a nation cannot prescribe against itself. Not only does this

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nostri liberassent, cessasset, adhuc de facto licuit se a Romano imperio subducere, cum constet Romanum imperium orbem vi & armis subjugasse ac subegisse, non autem conciessione onerosa tale imperium quaesisse ut patet ex superioribus.'

[47] See ibid., II, c. li, nos. 37–8, a claim which appears in relation to the subordination of ecclesiastical corporations to the king of Spain after the vanquishment of infidels.

[48] Ibid., II, c. lxxxii, no. 9.

[49] Ibid., II, c. lxxxiii, nos. 30–1.

[50] Ibid., II, c. lxxxiii, nos. 30–1.

[51] Ibid., II, c. lxxxix, nos. 15–16, 22, 30–1.

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disqualify the claims of Genoa and Venice, but it also applies to the separate attempts of the Portuguese and the Spanish to prohibit other Europeans from navigating the seas on their way to the Indies by making recourse to immemorial usage (this was reasoning Vázquez considered to be 'insane').[52] And what, then, if 'Genuenses & Venetos' prescribed against each other, or 'Hispanis and Lusitanis' tried the same? This was an impossibility, because prescription, being purely civil, cannot be used 'inter exteros', writes Vázquez. Prescription's effects, in other words, were jurisdictionally specific, seemingly regardless of the inalienability of the *res* at hand: sovereigns could no more measure their claims of *imperium* against one another than foreign subjects could measure their claims of *dominium* against one another.[53]

III

At the outset of the early modern age of discovery, then, the idea of prescription had become more manipulable than it was in the age of the Roman Empire, yet its applicability upon seas and beyond them was hardly agreed upon. To be sure of this, it will be illustrative now to connect with a number of diplomatic and intellectual disputes over dominion and navigation. A premiere example can be made of the affray between Spain and England following the expeditions of Francis Drake, which offers an early glimpse into the kinds of disagreements that would emerge in the following century over prescription and empire.

By the terms of her commission to Francis Drake in 1577, Queen Elizabeth authorized the privateer to do very little. Given command of a small fleet, which comprised a few royal ships along with any potential prizes (those 'other shipps as shall ioyne with you'), Drake was directed to head into 'the seas', where he would enjoy, at all times on his voyage, 'full power and iurisdiccion' over the English subjects of his crew (and them alone).[54] His expedition turned out to be a remarkable one. Drake circumnavigated the world and, in the process, accumulated for himself and his queen an incredible bounty, through the plunder of Spanish treasure-laden ships which he seized off the

[52] Ibid., II, c. lxxxix, no. 32: '…& quamvis ex Lusitanis magnam turbam saepe audiverim, in hac esse opinione, ut eorum rex ita praescripserit navigationem Indici occidentalis ejusdemque vastissimi maris, ita ut reliquis gentibus aequora illa transfretare non liceat, & ex nostrismet Hispanis vulgus in eadem opinione fere esse videatur, ut per vastissimum immensumque pontum ad Indorum regiones, quas potentissimi reges nosti Hispaniorum subegerunt, reliquis mortalium navigare, praeterquam Hispanis jus minime sit, quasi ab eis id jus praescriptum fuerit, tamen istorum omnium non minus insane sunt opiniones, quam eorum qui quoad Genuenses & Venetos in eodem fere somnio esse adsolent, quas sententias ineptiri, vel ex eo dilucidius apparet, quod istarum nationum singulae contra se ipsas nequeunt prascribere, hoc est, non respublica Venetiarum contra semetipsam, non respublica Genuensium contra semetipsam, non regnum Hispanoum contra semetipsum, non regnum Lustitanorum contra semetipsum…esse enim debet differentia inter agentem, & patientem, ut dictis juribus'.

[53] Ibid., II, c. lxxxix, no. 33; see also II, c. li, nos. 32–4.

[54] Letter patent to Francis Drake (15 Mar. 1587), Plymouth and West Devon Record Office, 277/15.

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coasts of South America and the islands of the East Indies. This Pacific bounty led the Spanish ambassador to England, Don Bernardino Mendoza, to lodge a formal demand for restitution in London. Invoking the superiority of the papal jurisdiction to argue for the exclusive right of the Spanish to frequent the Indies, and conflating his concerns of property, passage, and trade, Mendoza's complaints represent all that was so confusing about the place of the extra-European world in the juristic thought of the post-Tordesillas and pre-Grotian period. The unenviable obligation to respond to this protest fell to the English diplomat, Robert Beale. To dislodge the Iberians from their delusions about donations, Beale drew his inspiration from their common ground, the Roman tradition, and produced a somewhat different treatment of the legal issues in question. Beale offered two justifications for Drake's plundering. First, the Spanish had impeded the English from commerce, contrary to the *ius gentium*, and secondly, their illicit collusion with rebels in Ireland and England was more expensive to Queen Elizabeth than the amount exacted by Drake (even though his letters patent were not explicitly issued with restitution in mind). To some extent, though, these matters were academic. If all was fair in trade and war, for Beale it followed that there was nothing fair about the Spanish pretence to ownership of immoveable property beyond Europe. For it was 'not intelligible' to Elizabeth, Beale informed the Spanish ambassador,

> that her subjects and those subjects of other Princes should be prohibited from the Indies, by an unconvincing Spanish right, from the Roman Pope's donation, in whom she acknowledged no prerogative in such cases, and no authority to oblige Princes owing him no obedience; or to infeudate the Spaniard in the *New World* and invest him with its possession. No other proprietary right have the Spanish but this claim based upon the construction of some huts and the denomination of some rivers or Capes. This donation of things belonging to somebody else, which has no basis in law, and this imaginary propriety, cannot without violation of the law of nations prevent other Princes from pursuing commerce in the region, or establishing Colonies, where the Spanish do not inhabit, since prescription without possession avails nothing; moreover they may also freely navigate that vast Ocean, since the use of the sea and the air is common to all. No title to the Ocean can be claimed by a nation or a private person, for neither nature, nor public usage, permits any occupation of it.[55]

This was more than just a defence of Drake; it was a critique of the acquisition of *dominium* by donation, but this was straightforward enough for the times. Far more interesting for our purposes was Beale's denial that papal bulls could infeudate even those subjects of Spain who were obedient to Rome. It followed for Beale that even if the papal donations conveyed some legitimate proprietary

[55] Guilielmo Cambdeno (William Camden), *Annales rerum Anglicarum, et Hibernicarum regnante Elizabetha* (Frankfurt, 1616), p. 329. That the anonymous speaker here is Robert Beale is the authoritative remark of Richard Tuck, *The rights of war and peace: political thought and the international order* (Oxford, 1999), pp. 112n5.

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right, which he did not accept, then the Spaniards could make no claim to that which they did not actually possess – a point which led Beale to proffer a Vázquezian reading of the law of prescription. Observe moreover the distinctions Beale makes between kinds of *res* in order to retract the limits of the Spanish Empire: rights to immoveable property abroad were yet to transfer to the Spaniards, moveable property remained right in the hands of the unjustly wronged taker, and the sea, being common to all and alienable to no subject, monarch, or pope, was properly the possession of none.

From the Dutch corner of Europe, a similarly multi-faceted intellectual and legal dispute, in which prescription plays an important but underappreciated part of the discourse, arose in 1604. This was the direct ramification of the Dutch capture of the *Santa Catarina* in the straits of Singapore on 25 February 1603, an event Hugo Grotius considered to be 'representative of all such captures' in the period, and surely the most 'celebrated'.[56] This Portuguese ship had been intercepted by Jacob van Heemskerck, the commander of a small fleet of ships sent into the Indies by an Amsterdam *voorcompagnie* of the Vereenigde Oostindische Compagnie, in 1602. Rationalizing its seizure as a type of pre-emptive restitution, van Heemskerck acquired a magnificent prize, to the value of about three million Dutch guilders (or about £300,000) at the time. The Portuguese quickly disputed the legality of the capture, but the Admiralty Court of Amsterdam, with manifold and opportunistic reasoning, deemed the *Santa Catarina*'s goods to be fair prize in September of 1604.[57] 'The judges were content', Martine Julia van Ittersum summarizes, 'to jumble together natural law, *ius gentium*, and the concept of just war, without clarifying what, if any, connections there might be between these legal principles on a theoretical and practical level'.[58] Hugo Grotius accepted

[56] Martine Julia van Ittersum, *Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies (1595–1615)* (Leiden, 2006), p. 5. This observation is confirmed by ongoing historiographical interest. See especially Peter Borschberg, 'The seizure of the *Sta. Catarina* revisited: the Portuguese empire in Asia, VOC politics and the origins of the Dutch-Johor alliance', *Journal of Southeast Asian Studies*, 33 (2002), p. 31; Edward Keene, *Beyond the anarchical society: Grotius, colonialism and order in world politics* (Cambridge, 2004), pp. 50–2; Tuck, *Rights of war and peace*, pp. 79–80; Koen Stapelbroek, 'Trade, chartered companies, and mercantile associations', in Bardo Fassbender and Anne Peters, eds., *The Oxford handbook of the history of international law* (Oxford, 2012), pp. 338–41; Martti Koskenniemi, 'International law and the emergence of mercantile capitalism: Grotius to Smith', in Pierre-Marie Dupuy and Vincent Chetail, eds., *The roots of international law / Le fondements du droit international* (Leiden, 2014), pp. 4–9; Hedley Bull et al., eds., *Hugo Grotius and international relations* (Oxford, 1992).

[57] The court's final ruling borrowed from the Amsterdam company's own justification for the seizure, but additionally mobilized a number of other justifications as well. Interpreting a commission issued by Maurits van Nassau in Holland, which permitted the use of force in acts of 'self-defence', to authorize the waging of a 'just war' in the Indian Ocean, the Amsterdam admiralty also conjoined a number of legal ideas from multiple sources of law that were not intuitively compatible.

[58] Martine Julia van Ittersum, 'Hugo Grotius in context: Van Heemskerck's capture of the *Santa Catarina* and its justification in *De jure praedae* (1604–1606)', *Asian Journal of Social Science*, 31 (2003), p. 523.

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the invitation to search for these connections after receiving a copy of the admiralty decision in October 1604. In collaboration with the Vereenigde Oostindische Compagnie, Grotius compiled his manuscript on the law of prize and booty, *De iure praedae* (1604–8), responding to, and supporting, the *Santa Catarina* decision.[59] It was in this context that Grotius developed his famous but well-precented argument for the preservation and restitution of private rights irrespective of the lack of effective jurisdiction. What this required was a radical fusion of the vaguely public 'laws of nations' with an assortment of private law analogies and anecdotes from the Roman tradition; this fusion he presented from his own secular humanistic position yet, without any contradiction, in the framework of a natural law tradition popular at the time.[60] Alchemy of this kind allowed him simultaneously to hold, among other things, that it was right for corporations and individuals to wage just war through public authorization with the delegated and implied authority of the home sovereign and in the absence of judicial recourse on the seas.[61]

De iure praedae carried an important argument about prescription too. Prescriptive rights abroad Grotius thoroughly disallowed to the Portuguese. On this topic, Grotius believed Vázquez ('the pride of Spain') to be the leading authority, and accordingly offered a wholly positive appraisal of the *Controversies* in *De iure praedae*.[62] Yet there was a subtle point of difference between them which Grotius chose not to emphasize: whereas Vázquez saw in the primaeval state of nature a situation in which immoveables existed in common, and could subsequently be claimed and held good against others after possession *longi temporis*, Grotius was plain that 'prescription, upon whatsoever interval of time it may be based, is not applicable in regard to those things which have been assigned to all mankind for its common use'.[63] Although Grotius attributed to Vázquez 'the thesis that public places which are common by the law of nations cannot be made the objects of prescription', he was really only borrowing the Spaniard's notion that the rights of navigation on the seas could never be affected by claims based on prescription.[64] On that question, of course, Grotius and Vázquez were very

[59] It emerged after the acquisition of the Grotius papers by the University of Leiden in 1864 that the twelfth chapter of this long-unpublished manuscript formed the basis of *Mare liberum*, which was published to critical acclaim in 1609. See Martine Julia van Ittersum, 'Preparing *Mare liberum* for the press: Hugo Grotius' rewriting of chapter 12 of *De iure praedae* in November-December 1608', *Grotiana*, 26–8 (2005–7), pp. 246–80.

[60] It represented an unusual intellectual configuration, to be sure. 'But I believe that new light can be thrown on the matter with a fixed order of teaching', Grotius opined in 1606, and 'the right proportion of divine and human law mixed together with the dictates of philosophy'. Hugo Grotius to G. M. Lingelsheim (23 Nov. 1606), in Hugo Grotius, *Commentary on the law of prize and booty*, ed. Martine Julia van Ittersum (Indianapolis, IN, 2006 [1604–8]), p. 553.

[61] Ibid., pp. 9, 424.

[62] Ibid., p. 343: 'As a matter of fact, the entire question has been quite thoroughly discussed by Vázquez, the pride of Spain, a jurist who in no instance leaves anything to be desired in the keenness of his investigation of law nor in the candour with which he expounds it.'

[63] Ibid., p. 343.

[64] Ibid., pp. 340–7, quote at p. 346.

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much in synch. Grotius appeared however to take a firmer stance than Vázquez on immoveable property, following what he considered to be 'the general abolition of communal ownership' in organized (European) society. Principally, though, this point was developed in the framework of an argument against the claims of a 'private person' to 'prescriptive rights over the public possessions of a given nation', and this was not an idea developed explicitly in relation to the lands of foreign sovereigns in the Indies; besides, Grotius (in this tract, anyway) was principally concerned with the rights of navigation on the sea and moveable property, caring less for the generation of land rights abroad.[65]

The publication of Grotius's *Mare liberum* (1609), which had originally formed the twelfth chapter of *De iure praedae*, instigated a lasting debate in Europe, and most particularly in Iberia. Prescription was one of the most contentious ideas in this discourse. For Grotius, prescription was inapplicable to expressions of ownership and jurisdiction over the sea. These assertions were first seriously challenged by Serafim de Freitas (1570–1633) in *De iusto imperio Lusitanorum Asiatico* (1625). Affirming the place of *longi temporis praescriptione* in the public *ius gentium*, yet cautious about the rights of private individuals to impede upon the *res publica*, Freitas argued that an exclusive and public Portuguese right of *navigatio* in the Indian Ocean had been perfected following the passage of 'time immemorial' (that is, after the voyages of Vasco da Gama at the end of 1497).[66] With this argument, Freitas also blended *prescription* into *old custom*, and often appears to have thought of these concepts as though they were synonymous. In that sense, he went even further to erode the distinction than fellow Iberian, Francisco Suárez (1548–1617), who coupled these ideas in a similar fashion. Suárez was at least prepared to offer the contrast between 'prescriptive custom' (of a minimum ten years) and 'non-prescriptive custom' (of less time) in *De legibus* (1612).[67] Committed to the scholarly identification of the origins, in custom, of the *ius gentium*, Suárez's main agenda was to distinguish the law of nature from the law of nations, and this is telling. It also represents a significant difference between himself and Freitas, the latter more overtly an imperialist volunteering, through his writing, to defend the establishment of the 'Portuguese Asian Empire' by prescription. Freitas, moreover, was far more of a canonist than he was a civilian. Prescription, for him, was elaborated largely to defend the papal bulls of the fifteenth and sixteenth centuries,

[65] Ibid., p. 355.

[66] Seraphino de Freitas, *De iusto imperio Lusitanorum Asiatico* (Valladolid, 1625), c. xiii–xiv. For the nuances of this argument, and its relation to those developed by Grotius and Selden, see Mónica Brito Vieira, '*Mare liberum* vs. *Mare clausum*: Grotius, Freitas, and Selden's debate on dominion over the seas', *Journal of the History of Ideas*, 64 (2003), pp. 361–77.

[67] The need for an antecedent entity to create law (rather than to extinguish it) in this fashion is unclear. See Francisco Suárez, 'Of unwritten law which is called custom', in Gwladys L. Williams et al., ed., *Selections from three works of Francisco Suárez, S.J.* (2 vols., Oxford, 1944), II, pp. 503–18. See also Brian Tierney, 'Vitoria and Suarez on *ius gentium*, natural law, and custom', in Perreau-Saussine and Murphy, eds., *The nature of customary law*, pp. 101–24.

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an aspect of his argument which gave it little purchase beyond Iberia but special favour in Portugal. There, the notion of papal prescription in the New World would be qualified and expanded in *De Indiarum iure* (1629) by Juan de Solórzano Pereira, which presented a more considered treatment of the legitimacy of the Portuguese dominance of the Indian Ocean than Freitas had been prepared to offer. As Pereira declared, Portuguese kings, who were endorsed by the pope, had always conducted themselves with good faith in the New World and their conquests had been collected in this way. If the grant itself is later considered to have been made in error, he argued, this is inconsequential to the carrying out of prescription and the creation of title, which for Pereira provides the acquiring interest with a defensible and exclusive right after the passage of thirty or forty years regardless. What is done is done, in other words, or more to the point, in the language of prescription.[68]

To the jurists of post-Reformation England, the assertion that papal donations, perfect or imperfect, firmed into right with the passage of time was easily disqualified, because papal donations were barely recognized in England. The argument made by Grotius for the freedom of seas was far more controversial, however. To this, John Selden most famously responded. Within *Mare clausum, seu, de dominio maris* (1635), the case for a public law relationship between *praescriptio* and *imperium* was developed and Anglicized: the Italians had used prescription for their *civitates*, the Spaniards had used it for their own *supremum potestatem*, and now came the turn of Anglia, Scotia, and Hibernia. As David Armitage and others acknowledge, Selden offered an original conceptualization of England and its seas as a 'British Empire', an entity which had come into existence by 'lawful prescription; whereupon as on a most strong Title, the Dominion or Ownership of the same Empire herein may bee founded'.[69] England's monarchs were not the only ones capable of boasting of their great reach across land and sometimes water, being no different to the princes of other dominions, 'subject heretofore to the Roman Empire, and who afterwards became absolute within themselves, not onely by Arms, but also by prescription (which is every where admitted among the Law of Nations)'.[70] Aligning with the Italian civilians, Selden's British Empire enjoyed 'private Dominion' over rivers, seas, and lands just as 'Spain, France, Poland and Venice' enjoyed the same in their own regions.[71] However, notwithstanding his strong case, made also by Freitas, for the place of prescription in the law of nations, for Selden it did not follow that the Portuguese and the Spanish could claim their overseas empires by prescription 'against themselvs',

[68] Juan de Solórzano Pereira, *De Indiarum iure*, ed. Carlos Baciero et al. (3 vols., Madrid, 1994), III ('De retentione Indiarum'), c. II.

[69] John Selden, *Of the dominion and ownership of the seas*, trans. Marchamont Nedham (2 books, London, 1652 [1635]), bk I, p. 2; David Armitage, *The ideological origins of the British Empire* (Cambridge, 2000), pp. 100–24.

[70] Selden, *Of the dominion and ownership of the seas*, I, p. 170.

[71] Ibid., I, p. 128.

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he wrote, and also 'because the Law of Prescriptions is purely Civil. Therefore such a Law can bee of no force, in deciding Controversies that happen betwixt Princes or people that acknowledg no Superior.'[72] Here he echoed Vázquez, but in a way that gave prescription its strongest purchase in uncontested settings, a topic upon which Selden offered arguably his most interesting contribution on the relationship between prescription and empire. *Res nullius* – 'Sea or Land abandoned, and of no person possessed' – came into the 'possession and Dominion' of the occupant after the passage of time. This, for Selden, 'may bee called Prescription, as if a Falcon were let flie and cast off by its master, and thereupon growing wilde, should after bee taken up by another, and by him mann'd, and for a long time fed; although not properly, yet not absurdly it may bee said, that this second master hath it by Prescription'.[73]

That here we encounter a 'first' and a 'second' falconer signifies a commitment to the original Roman interface of prescription, which, as has already been noted, was no longer consistently necessary for scholars of the topic. To provide another example of this, at around the same time Selden wrote, the Dutch civilian, Johannes van der Graef, held in *Syntagma iuris publici* (1644) that land never occupied ceded to its first occupant through immemorial prescription, or the presumption thereof, in the absence of titleholder. In conventional legal contexts featuring a patient and an agent, van der Graef presented *praescriptio longi temporis* (of thirty years) as a means both to acquire a right and to repel an intruding claimant, but in unconventional contexts, 'praescriptione libertatis', more akin to the rule of first taker, came into play.[74]

Grotius, by this time, had refined his take on prescription, exploring its more general application beyond the rights of maritime navigation in *De iure belli ac pacis* (1625), by describing contexts featuring competing interests only, if often vaguely. The result was a more thoughtful engagement with Vázquez's thinking, but a necessary watering down of the concept's potency. Conceding the many difficulties associated with using prescription between neighbouring independent princes to resolve territorial disputes or to settle upon the locus of sovereignty, Grotius – with Vázquez and the recent memory of the Dutch Revolt from Habsburg rule in mind – was prepared to offer exceptions.[75] '[O]ne King may acquire a Right of Sovereignty, to the Prejudice of another King; and one free People to the Prejudice of another free People, as by an

[72] Ibid., I, pp. 9–10.
[73] Ibid., II, pp. 24–5.
[74] Jacobo P. F. van der Graef, *Syntagma iuris publici* (The Hague, 1644), pp. 395–6, 398–9.
[75] This matter had been far more pressing, of course, when the jurist Aggaeus van Albada presented his case to legitimize the actions of the Staten Generaal at negotiations in Cologne some forty years earlier, by making regular recourse to Vázquez, albeit principally to the first book of the *Controversies* ('On Princes'). See Gustaaf van Nifterik, 'Fernando Vázquez, "Spaignaert", en de Nederlandse opstand', *Legal History Review*, 68 (2000), pp. 523–40.

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express Consent, so also by a Dereliction, and that taking of Possession which follows it, or which receives some new Force and Virtue from it.'[76] This course of action was especially right in pursuit of liberty, held Grotius (in line with fellow Dutchman, van der Graef).[77] If, following Vázquez, there was some room for doubting the use of prescription between princes, then *among* them, on the question of property, the idea remained a principled means of resolving disputes, which represented a departure from the Spaniard. Tellingly, Grotius's examples are only of a private law nature. 'Thus if a Man, who knows very well that a Thing belongs to him, should treat with the Person who is in Possession of it, as if he was the true and lawful Proprietor, he may reasonably be supposed to resign his Right.'

Thus again, should a Man knowingly suffer another to enjoy what is his for a considerable Time, without demanding it, it might be concluded from his Forbearance, that he designed to part with it altogether, and looked upon it no longer as his Property; unless there was any other Reason, that manifestly hindered him from making Opposition.[78]

Implicitly, these were offered as private analogies for public arbitration. On the most important aspect of *praescriptio longi temporis*, however, Grotius was as vague as Vázquez. Upon the precise 'Space of Time' to allow prescriptive rights to materialize, Grotius refused to place 'fixed limits', endorsing instead, as was often the norm in Spain, England, and elsewhere, a loose understanding of 'time immemorial' from Roman thinking.[79]

Thus had a great argument about maritime navigation in the age of discovery opened onto the first serious investigations of jurists on the prescription in international law. Europeans were the primary stakeholders, not native communities. The key decades were those between 1580 and 1640, a period which coincided with the dynastic union of the Spanish and Portuguese, and an important shift in the imperial politics of expansion into the New World. During this period, the spiritually ordained colonial projects of the Iberians, whose 'donations' derived from papal bulls and found subsequent ratification through inter-Iberian treaties during the sixteenth century, were discredited on multiple fronts. Colonizing proprietors and corporations from the portside cities and merchant hubs of a more north-westerly region of Europe, receiving the secular authorizations of their sending polities, took to the New World with increasing enthusiasm in this period, and directly challenged all absentee pretences of *imperium* that were based upon papal favouritism. Pursuant to this

[76] Hugo Grotius, *The rights of war and peace*, ed. Richard Tuck (3 vols., Indianapolis, IN, 2005 [1625]), II, p. 499.

[77] Van der Graef endorses prescription for its use against tyrannous rule but is more ambivalent about its application for the expansion of *imperium*. See van der Graef, *Syntagma*, pp. 398–9.

[78] Grotius, *Rights of war and peace*, II, pp. 487, 489.

[79] Ibid., II, pp. 489–91, 498–501.

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challenge, the idea of prescription was ready to be deployed by colonial actors in times of the first half of the seventeenth century, particularly in North America.

Examples are rare to come across, however, and seldom does prescriptive reasoning appear unfused with other legal ideas. Often the language of prescription is not used, but its faint ideological rudiments may be detected. For example, the London alderman Robert Johnson, who maintained a number of ties to the Virginia Company of the same city, conveyed the importance of time to the fortification of the English claim in *Nova Britannia* (1609) in this way: '[T]he Coasts and parts of Virginia haue beene long since discouered, peopled and possessed by many English…without any interruption or inuasion', which now (that is, after two years) impeded all other Europeans from making 'iuste title' through 'possession, conquest, or inheritance'.[80] Somewhat later, in New England, John Winthrop of the Massachusetts Bay Company – who in his youth had read civil law at Gray's Inn – likewise referred to the passage of time as a means to justify rights of traffic and habitation in the region, but again the word 'prescription' is not used.[81] Approached by representatives of the neighbouring Plymouth Plantation in 1634 with concerns about interlopers on the Kennebec River ('whether their right of trade there were such, as they might lawfully hinder others from coming there'), Winthrop assured his colleagues not to worry:

> their right appeared to be good; for that, besides the king's grant, they had taken up that place as *vacuum domicilium*, and so had continued, without interruption or claim of any of the natives, for divers years; and also had, by their charge and providence, drawn down thither the greatest part of the trade…which none of the English had known the use of before.[82]

It was hardly unusual in early colonial America to blend discrete ideas together to fortify an exclusionary right, but the inclusion of a claim upon the basis of time within this jumble was probably soundest in discursive convention at the time: the 'king's grant', after all, was as spurious as the pope's donation, and even led to scandal during the dynastic crisis; the concurrent political demands levelled by Pequot, Narragansett, and Mohegan peoples elsewhere in New England, on the other hand, had the effect of minimizing the reach of any argument about *vacuum domicilium* beyond the mouth of the Kennebec.[83]

[80] Robert Johnson, *Nova Britannia offering most excellent fruites by planting in Virginia: exciting all such as be well affected to further the same* (London, 1609). For a wider treatment of Johnson's involvement in the Virginia Company of London, see Andrew Fitzmaurice, *Humanism and America: an intellectual history of English colonisation, 1500–1625* (Cambridge, 2003), pp. 61, 64, 74–87.

[81] Francis J. Bremer, *John Winthrop: America's forgotten founding father* (Oxford, 2003), pp. 89–124.

[82] James Kendall Hosmer, ed., *Winthrop's Journal* (2 vols., New York, NY, 1908), I, pp. 128–9.

[83] Roger Williams, *Mr Cottons letter lately printed, examined and answered* (London, 1644), in *Complete writings of Roger Williams* (7 vols., New York, NY, 1963), I, pp. 324–5; John Cotton, *A Reply to Mr. Williams His Examination*, in *Complete writings*, II, p. 46.

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The short-lived creation of New Sweden on the Delaware River (what the Dutch called the 'Zuid Rivier'), to the south of New England much closer to New Netherland, provides a more fruitful context to explore the place of prescription in colonial America, as the idea found application between European interests. When the Geoctroyeerde Westindische Compagnie's director on the ground, Willem Kieft, received news of the arrival of the Swedes and their establishment of Fort Christina, his rebuke came promptly. In a letter of early May in 1638, Kieft confessed his doubts about the authority of the Swedish queen to plant in land which 'has been many years in our possession and secured by us above and below by forts and sealed with our blood'.[84] Years later, after Kieft was replaced by the firmer and more experienced Pieter Stuyvesant, the Westindische Compagnie more assertively challenged the Swedish occupation of the Delaware by charging the commissary of Fort Nassau, Andries Hudde, with the task of building additional fortifications nearby in the summer of 1647. In response, Johan Prints, the governor of New Sweden, made his opposition to the Dutch presence widely known, 'spread[ing] the report everywhere', grumbled Hudde, 'that [our] Company has nothing to say in this River'. Hudde, as expected of him, acted otherwise. After accepting an invitation in June to dine with Prints at his table, Hudde boasted to the Swedish governor that the Westindische Compagnie's claim to the river was far better than the Nya Swerige Compagniet's claim because it came first. This enraged the short-tempered Prints, who exclaimed in response 'that the [Westindische] Company could not depend on or confirm their old or continuous ownership'. This was an argument Prints made by diabolical analogy, claiming 'that the Devil was the oldest proprietor of Hell, but that he might even admit a younger one'. This wonderful expression was apparently one of Prints's many 'other vulgar expressions to the same effect' offensive to Hudde's ears. Falling out over prescription, the two men were never to share a table again.[85] The Swedish colony on the Delaware River did not last very long after this. In the summer of 1655, Westindische Compagnie forces led by Pieter Stuyvesant swooped on the settlement and forced the capitulation

[84] Protest of Director Kieft against the Landing and Settling of the Swedes on the Delaware (6 May 1638), in B. Fernow, ed., *Documents relating to the colonial history of New York* (*DHNY*) (15 vols., Albany, NY, 1853–87), XII, p. 19. The bloody metaphor would find repetition later by van der Donck: 'What right these people have to [occupy the Delaware River], we know not; we cannot comprehend how servants of other powers, as they represent themselves, but by what commission is not known here, make themselves so much masters, and assume authority, over land and property belonging to and possessed by others and sealed with their blood, independent of the [Geoctroyeerde Westindische Compagnie] Charter.' Adriaen Van der Donck, *Remonstrance of New Netherland, and the occurrences there*, trans. E. B. O'Callaghan (Albany, NY, 1856), p. 23.

[85] Report of Andries Hudde, or A Brief but True Report of the Proceedings of Johan Prints, *The instruction for Johan Printz, governor of New Sweden*, ed. and trans. Amandus Johnson (Philadelphia, PA, 1930), p. 269.

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of Prints's replacement, Johan Risingh.[86] The company directorate in Amsterdam then issued new instructions for Stuyvesant regarding the restoration of the Dutch right to the Zuid River. 'You must be especially careful in all this', they advised, 'that by doing everything according to prescription the burdens of the Company may be eased and injury prevented'.[87] By this pronouncement, it is unclear whether reference is being made to the kind of *praescriptione libertatis* proposed by van der Graef, or otherwise to the rebuke of time upon Swedes neglectful of their property. Either way, the Devil was restored to Hell.

Just as juristic thinkers like Bartolus, Vázquez, and Grotius elaborated only upon the extent to which prescription could be used *within* a European polity and *against* another European polity (and therefore, in either respect, to establish a right cognizable among Europeans only), so too did Europeans in North America, generally in corporate or corporate-proprietary forms, consider prescription among themselves only. That there is little evidence to suggest that the land rights of indigenous communities were considered within a prescriptive frame in settler colonial contexts should not be surprising, for the obvious reason that time, in such contexts, worked decidedly against the newcomers. It is unlikely, therefore, that Winthrop's claims to the ownership of the Kennebec River implied that the Massachusetts Bay Company had prescribed against the aboriginal claim, for that would have suggested aboriginal ownership rights at *some* point in time (before, that is, these rights were superseded after 'divers years', which could have not have been any more than thirteen). Instead, in North America, outright aboriginal land ownership tended to be ignored in the first two decades of the seventeenth century (hence Winthrop's 'vacuum domicilium'), until in some places it became conventional to acknowledge these rights purely in order to extinguish them. Wheresoever aboriginal land ownership was recognized in North America in the two centuries following 1621, this was done in order to transfer ownership to settlers. Prescription was not used for this kind of dispossessive application. The preferred device for this transfer, instead, was contract – dressed up, sometimes, as treaty – though war could provide for the same result too, while particular understandings about the state of nature and the 'improvement' of land permitted the implication of the absence of title altogether for some time afterwards as well.[88]

[86] See Stellan Dahlgren and Hans Norman, eds., *The rise and fall of New Sweden: Governor Johan Risingh's journal of 1654–1955 in its historical context* (Stockholm, 1988).

[87] Heren XIX to Pieter Stuyvesant (22 Dec. 1659), *DHNY*, XIV, p. 450.

[88] Stuart Banner, *How the Indians lost their land: law and power on the frontier* (Cambridge, MA, 2005), pp. 10–111; John C. Weaver, *The great land rush and the making of the modern world, 1650–1900* (Montreal and Toronto, 2003); Tuck, *The rights of war and peace*, pp. 166–96; Fitzmaurice, *Sovereignty, property and empire*, pp. 85–214. See also Edward Cavanagh, 'Possession and dispossession in corporate New France, 1600–1663: debunking a "juridical history" and revisiting *terra nullius*', *Law and History Review*, 32 (2014), pp. 97–125.

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Prescription therefore leaves an unusual mark on modern American property law, it should be noted as an aside here. Prescription may have been useful to sort out the contentions of corporate governments in colonial America, but it would get an even better application in the succession of political crises leading up to Independence, after which point the idea would be reserved for individual settlers on the western frontier (and for whom prescription would be better known as 'adverse possession'). But prescription in the New Republic remained dangerous in respect of *ab origine* property rights, and it should be of little wonder, then, that the response of Chief Justice John Marshall, to the claims of 'Indian Nations' to 'time immemorial' ownership in the Supreme Court of the United States of America between 1820 and 1832, was to reduce all aboriginal ownership rights to those merely of *occupancy*.[89] In these rulings, Marshall spoke of 'prescribing' not in any traditional juristic sense, but to convey an authoritative decree (which is an observation about the separate development of the American common law and the English common law that is about as acute as any, but that is another digression). Ultimately it remains the job of another essayist to track the relationship between prescription and empire from Grotius to Lauterpacht, but the trajectory of this relationship into modernity, and why the stakes are so high, might now hopefully be clearer as a result of this survey.

IV

Prescription became a key component in the ideologies of early modern European imperialism, as it was used to contemplate territorial dominion and maritime navigation abroad after the late sixteenth century. By exploring those contexts between the age of Justinian and the age of Hugo Grotius in which prescriptive reasoning found obvious and sometimes opportunistic application, it can also be observed that unconventional associational polities were among the most enthusiastic to apply such reasoning. Well before European legal traditions began to accept the fiction that church and lay corporations could enjoy their own legal personalities, Justinian had bundled religious associations and civic associations together in contemplation of their exceptional powers of prescription.[90] Canonists and civilians of a later era would continue to find, in prescription, a means to amplify and extend the rights of corporations as was increasingly necessary after the twelfth century, which was typically more contentious than the use of prescription, by ambitious medieval kings, to

[89] *Johnson v. M'Intosh*, 21 US 543 (1823); *Cherokee Nation v. Georgia* 30 US 1 (1831); *Worcester v. Georgia* 31 US 515 (1832).

[90] Canning, 'The corporation', 17; Ullmann, 'Delictal responsibility', 81. See also Otto von Gierke, *Political theories of the middle ages*, trans. F.W. Maitland (Cambridge, 1900); F.W. Maitland, 'The corporation sole (1900)', in David Runciman and Magnus Ryan, eds., *Maitland: state, trust and corporation* (Cambridge, 2003), pp. 9–31; P.W. Duff, *Personality in Roman private law* (Cambridge, 1938), pp. 221–3.

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carve out for themselves new polities in the voids of the *Imperium Romanorum*. Ecclesiastical corporations used prescription to make church acquisitions essentially inalienable and to determine rank and service across the Christian world, whereas city-states used prescription to justify the creation of these polities and then to extend their jurisdictions over maritime traffic and trade. These latter-medieval corporate interpretations were radical and attracted much controversy. Likewise, too, in the age of early modern imperialism, prescription was an important idea, not so much in relation to indigenous communities, but instead finding best application in arguments prefabricated to hold either for or against the rights of trading companies, or papally endorsed Iberian interests, within jurisdictionally uncertain parts of the New World. If any link, therefore, can be identified between prescription and empire in medieval and early modern political thought, then it needs only to be added, in conclusion, that this link was often corporate in character.[91]

[91] For this reason, it seems significant not only that Edmund Burke, in the oration cited at the outset of this article, would prefer to think in terms of *prescription* rather than *custom* in relation to the English constitution, but also that he would do so in order to justify the 'legislative body corporate' of the Commons.

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