

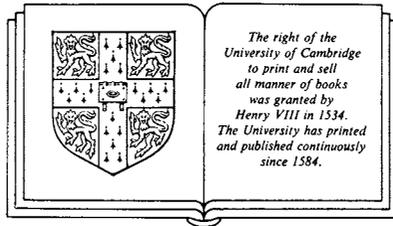
THE GOTHIC BEQUEST

*Medieval institutions in
British thought, 1688–1863*



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Introduction

In our own time the history-writing of the seventeenth century has been a favourite study of historiographers and the subject of a series of remarkable books. It is fitting that it should be so, for the historical works then produced were as prodigious in number as individually they often were in length. Moreover, while the efflorescence of antiquarian and topographical writing issued in celebration of England during Elizabeth's last years has never been forgotten, some now claim that it inaugurated a transformation in historical writing, substantially completed by the Restoration, that determined the future character of English historical scholarship.¹ Certainly, the advance of medieval learning was then rapid. Indeed, when in 1939 Professor Douglas wrote his graceful tribute to the scholars of the two generations subsequent to the Restoration, in whose works he saw the culmination of a golden age of medieval scholarship, he could claim for their writing that in its full extent 'it has not yet been superseded'.²

However, it is not only the piety of the living scholar towards his departed predecessors combined with a residual utility remaining in the heavy tomes of men long gone that has drawn modern scholars to the study of Stuart antiquaries. In that age medieval history had urgent contemporary importance and their works have therefore been studied not only as a passage in the history of learning but also for their contribution to the political and ecclesiastical debate, and for their part in the history of political theory.

In the Church medieval history continued to be necessary to the defence of Canterbury against Rome, as it had been during the Reformation period,³ but where men of older generations had looked to the early centuries for a primitive Protestantism, as divines such as Ussher in part still

¹ Fussner (1962) *passim*. and esp. pp. 300-1. ² Douglas (1939) p. 368.

³ For the effect of the Reformation on English historical thought see Levy (1967) pp. 79-123.

did,⁴ increasingly in the seventeenth century some men sought there instead an uncorrupted Catholicism.⁵ It was, naturally, high churchmen who were most drawn to the Saxon and the medieval Church. The most celebrated works of the high-church school, Collier's *Ecclesiastical History* and Hickes' Saxon scholarship,⁶ were to be the work of Non-Jurors. But since in an age of increasing historical sophistication history both remained crucial to the defence of the Established Church and proved to be central to the debate on the nature of the Anglican Church herself, the seventeenth-century Church of England perforce became the 'natural home of antiquarian learning', and the episcopate of the later Stuart age was to be notable above the bench of any other time for the number of medieval scholars it contained.⁷

In secular history the advance of historical learning was contemporary with the eruption of constitutional dissension. Indeed, in both Church and State controversy was the goad that drove forward historical scholarship. The debate between the early Stuarts and their Parliaments was, on the theoretical level, a debate about history. The Parliamentary opposition to James and Charles I tried to confine the Crown within what it thought was the Crown's due place in the mixed government that was the Ancient Constitution by the citation of historical precedents, while the supporters of the Stuarts urged that the royal claims were historically verifiable.

This last theme, the use of history in controversy, is capable of a grand extension. For, turned to the past by contemporary necessity and interpreting their past in the light of their present, Stuart lawyers and antiquaries developed theories long influential in constitutional debate. After the Revolution they, most notably Sir Edward Coke,⁸ became Whigs by posthumous affiliation, and thus their ideas were to live on in the Whig canon.

Such processes of thought breed anachronisms, and therefore misunderstanding. In 1931 Sir Herbert Butterfield had given a classic caution against the snares that present presuppositions set for the scholar; indeed, he had identified Coke and his brethren of the Law as the forbears of those later Whig historians who fell to the snare and above all others studied 'the past with reference to the present'.⁹ Yet realisation of its dangers should be accompanied by a recognition of the power of that mode of thought. Present political necessity helped to shape three influential historical views

⁴ R. Buick Knox *James Ussher Archbishop of Armagh* (1967) pp. 98-112, 155-66.

⁵ Douglas (1939) pp. 258-59; Every (1956) pp. 6-18. For the related issue of the growing claim to *iure divino* episcopacy see Lamont (1969) pp. 36-41, 43, 45-46, 57-68.

⁶ For Collier see below pp. 28-9, and for Hickes see Douglas (1939) pp. 93-119.

⁷ Douglas (1939) pp. 319, 321, 330.

⁸ Chief Justice Coke, 1552-1634. His *First Institute* was published in 1628, the *Second Institute*, which contained his commentary on Magna Carta, having been previously detained by Charles I, was published by order of Parliament in 1642.

⁹ Butterfield (1931) pp. 11, 63 and Butterfield (1944) pp. 40, 71.

of the Constitution – Immemorialism, the Gothic theory, and the Norman Yoke – that will appear frequently in this study.

Indeed, Sir Herbert himself accepted the duality, and, during the War years, in a succinct and influential book, he showed how much the constitutional development of the seventeenth century owed to partisan history, and how powerfully the Whig interpretation of history itself – ‘part of the inescapable inheritance of Englishmen’¹⁰ – had moulded the English political tradition.

Most subsequent British writing on Stuart historiography descends from *English Scholars*, with its emphasis on scholarly advance, and from *The Englishman and His History* and its stress on the political consequences of historical opinion.

In the latter book Butterfield showed how much the Parliamentary case owed to lawyers and to antiquaries, who were often indeed the same men, and how much the outlook of both was shaped by the Common Law. Above all he demonstrated how the Parliamentary lawyers restored and interpreted Magna Carta until it became in their minds at once a specific against particular grievances and a declaratory statement of the principles of the constitution. Since he first wrote the history of commentary on the Charter has been further elucidated, by Sir Herbert himself, by Faith Thompson, by Professor Holt, and by Anne Pallister, in whose book the story is carried in detail down to the mid-nineteenth century.¹¹

The Parliamentary opposition asserted against what it saw as Stuart irredentism first an immemorial Law that had ever limited the Crown, and then an equally immemorial Parliament and Commons.¹² The details of the claim were clear, the problem was to explain its success in an increasingly historical age and one well acquainted in other contexts with the concept of anachronism.¹³

Part of the answer lay in the circulation at this time of spurious texts that seemed to support Cokean attitudes.¹⁴ But this was clearly a partial explanation, for it remained to explain why those texts were not suspect.

¹⁰ Butterfield (1944) p. 2.

¹¹ Butterfield (1969) *passim*; Faith Thompson (1948) Part III *passim*; Holt (1965) pp. 2–18; Pallister (1971) *passim*.

¹² The Commons had claimed to be ‘of ancient authorities’ as early as 1581, Butterfield (1944) p. 45; for the greater later stress on the immemoriality of Parliament, and for the implications of the claim, see Pocock (1957) pp. 47–53.

¹³ Levy (1967) pp. ix, x, 77, 110, 189, 291.

¹⁴ *The Mirror of Justices*, printed in 1642, and the *Modus Tenendi Parliamentum* asserted a pre-1066 Parliament while the false Croyland chronicler, Ingulf, witnessed to the reissue of the Confessor’s laws by William I. Moreover, Lambarde in his edition of the Saxon laws, *Archaeologia*, of 1568, had unwittingly muddied the waters by printing spurious post-Conquest texts; see Pocock (1957) p. 43; Styles in Fox (1956) pp. 62–63 and, for Ingulf, Antonia Gransden *Historical Writing in England* II, 400, 490–91.

The most serious attempt to solve the conundrum was Professor Pocock's. He argued that Coke's opponents could not effectively traverse his claim since, due to the dominance of the Common Law, all shared Coke's presuppositions.¹⁵ He thought that their ignorance of other forms of law denied Common Lawyers any antidote to their inveterate habit of interpreting past law by later decision, thus suggesting the substantial identity of past and present. Indeed, he considered that the Common Law became more, not less, self-absorbed during the later sixteenth century. However, things were ordered differently in France, and French influence allowed Sir Henry Spelman¹⁶ to recover the nature of past feudal society and to show that the Law had once been very different from its modern form. Pocock demonstrated how the eventual publication of Spelman's key works hastened the demise of Cokean immemorialism and of its Parliamentary corollary.¹⁷

Professor Pocock's book has been the most influential work on Stuart medieval and legal historiography for a generation, and certainly for most of those years this particular argument has carried conviction. But recently legal historians have questioned how total was the dominance of the Common Law, and how ignorant of others laws Common Lawyers, including Coke himself, truly were.¹⁸ It also appears that Cotton¹⁹ and Selden²⁰, as well as Spelman, were aware of continental thought and sceptical of aspects of immemorialism.²¹ If these modifications are sustained it will appear that Coke's legal insularity was owing to wilful blindness as well as to innocent ignorance,²² and we shall need to seek other causes than myopia among Common Lawyers for the dominance of immemorialism.

Medievalists, however, sometimes claim Coke for themselves²³ and insist that in his day the Charter was cited in the context of fourteenth-century legislation.²⁴ The political argument was about precedents, and that Coke rejected those of the fifteenth and sixteenth centuries in favour of earlier authority is unsurprising. But the importation of remote precedent into

¹⁵ Pocock (1957) pp. 56–69.

¹⁶ Sir Henry Spelman, 1564–1641, gentleman and antiquary; see Pocock (1957) pp. 91–123.

¹⁷ *Ibid.* pp. 93, 123, 182–83, 197.

¹⁸ See Brooks and Sharpe (1976) and Pawlisch (1980) *passim*.

¹⁹ Sir Robert Cotton, 1571–1631, manuscript and book-collector, see Fussner (1962) pp. 117–49.

²⁰ John Selden, 1584–1654, legal historian and parliament man, see Fussner (1962) pp. 275–98.

²¹ Brooks and Sharpe (1976) pp. 138–40.

²² Butterfield (1944) pp. 48–49, 53–54 had stressed the innovative side of Coke; see also Brooks and Sharpe (1976) pp. 134, 141–42.

²³ Holt (1965) p. 8.

²⁴ Thompson (1948) pp. 86, 90–94, 253, 327, 331–38, 337–38, 341, 346, 349, 370.

new ages, while it may be a radical or a reactionary act, can rarely be a conservative one. Coke invoked his precedents in favour of seventeenth-century causes; indeed, according to Wagner and Mr Hill, in favour of economic liberalism.²⁵ Coke was as Janus-faced as the Charter he revered.²⁶

The antithesis of the Immemorial Law is the Norman Yoke. In English history the interpretation of the Conquest itself has been a perennial study; in 1939 Professor Douglas had explored its seventeenth-century historiography and later he was to return to the Norman theme and to examine writing, in the main scholarly writing, on the Conquest as far forward as the 1940s.²⁷

In 1954 Mr Hill took a different approach and examined populist interpretations of the Conquest, being more concerned with their social context and their political application than with their accuracy. He thought that from about 1530 two strands of opinion could be discerned within appeals to Saxon precedent. One stressed continuity, and appealed to the Saxons within the tradition of the existing Law. The other asserted that in place of an earlier freedom William I had fastened the yoke of an alien and oppressive law upon England, which it behoved Englishmen to remove.

The Civil War tore these two strands apart and impelled the radical development of the latter. Monarchy and aristocracy became tainted by Normannism. The Levellers invoked the Norman Yoke in support of their demands for law reform and for universal suffrage; they therefore never quite decided whether Magna Carta was a valiant protest against Normannism or irredeemably tainted by it. The more radical Diggers used the theory to urge land reform.²⁸

It is sometimes held that the Norman Yoke developed from an historical theory to an anti-historical theory; that it so demonstrated the flawed nature of all historical precedent that it drove its advocates to base themselves at last upon reason. However, Leveller thought is ambiguous, and recently it has been doubted whether a consistent rejection of historical politics can be collected from its writings.²⁹

After the late 1650s the most radical forms of the Norman Yoke disappear. But in general terms the concept had wide popularity until the nineteenth century.³⁰

The Norman Yoke and Conquest theory are but two sides of one coin.

²⁵ D. Wagner in *E.C.H.R.* vi, 1935, pp. 30-44; Hill (1965) pp. 233-43.

²⁶ Coke's adaptation of the Law was contemporary with a widely held desire to believe in a *fundamental* Law or laws. For the nuances of this elusive concept see Gough (1955) *passim*.

²⁷ *The Norman Conquest and British Historians* The David Murray Lecture, 1946, reprinted in Douglas (1977) pp. 55-76.

²⁸ 'The Norman Yoke' reprinted in Hill (1958) pp. 57-87. ²⁹ Seaberg (1981) *passim*.

³⁰ Hill (1958) pp. 87-122.

Mr Hill thought that pre-Civil War Royalists appealed to the Conquest as an historical defence of royal authority;³¹ however Pocock doubted whether a coherent Conquest theory could be demonstrated at that date. Yet he noted that lawyers and political writers endlessly denied a Conquest that no one seemed to affirm.³² Professor Skinner later supplied the missing link. It was Tudor and Stuart popular history writers who blankly asserted that William was a conqueror.³³

At the very time that the Immemorial Law met its opposite it also acquired a rival in the Gothic theory. Interest in the Saxons had grown during the sixteenth century; churchmen had looked to them as the historical progenitors of the reformed Church of England and had therefore patronised Saxon studies,³⁴ while Lambarde and Laurence Nowell, two of Burleigh's clients, had applied Saxon learning in legal and topographical studies. Moreover, the advance in scholarly competence was proving fatal to the theory most likely to prevent full recognition of the importance of the Saxons, namely the British History that had been Geoffrey of Monmouth's gift to Romance.³⁵ The British History had traced the origins of the British to the Trojans and had gloried in the deeds of Arthur. Its decline was slow; Coke cited it, and the desire to assert the British Church to have been of apostolic foundation rescued some of its features from oblivion: Joseph of Arimathea and Lucius, the putative second-century British Christian King, survived this new fall of Ilium.³⁶

But Lambarde had accommodated the Saxons to the British History. The advance of the Saxons from an origin of the English to the origin of the English was the work of Richard Verstegan more than of any other writer in English.³⁷ Yet the Saxons were clearly but the English example of the barbarian migrants of the post-Imperial period, the German peoples that the seventeenth century called the Goths. Continental writers of the time, or some of them, traced all the polities of northern Europe to the Goths and the theory was clearly rooted in England by the time of the Civil War.³⁸

A Saxon origin for the Law, or for parts of it,³⁹ and the Immemorial Law were, in a simple sense, rival theories. The Gothic theory was to be very influential; an extensive account of its legendary foundations and of its

³¹ *Ibid.* pp. 61–63. ³² Pocock (1957) pp. 54, 55. ³³ Skinner (1962) pp. 156–60.

³⁴ Archbishop Matthew Parker was an especially important figure, see Douglas (1939) pp. 61, 208; Levy (1967) pp. 115–22.

³⁵ Kendrick (1950) *passim.*, and for the decline pp. 109, 112–13, 132.

³⁶ For late examples see below pp. 128, 150.

³⁷ Verstegan, born Rowlands, a Catholic emigrant of Dutch descent, published his *Restitution of Decayed Intelligence* at Antwerp in 1605.

³⁸ Notably in the work of Nathaniel Bacon, see Kliger (1952) p. 141.

³⁹ As in Spelman, *P.W.* p. 100; see also Pocock (1957) pp. 103–4.

later cultural and political importance was given by Kligler in his *The Goths in England* of 1952.

The Civil War destroyed the mixed government of the old order, although in 1660 Englishmen resolved not to notice and restored the Ancient Constitution. A wealth of theorising, shocked into precocity, filled the interim. Among it one remarks the presence of concepts of sovereignty,⁴⁰ acceptance of the Conquest,⁴¹ and, most important, from those who disliked the practical demonstration of unchecked authority by a fraction of the Parliament, attacks in the *Freeholders Grand Inquest*⁴² and by Prynne⁴³ upon the immemoriality of the Commons.⁴⁴

Thus although 1660 repleved the old constitution historical controversies in the Restoration period were different from those before the War. Controversy now, particularly over patriarchalism and the Norman Conquest, was often about the source of authority, and therefore of power, and not its limits.

Among those controversies the most crucial development here is that which was the grand theme of the *Ancient Constitution and the Feudal Law*, the precipitation of the half-realised implications of earlier historical thought into almost crystalline coherence in the writings of late Restoration royalists, most notably Robert Brady.⁴⁵

Spelman's recognition of the scale of the changes wrought by Norman feudalism was, when joined late in the Restoration years⁴⁶ to an aggressive assertion of the Conquest, epochal. It was especially potent because the combination was being stressed in an intellectual milieu aware of sovereignty. At least by implication it provided the historical foundation of a sovereign monarchy. Moreover Prynne and Filmer by their use of the writs of summons to assert that the Lords were historically prior to the Commons, and that the knights and the burgesses had not been regularly summoned to Parliament before 49 Henry III had shown how the Parliamentary consequences of feudalism could be demonstrated.

⁴⁰ Skinner (1962) pp. 162-71.

⁴¹ By Hobbes, see Pocock (1957) pp. 149, 162, 164.

⁴² Usually, but not invariably, ascribed to the patriarchal writer Sir Robert Filmer.

⁴³ In *The First Part of a Historical Collection of the Ancient Parliament of England*, 1649. See Lamont (1963) p. 187.

⁴⁴ Prynne wrote to salvage the Ancient Constitution, Filmer for the King. Later Prynne published his evidence, the Writs of Summons to Parliament, in his *Brief Register of Parliamentary Writs*, 1658/59-1664. After the Restoration Prynne was Keeper of the Records in the Tower; for the later parts of his career see Pocock (1957) pp. 156-62 and Lamont (1963) pp. 175-231.

⁴⁵ For Brady see Douglas (1939) pp. 148-74; Pocock (1951) *passim* and Pocock (1957) pp. 188-228. Brady published his *Introduction to the Old English History* in 1684, and the first volume of his *Complete History* in 1685.

⁴⁶ Pocock (1957) pp. 195-96. 'Feudalism', of course, is an historian's term; the word itself does not appear in English until the 1830s.

As Pocock's seminal book demonstrated Brady systematised these previously separated points. In Brady's writing feudalism was both the consequence and the proof of the Conquest, and all thereafter was to be interpreted by reference to an all-pervasive feudalism. Magna Carta was the embodiment of feudal principles, or the relaxation of feudal bonds, not a recognition of the timeless principles of the Law. Moreover, the Charter's first concern had been the defence of Holy Church.⁴⁷ It was not just that, conveniently or otherwise, there was no record of the summons of the Commons before 49 Henry III, there *could* have been no Commons until the original Great Council of tenants-in-chief alone had been widened, first through the summons of the lesser tenants-in-chief by Magna Carta, and next by the call of the knights and burgesses, initially in 1265, and then, after a pause, by Edward I.

The argument destroyed the usual historical defences of the limited monarchy, but against it Brady's opponents, Atwood and Petyt,⁴⁸ could only deploy a tired immemorialism and attempt to deny the full rigour of the Conquest.

But Brady's achievement must neither be over-estimated nor wrenched from its context. His argument and his evidence, though remarkably sophisticated, were not well integrated; moreover, he did not apply his analysis evenly, for his was an era which still thought the past in some sense controlled the present, and yet also thought in terms of sovereignty.

Brady did not argue that the Stuart Crown should act as a feudal suzerain. He thought, or assumed, that to convict Parliament of a feudal origin was to subordinate it to the Crown, and that to prove the Conquest was in some sense to defend present royal authority. He subordinated Parliament in order to clear the path of the Bodinian sovereign.⁴⁹

But Nemesis awaited Brady. The Revolution robbed him of place, and, for over two hundred years, of recognition of his true stature. After 1688 history still remained a usual mode of political debate, while all the old theories of the constitution survived, but the Revolution compelled their reappraisal.

This book is offered, perhaps rashly, as another link in the chain of works cited above; in creating it I have gained immensely from the quality of the writing that has so firmly established the pre-1688 story. And where the

⁴⁷ Brady *An Introduction to the Old English History* quoted in Pocock (1957) p. 207. The Tudor view of Magna Carta as a plot of the Popish clergy was still extant; Prynne for one shared it, Lamont (1963) p. 95.

⁴⁸ For Atwood and Petyt before 1688 see Pocock (1957) Ch. VIII *passim*, and for after 1688 below pp. 22–5, 26–8.

⁴⁹ Corinne Weston (1972) *passim*. Jean Bodin, 1530–96, was perhaps the most influential contemporary exponent of legislative sovereignty, see Quentin Skinner *The Foundations of Modern Political Thought* Cambridge 1978 II pp. 286–90.

works discussed here have extended beyond 1688⁵⁰ they have proved equally stimulating and valuable.

This attempt to elucidate post-Revolution writing upon medieval topics has certain bounds. I have taken the second Reform Act as the final obsequies of the 1688 order, and the attack on the statute text of Magna Carta as the symbolic end of my story. Moreover, there is one major exclusion: I have, regretfully, not dealt with Scottish writing prior to 1707.

I have sought a mean between rarified scholarship on the one hand and on the other ephemeral products that repeated endlessly familiar argument, but while I have eschewed avowed fiction I have included certain works cast in fictional form which were vehicles for interpretations held by their authors to be historically accurate. Some of them, notably those of Palgrave, contain more truth about the past than some other books ostensibly written as sober history.

What remains is a wide field, and the balance to be struck within it is clearly debatable. I have, consciously, dealt more briefly than was possible with the radicals, for they have been well treated by Caroline Robbins,⁵¹ Mr Hill, and others. In particular I have not dealt proportionate to their notoriety with either Burdett or Cartwright, for the former was well discussed by Anne Pallister,⁵² and the latter sports a modern biographer in Mr Osborne.

By contrast I have given considerable space to the parsons. Historical writing on ecclesiastical and on political themes follows separate, but related, paths; their comparison is instructive. Moreover, the clergy's numbers, influence, and indefatigable industry as the writers, and presumably also the readers, of historical argument compels proportionate treatment.

Less attention has been lavished on the eighteenth century's writing on medieval topics – the cultural dimension, perhaps, apart – than on the seventeenth century's study of the Middle Ages. In part this is because the subject is perceived to be less important and less interesting. The sneers of some contemporaries at 'monkish owl-light', the assumed dominance of abstract reason in eighteenth-century thought, and the nineteenth-century historical movement's denigration of the historical competence of the eighteenth, especially upon medieval subjects, have all had their effect. The eighteenth-century Church, too, has not been vindicated, or has been vindicated but recently, from the slurs cast on it by its Gothic-revived nineteenth-century successor.

These feelings have been enhanced by the very success of recent historiography in recovering the sophisticated historical scholarship of Restora-

⁵⁰ Most notably Douglas (1939); Hill (1954); Pocock (1957) and Anne Pallister (1971).

⁵¹ In *The Eighteenth Century Commonwealthman* (1959).

⁵² Anne Pallister (1971) pp. 67–71.

tion royalism. The Revolution, it is thought, entailed the perpetuation of out-moded history.⁵³

It would be absurd to argue that history retained the precise authority in the eighteenth century that it had earlier enjoyed. Nor is there any denying that the majestic stream of editions then dwindled down to a trickle. But history, one might argue, rather changed its importance than lost it. For with the eventual establishment of political stability the earlier concentration on the normative commands of the past could be relaxed somewhat, while historical narration and above all explanation gained in comparative importance. The appetite of the age for history remained large, and in serving it the eighteenth-century writers used far more of the legacy of their seventeenth-century predecessors than we used to allow. Indeed, in a sense they dressed the raw harvest of seventeenth-century scholarship for public sale. It was, after all, an eighteenth-century Scot, not a seventeenth-century Englishman steeped in the Common Law, who claimed 'this is the historical Age and this the historical Nation'.⁵⁴ It was not altogether an exaggeration; such, at least, is a contention of this book.

⁵³ Skinner (1962) pp. 176–78.

⁵⁴ David Hume to William Strahan, August 1770, *The Letters of David Hume*, ed. J.Y.T. Grieg, Oxford 1932, Vol. II pp. 230–31.