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Imaginary Bodies: Legal Fictions and Rhetorical Tropes in Early Modern England

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Ph.D.

2015
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Summary:

This thesis is an investigation of the development and significance of the early modern English use of the term “body politic”, both as a rhetorical trope and as a legal term of art. Unlike previous scholarly work on the subject of the king’s body politic, this study considers the metaphor, and legal fiction, of the body politic in terms of the development of legal personhood as well as sovereign authority. Using literary critical close reading techniques, it examines print and manuscript texts as well as records of political speeches, which were widely available when the English courts decided Calvin’s case in 1608, or which subsequently took advantage of the availability printed reports of Calvin’s case. A reading of the printed reports of Calvin’s case itself, one of the most important instances of legal deployment of the term “body politic” forms the crux of the thesis. It clarifies the distinctions between political and legal uses of the body politic language. Ultimately, it concludes that lawyers and judges took advantage of widespread interest in Calvin’s case and familiarity with metaphorical bodies from beyond the realms of law to enhance their own prestige and that of the courts. Further it draws on texts from the period following the decision of Calvin’s case and leading to the outbreak of the English civil war to demonstrate that writers with and without legal training took advantage of the new availability of case law dealing with the king’s body politic to make legal and political arguments. Finally, it considers eighteenth- and nineteenth-century case law to illustrate the continued importance of legal thought from Calvin’s case to jurisprudence dealing with political sovereignty and the limits of legal personhood in English and trans-Atlantic contexts.
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Abbreviations:

AV  The Authorised Version of the Bible
BL  British Library
Douay-Rheims  The Douay-Rheims English Translation of the Bible
PRO  Public Record Office
SP  State Papers
US  United States Reports
YB  The Year Books

A Note on Spelling, Dates and Citation:

I have adopted the new style for dates, taking the year to begin on 1 January.
Where I quote from texts in English, I have generally left original spellings and punctuation intact, save where I have modernised “u/v” and “i/j” substitutions for easier reading. Bowing to longstanding convention, I have adopted the distinction between the Stewarts in Scotland and the Stuarts in England. Where I have quoted cases heard by the Supreme Court of the United States, I have followed American Bluebook legal citations standards, so that the case name is followed by the volume number of the United States Report in which the case appears and the page number on which it begins. So, for example Dred Scott is cited as Dred Scott v Sandford 60 US 393 (1857), and it appears in the sixtieth volume of the United States Reports, starting on page 393 and was heard in 1857.
Preface:

This is a study of bodies in the legal and political imagination. I became interested in the legal and political functions of imaginary bodies while undertaking preliminary research for a project that I initially assumed would deal with efforts at legal hegemony in the aftermath of the 1603 Union of the Crowns. I read Edward Coke’s report on *Calvin’s case*, that first key moment in establishing who was and was not a subject of the new British crown that James VI and I claimed to possess. As I read the case, I was struck, as most of its readers are, by Coke’s apparent commitment to the notion that the king has a body politic. As I read further into Coke’s legal writing and that of some of his contemporaries, I was equally struck by the fact that the king was one of many possessors of a body politic because, Coke, like some of his contemporaries and colleagues, used the terms “body politic” and “corporation” interchangeably. Of course, F. W. Maitland, the great pioneer of twentieth-century legal history, noted this element of Coke’s account, famously remarking that the king as corporation was a “curious freak” of English law. Yet this insight notwithstanding, students and scholars of law have been reluctant to take the metaphor of embodiment particularly seriously, with respect to sovereigns, or corporations more generally.

The king’s, or queen’s, body has long been of interest to audiences and spectators from far beyond the realm of legal scholars. Cries of “The king is dead! Long live the king!” familiar from historical dramas on stage and screen and even the avid appetite for news of royal pregnancies and births seem to belong to the realm of spectacle and tabloid rather than that of the dryer technicalities of

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corporate law. Yet the preoccupation with the rituals of royal births and deaths highlights the affinity between governments and corporations: a government requires a common conviction that its authority is permanent – its quotidian business must continue in the liminal period between the interment of one ruler and the coronation of the next, and laws must maintain their force. Political philosophies justifying this permanence of governments, and the rituals celebrating the smooth passage from one monarch’s reign to the next, offered a model for thinking about other entities that required the fiction of permanent existence or, to use the legal term, perpetuity. Of course, such fictions could also create room for discussion of the law that survived as individual kings died. Thus when the eighteenth-century legal scholar William Blackstone turned to the matter of corporations in his *Commentaries*, he described corporate by-laws, made by a corporation’s members, as “a sort of municipal laws of this little republic”.^2

Indeed, the two fundamental characteristics of corporations, perpetuity and separateness – the independence of a corporation as a legal entity from those who direct its actions – were integral elements of the corporate status that F. W. Maitland highlighted so astutely. For William Blackstone, who, as the first professor of the common law at a British university, faced the formidable task of packaging the common law for the consumption of a wider, non-professional university audience, the primary advantage of the corporation was its perpetuity. Since Blackstone’s time, most practicing lawyers, and those who chose the corporate form, have come to prioritise corporations’ status as separate rather than perpetual entities, because it is the former that insulates those who own and act for

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corporations from their debts and, in some cases, their misdeeds. Yet the limited liability conferred by corporations is available to limited liability partnerships and unincorporated companies; still imaginary, undying corporate persons remain pervasively present.

The bodies law imagines for corporations remain a potent force within and beyond legal culture. In this thesis my aim has been to document some of the rich variety of the bodies imagined for early modern monarchs and to trace their influence on political, and particularly on legal, thought. In keeping with the latter goal, I have argued a link between the canonical status of particular lines of legal thought about kings and corporations and the gradual, deeply ambivalent movement of early modern legal culture toward printed commentaries and law reporting. I have thus prioritised three kinds of sources: printed legal writing about the body politic that aimed for, or achieved, a degree of popularity beyond its immediate surroundings; political works by non-lawyers which affected perceptions of the body politic; and texts, by lawyers and non-lawyers alike, which demonstrate the aftereffects of efforts to control the metaphor of the body politic in the crucial period of the union of the crowns. I have further prioritised texts that emphasise the physicality of the body politic, and its connection to and impact the real bodies of monarchs and subjects. I have read these sources intertextually and intensively.

Precedent-based legal logic requires an odd engagement with textual records, at least from the perspective of the historian. Lawyers hoping to win cases

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and judges seeking to legitimate their findings are often exhaustively aware of legal results, but they tend to cite these results in isolation, deracinated from their contexts and sometimes even their causes. As a scholar, I have had more concern for context than many practicing lawyers can afford. Yet because of my interest in the performative nature of the production of legal opinions and arguments I have generally taken lawyers own claims about which texts they used and how at face value. This is not because I argue that published, widely-circulated, and ultimately well-known legal materials necessarily represented widespread consensus or even necessarily transparency. Rather, it is because my interest is in how jurists positioned their opinions to become part of received legal opinion connecting imaginary personhood and nationality. This means that my legal sources will be, by and large, well-known to legal historians and some lawyers, and even vaguely familiar to law students. This study, I hope, will offer readers new insights into the links among political expediency, print propagation, and precedent, especially in the emergence of a body of thought about legal personhood and allegiance. I highlight the texts that combined to establish the importance of imaginary personhood to broad-based perceptions of the law pertaining to corporations and allegiance alike and texts that demonstrate those perceptions themselves. I have tried to balance sensitivity to texts’ contexts with intensive readings of the texts themselves.

Allegiance and corporate personhood have of course remained deeply relevant since the early modern period and they continue to attract wide interest to this day. As I finished this thesis, the Supreme Court of the United States ruled that for-profit corporate personhood includes a right to the free exercise of religion in the case of Burwell v. Hobby Lobby; as I write this preface, voters in Scotland are
preparing to go to the polls to determine whether Scotland will remain in the UK. Questions of whether an independent Scotland would retain the pound as its currency or continue its allegiance to Elizabeth II and her heirs have made the debate about disunion look remarkably like the debate about union in 1603. By the same token, the American Supreme Court’s ruling that closely held, for-profit corporations can share the religious convictions of their directors indicates the continued room for renegotiation of the relationship between natural and politic bodies. Under such circumstances, bringing together new valences of the idea of the body politic in the early modern imagination surely becomes an especially rewarding endeavour.
Acknowledgements:

The border crossing, between countries and disciplines, which has characterised the subjects of my research has characterised my own life as well. From before my post-graduate career even began, I have had the good fortune of receiving advice and instruction from Crawford Gribben, who formally became my thesis advisor when I came to the School of English at Trinity as a recent graduate from the University of Chicago. Without his early encouragement to take a risk and attempt “literary” readings of law printing as propaganda, I might never have undertaken my current line of research. Crawford’s work took him to Queen’s University Belfast just as mine was leading me to conclude that perhaps I was a historian after all. With help from faculty in the Schools of English and History and the Humanities, I transferred from one to the other.

Graeme Murdock of the school of History and Humanities graciously agreed to become my new supervisor, and what might have been a difficult or disruptive transition instead became an opportunity to keep a foot in two methodological camps. His patience as I reworked large portions of this thesis to reflect my newfound historical focus and his tendency to pose difficult questions, particularly about issues of audience and reception, have done much to make this thesis stronger. Meanwhile, Crawford kindly continued to read drafts from Queens, so I have had the benefits of the input of both of my advisors, jointly and severally. Robert Armstrong offered invaluable insight in the context of my confirmation exam. Since then, I have benefitted greatly from the comments, criticisms and recommendations of my final examiners, Alan Cromartie and Ciaran Brady. Steve Zwicker and Derek Hirst at Washington University in my native St Louis both
generously took the time to discuss aspects of this thesis with me. Kate Harvey and Kate Roddy listened to far more than their share of monologues on the vagaries of the history of corporate law and always asked the right questions. While I was still a student in the School of English, I was also the fortunate recipient of a Peter Irons studentship. Among other things, it enabled me to attend a particularly productive workshop on the cultures of the Inns of Court at the Folger Library in Washington DC, where I benefitted immensely from the insights of my fellow attendees and our convenor, the late Christopher Brooks. As the beneficiary of so much good fortune and scholarly generosity, I am acutely aware of the truth of scholarly commonplace: I owe my success to my teachers and colleagues, my failures are all my own.

In addition to these scholarly debts, I owe a profound debt of gratitude to my families. In Dublin, I’ve had the good fortune to find a family of adoption, particularly with Lucy, Simon, and Benjie who have offered me boundless friendship and a very necessary refuge both for and from work. In St. Louis, the family I grew up with, especially my parents, John Sappington and Mary Karr, and our dear friends, Steve Smith and Jeanne Harper, have given me free legal and editorial advice, constant loving support, and an enthusiasm for this project that has never wavered. I could not have completed it without them.
Glossary of Legal Terms:

Allodial Tenure: absolute legal possession of real property, free from the possibility of even government confiscation.

Ante nati: Persons born before the accession of James VI and I to the English throne and the *de facto* union of the crowns.

Attainder: The legal fiction that commission of a felony resulted in tainted blood. The attainted person's property reverted automatically to the crown because the blood taint passed to his heirs, disqualifying them from inheriting.

Conveyance: The transfer of legal possession of real property from one person to another.

Disseisin, to disseise: Unlawful dispossession; to dispossess someone illegally.

Escheat: The reversion of property back to a feudal lord, or the crown, where the property's possessor had died with no heir, or he or his heir had been attainted.

Fee en taile: Legal possession of real property, which the possessor must, by law, pass on to the next heir.

Fee Simple: Legal possession of real property, which the possessor may sell or distribute in a will, or in the absence of a will passes to the possessor's next of kin rather than escheating.

Post nati: Persons born after the accession of James VI and I to the English throne.

Seisin; Livery of Seisin: The possession of a feudal fiefdom; the process by which a fiefdom is transferred from a feudal lord to his enfeoffee.
1. Introduction

The king has two bodies. Such a conclusion is hardly novel: lawyers working, writing, and pleading for and against the crown have, when it was convenient, long trotted out the fiction that in addition to the tangible, visible “body natural” he or she possessed in common with the rest of humanity, the monarch possessed an additional, invisible and perfect “body politic”. The body politic’s expedience in law assured it a place in a wider political and literary rhetoric. In turn, this wider visibility has meant that historians of politics, ideas, and culture, as well as literary critics have devoted more attention to the “body politic” than to any other legal fiction. This preoccupation reflects the pervasiveness of imaginary bodies under Anglo-American law.\(^1\) Despite radical transformations in their functions, responsibilities, and structures, corporations, named for the Latin \textit{corpus} (body) and the cognate Law French \textit{corps}, still carry their imaginary bodies in their very name.

In this study, I consider this pervasiveness of bodies in legal fictions, with a focus on the historically contingent notion that there were, in sixteenth- and seventeenth-century England, multiple, widely divergent conceptions of the term “body politic”. I further argue that the disparity of these concepts became almost inescapable during the period immediately following James VI and I’s accession to the throne of England, when political theorists and lawyers confronted not only multiple ideas of the “body politic” but also multiple realms with a single monarch but entirely distinct and independent political and legal regimes. Finally, I conclude

\(^1\) American lawyers and law professors tend to use the term “Anglo-American law” to refer to a tradition of precedents shared among the American, UK, and sometimes other nations’ legal traditions; for their purposes it is, as a rule, synonymous with the term “common law”. Because seventeenth-century common lawyers themselves deployed the term “common law” in a variety of contexts and their usage was considerably more complicated than modern American usage would suggest, I use “common law” to refer to early modern legal practice and “Anglo-American law” to refer to the legal and historical traditions that emerged from that practice.
that ultimately, no single definition of the body politic established pre-eminence and that for this reason, subsequent generations of politicians, political philosophers and lawyers continued to draw on multiple and very different traditions despite using identical terminology. Yet if no definition of the body politic has become dominant, neither have the varied and competing definitions of the body politic been unaffected by their commingling: legal fictions that conferred imaginary bodies on intangible entities and political theories that anatomised the state as a body writ large were both physicalised by the joining of the body politic to the king.

Scholarship about the body politic inevitably confronts the problem of what kind of fictive or metaphorical body a particular text requires its readers to imagine. Bodies have been such a popular rhetorical trope because bodies are easy to imagine, but the trade-off for this universality was the breadth of variety of the bodies that various writers, readers, speakers and listeners have envisioned. For lawyers, the imaginary body differed from real bodies in several significant ways: because they were perfect and undying, bodies politic were never disabled from buying, selling or leasing but because they were invisible, they could not (obviously) serve on juries, give testimony or stand trial. More generally, the law tends to imagine bodies as much in terms of what they can do as what they look like: monstrosity, infancy, dotage, and even invisibility mattered where they impinged on capacity before law – capacity to buy, sell, lease, rent, testify, serve on a jury or do any of the other things that might bring a person, or an imaginary body, into contact with the power of the law. Accordingly, lawyers imagined legal bodies in a form that ensured they had the capacity to fulfil certain legal functions.

“Capacity”, a crucial term of art for Stuart lawyers such as Chancellor Ellesmere and Sir Edward Coke, remains significant to this day. According to Les...
Terms de la Ley: or Certaine difficult and obscure wordes and termes of the common laws of this realm expounded, the expanded 1624 version of the Rastells' Expositiones Terminorum legum Anglorum (first printed in 1523), “capacitie is when a man or bodie politike or corporate is able to give or take lands or other things or to sue actions.” That lawyers tended to analogise between bodies politic and men was not incidental: when they imagined a body politic with the capacity to do everything a client, or situation, required, lawyers modelled such an imaginary body on the real person most capable under law – an adult male.

As I shall argue below, ideas of legal capacity in English law tended to coincide with ideas of physical and bodily capacity. The tendency to embody legal entities like corporations by granting them fictional bodies politic (through letters patent or parliamentary acts) was part and parcel of this mental habit. Though it existed independent of any such specific letter patent or act of parliament, the seemingly indissoluble interdependence between the king's body politic and the actual physical body of the king or queen also played into this linkage of physical reality and legal capacity. Real bodies and the capacities the law identified in them bound lawyers' imaginations, linking the form and function of imaginary bodies even more closely. Legal thought about capacity has tended to conform to conventional wisdom drawn from medical thought and social mores; in short, capacity under law, like law itself, is, and has been, culturally constructed. Nevertheless, I will argue that because of its own function conferring legitimacy, legal capacity has in turn shaped normative

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2 John Rastell, Les Termes de la ley: or, Certaine difficult and obscure wordes and termes of this realme expounded (London: Printed [by Adam Islip] for the Company of Stationers, 1624), f. 48v. This is the earliest appearance of the term “capacity” I have been able to trace in an edition of Rastell’s legal dictionary, the first in the genre to list and define terms of English law in alphabetical order. This innovation accounts for its regular reprinting and expansion and its continued popularity through the seventeenth century.
models of the body, physical or imaginary. Thus, just as the image of the body politic was an adult male (albeit an undying one), generations of insistence that the capacity of the law's ideal imaginary body had its capacities in common with these particular legal subjects cemented their position before the law.

Legal scholars and lawyers, particularly corporate law specialists, have been reluctant to acknowledge the enduring rhetorical force of imaginary bodies as a model for the corporate entity. Dealing with the problem of corporate punishment, the eighteenth-century Chancellor of the Exchequer, Baron Thurlow (1731-1806), is said to have remarked that, "Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like." Thurlow's claim was pithily reformulated by the American humourist H. L. Mencken as a declaration that a corporation "has no soul to be damned and no body to kick." Even the great English legal theorist William Blackstone, acknowledging the rhetoric of corporate embodiment, preferred to consider the corporation as a "little republic" when he wrote on by-laws and corporate governance. More recently, scholars favouring an economic analysis of law, most notably Michael C. Jensen and William H. Meckling have advanced a model that rejects corporate personhood entirely, preferring to imagine the corporation as a nexus of contracts rather than an invisible, immortal body. Yet even this nexus model of mutual contractual and fiduciary obligations between individuals with financial interests in a corporation depends on the cover of a

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3 Quoted in John Poynder, *Literary Extracts from English and other Works; Collected during Half and Century: Together with some Additional Matter* Vol. I (London: John Hatchard & Son, [1844]), p. 268. Interestingly, the only other quote Poynder provided on the subject of corporations was a relatively lengthy extract from the *Life* of William Wilberforce, which argued that when men formed corporations they could divide responsibility to so great an extent as to avoid self-censure (see ibid, pp. 267-8.)


legal fiction, that any such contractual nexus exists within an imaginary body. The imaginary body's fictive immortality protects the ongoing enforceability of the contracts in the nexus. Thus, the impact of the corporation's imaginary body on law, policy and politics endures even where a nexus of contracts claims to have supplanted it. The modern corporate model still depends on the paradigm established when the lawyers and judges of seventeenth-century England reiterated the fiction that James VI and I had a corporate body, that is, a body politic. Accordingly, unpacking what the phrase "body politic" meant to whom and under what circumstances is a crucial project, not just for legal and intellectual historians, but also for everyone interested in how law governs and adjudicates for imaginary bodies, and sometimes real ones, in the present day.

This thesis takes lawyers' use of imaginary bodies as its starting point and investigates the way in which their conceptions of the body politic, as rhetorical trope and technical legal fiction, impinged on, conflicted with, and combined with other uses of and ideas about the body politic. With this aim in view, I have taken the writings of Lord Edward Coke and Chancellor Ellesmere about *Calvin's case* as the most effective legal invocation of a body politic. *Calvin's case* was a 1608 judicial decision resolving the fate of James VI and I's efforts to naturalise young Scots (those born after 1603) in England in the king's favour. As Chancellor of the Exchequer and Chief Justice of the Common Pleas respectively, Ellesmere and Coke both wrote influential explanations of their reasoning in the case. Yet neither Coke nor Ellesmere was simply a talented legal practitioner; both had long, significant political careers.⁶

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⁶ Both have, accordingly, attracted the interest of biographers. The study of Ellesmere's life which Louis A. Knafla wrote to accompany his edition of Coke's treatises remains invaluable, see Louis A. Knafla, *Law and Politics in Jacobean England: the Tracts of Lord Chancellor Ellesmere* (Cambridge:
For the moment, I want to stress the way that exposure to a wider political rhetoric shaped both men's thinking about the body politic in Calvin's case. Just as lawyers had, for centuries, interpreted statute and common law precedent to imagine a body suited to their clients' needs, those concerned with political issues could draw on metaphorical comparisons between body and state from sources as antique and august as Plato, Aristotle and St Paul. Where writers and speakers imagined bodies to make a point about the nature of the state rather than to fulfil a specific legal function, it was the nature not the capacities of the imaginary body that became crucial. Put even more simply, for politics, form not function was preeminent.

The tension between metaphorical form and legal function in Atlantic conceptions of the body politic came to a head at the turn of the seventeenth century when lawyers, and others, had to wrestle with the shape of a new body politic, with the potential for new, island-wide responsibilities and prerogatives. They freely conflated, and contrasted, metaphor and legal construct in order to advance arguments about the nature of sovereignty, royal prerogative and the form of the state. This study is an effort to disentangle the legal fiction from the broader political rhetoric and an argument for the influence of both, separately and together, on the subsequent development of both political and legal thinking about bodies and embodiment.

This tension between form and function at the core of the body politic was borne out when Lord Edward Coke stressed that the body politic was so named because it was a created by human policy, that is, human political action. That he did so in the context of determining the legal rights of the Scots born in James VI and I's

allegiance after 1603 was highly significant. James's plans for an Anglo-Scottish union that extended beyond a composite monarchy had led him to warn the English parliament that he refused to be the head of a monstrous body politic. Undeterred by this warning, the House of Commons managed to stave James's union plans off until 1610 when he abandoned his efforts and prorogued his first English parliament in frustration.

As his program for union lost steam in parliament, James decided to turn to the English judiciary to force some progress on the issue of naturalisation, at least for Scots born after his accession to the throne of England (the so-called *post nati*). A carefully constructed test case came before fourteen of the most influential judges in England who heard it *en banc* in 1609. The six-year-old plaintiff had been named for his grandfather James Colville, Lord Culross, one of James VI and I's staunchest Scottish supporters, especially as regarded the monarch's union program. Yet the curious carelessness afflicting courts, which tend to lose interest in ephemera like individual plaintiffs where substantive matters of law are up for debate, meant that young James Colville brought suit as Robert Calvin. And so, James's last ploy to secure naturalisation for at least some of his Scottish subjects in England became *Calvin's case*.

For the judges, *Calvin's case* (or the case of the *post nati*, as Ellesmere called it, invoking its wider implications) represented a unique opportunity to demonstrate the sufficiency and the utility of judge-made common law as a tool for enacting policy. Where statute had failed, or statute-makers in parliament had proved intractable, the judges and the common law could give James what he sought. Such an

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accommodation may seem surprising in light of the subsequent struggles which were to emerge between Ellesmere, Coke, and James, or even in light of the longstanding professional rivalry between Coke and Bacon (who argued Colville's case at the crown's behest). Nevertheless, *Calvin's case* made common cause among them. Such seeming consensus, however, is neither simple evidence of the calm before the subsequent decades' political storm, nor a reflection of the political battles to come. Instead, it indicates the width and flexibility of the legal fiction of the body politic. What seemed to enhance the prestige of the monarch could also constrain his or her power. Accordingly, skirmishes over the outcome of the case failed to emerge largely because all the parties involved understood that *Calvin's case*, couching its arguments in terms of the royal prerogative, would yield a result of *status quo ante* as far as legal precedent went.

Nevertheless, *Calvin's case* quickly established canonical status within Anglo-American legal tradition, in large part because it led judges to articulate, in relatively clear English, how the legal fact of the king's two bodies related to the mutual privileges and obligations between him and his subjects. As I will argue in discussions of *Calvin's case* specifically, Coke and Ellesmere both exploited the potential of printing in English, rather than the law French which was more typical for case reporting, to legitimate judicial opinion in *Calvin's case* to the widest possible readership. In doing so, both men revealed their own dependence on the vocabularies of non-legal bodies politic. In making law accessible, they also made a rather recondite legal fiction far easier to conflate with non-legal approaches to embodying the state in the person of the king.
Varied Conceptions of the Body Politic

Modern scholars have been no more immune to this temptation towards mixing the two concepts than early modern tract writers were. The great legal historian, F.W. Maitland considered kings, simultaneously private and corporate persons in law, to be "curious freaks" of longstanding legal tradition. Maitland differentiated between what he called moral and legal personhood. Maitland had been inspired by his work translating parts of Otto von Gierke's study of medieval theories Die publitischen Lehren des Mittelalters. Maitland's translation appeared as Political Theories of the Middle Ages in 1900. In 1957, Ernst Kantorowicz took up Maitland's reading of the body politic as a legal fiction in his rich study The King's Two Bodies. Kantorowicz, however, vastly expanded the scope of Maitland's original studies, elucidating the presence of the king's two bodies in everything from Shakespeare's Richard II to the art of the Aachen Gospels' fronticepiece. This variety of sources certainly helps to explain Kantorowicz's continuing influence on literary critics and historians of art as well as historians of culture and ideas. Recently, Victoria Kahn has taken up Kantorowicz in her study of scholarly works which explicitly martialed early modern texts in the service of claims about the nature of modernity. Kahn argues that, "precisely for this reason, these works have seemed more alive, more current, more relevant today than many of the classic works of scholarship on the Renaissance and

Her study of Kantorowicz notes the relationship between the legal and “poetic” fiction in Kantorowicz’s reading of Richard II, but, following Kantorowicz’s own approach, Kahn takes up the legal origins of royal double personhood primarily as a way into insights about the common points of politics and poetics. The more immediate ramifications of a corporate king on legal, as well as political, thought, and the interplay between the two modes of thinking which depended more on the printing press than the playhouse, are understandably of less interest to her. Other scholars have recently taken up Kantorowicz’s engagement with the king’s two bodies: David Norbrook and Lorna Hutson have, for example, differed in their assessments of the whether the idea of a dual-bodied king created room for subversion of monarchial authority.

Kantorowicz’s attempt to synthesize a broad range of sources from across Europe also led him to focus on the link between the king’s two bodies to his character angelicus. In Kantorowicz’s own words, “The body politic of kingship appears as a likeness of the ‘holy sprites and angels,’ because it represents, like the angels, the Immutable within Time. It has been raised to angelic heights, a fact which is worth being kept in mind.” Here Kantorowicz aligned “the body politic of kingship” with celestial bodies rather than with the more mundane, but equally undying, bodies politic of hospitals, borough corporations, and even sixteenth century joint-stock companies. Kantorowicz did, of course, acknowledge the similarity

14 Kantorowicz, The King’s Two Bodies, pp. 8-9.
15 The first chartered joint-stock company, the Russia Company or Muscovy Company was formed in 1553 to allow a group of merchants a monopoly on the rights of trade between England and Russia.
between kingly bodies politic and other entities invented by law, but for his purposes
this similarity was significant mostly as an excuse for a cult of a divinely intangible
royal body politic. Such an alignment was not simply "a fact that is worth being
kept in mind"; it dramatically reoriented the king's second body away from legal
necessity and toward religious and political ritual. Yet the interplay between ritual
and legal necessity is essential to any understanding of the body politic's importance
as both legal fiction and rhetorical construct.

This interplay was all the more remarkable because where other legal fictions
have come into use outside of the law they have generally done so independent of
their original legal purposes. Thus, very few of us think of medieval legal fiction, for
example, when we hear the name John Doe, despite the fact that the name was
ubiquitous in law for centuries before it became ubiquitous in literary fiction. Yet
monarchs and corporations, to say nothing of monarchs as corporations, have aroused
closer scrutiny and wider discussion than other legal fictions. Even so, it was entirely
possible to invoke the political metaphor of the body politic without imagining a
corporate body recognizable under English law. Legal uses of the metaphor of the
body politic coexisted with the trope of the Christian community on earth constituting
a body of which Christ was the head. St. Paul observed in his letter to the Romans
that "For as we have many members in one body, and all members have not the same
office: So we, being many, are one body in Christ, and every one members one of

and received its charter of incorporation in 1555. For an account of its chartering, see William Robert
Scott, The Constitution and Finance of English Scottish and Irish joint-stock companies to 1720 Vol. I
(Cambridge: Cambridge University Press, 1912), pp.15-23. For a lengthier account see William
16 For Kantorowicz on the Roman law of corporations, see The King's Two Bodies, p. 394, especially
nn. 270 and 271.
17 For the use of John Doe as a legal fiction in writs and leases, see John H. Baker, The Law's Two
another,18 providing readers with language to describe earthly polities as well as the church. Such language also encouraged the faithful to relate ideas of their own bodies and physical capabilities to the metaphor of church as Christ’s body. In this chapter I explore the rhetorical origins of a profoundly physical body politic to investigate what gave this physicality such staying power.

The Body Politic in the Union of the Crowns

The union of the crowns of Scotland and England in the person of James VI and I inevitably led to arguments about how best to imagine a new sovereign and his reign over his inevitably composite monarchies. James himself was eager to strengthen the cultural and political union between England and Scotland (James’s union speeches and proclamations focused on his “two realms” and Ireland seems to have played little part in his union thinking or ambitions).19 To be sure, debates about what form the union should take animated intellectual communities in Scotland and England alike. Even prior to James’s accession historians and chroniclers on both sides of the border started considering how events in England and Scotland had historically been intertwined. The Scottish chronicler and philosopher John Mair, or Major, (1467-1550), wrote the first joint chronicle of Scotland and England. Though his text was, in fact, disjointed, making little attempt to link events in the two countries’ histories, Mair was, as others have argued, a staunch advocate of an Anglo-Scottish alliance to supplant the Auld Alliance which had united Scotland and France, despite the fact that he had received much of his education in France. Two of Mair's

18 AV, Romans 12:4-5.
most famous students at St. Andrews, John Knox and George Buchanan shared his pro-union outlook, though his colleague and fellow historiographer Hector Boece was more phlegmatic about the prospect. As Roger Mason has argued, Boece shared Mair's concern with countering claims that Scotland had been an ancient English dependency, but he found less to attract him in a union of equal nations with England than Mair had.\textsuperscript{20} Particularly as Reformed Marian exiles began returning from Geneva, some English and Scottish writers began to envision an island united both by geography and in opposition to the forces of encroaching French and Iberian Catholicism, though the intellectual historian Colin Kidd has cautioned that "by no means did Scottish Protestantism speak with a single voice; nor was the dominant voice unionist".\textsuperscript{21}

This was not to say that James's plans for a closer-knit union of his kingdoms met with universal approval: the immediate aftermath of James's coronation saw a flurry of pamphlet literature from across the philosophical and ideological spectrum confronting the issue of how to approach the union. Those English writers who opposed closer union outright, wary of incurring their new king's disfavour, often wrote anonymously, or circulated anti-union treatises in manuscript rather than seeking print publication. Others, such as the lawyer-antiquarian Sir Henry Spelman advocated a temporary moratorium on union while the Scots and the English became more familiar with one another rather than abandoning union outright.\textsuperscript{22} In Scotland,

meanwhile, as Colin Kidd has demonstrated, pro-union pamphleteers threaded the needle to reiterate Scotland's historical independence and self-sufficiency while at the same time celebrating the prospects for a united Britain.\footnote{Colin Kidd, \textit{Union and Unionism}, pp. 53-60.}

For his own part, James energetically pursued his plans for union and clashed with the House of Commons on the issue consistently over the four sessions of his first parliament (1604-10). He unsurprisingly preferred to present many of his plans for union as proclamations: such proclamations included insisting that his subjects refer to themselves and one another as "North Britons" and "South Britons" rather than Scots and Englishmen, introducing a new currency, the "Unite" coin, which would carry the same value in England and Scotland, and baldly stating that the post nati from each of his realms were full subjects in the other realms.\footnote{James VI and I, "A Proclamation concerning the Kings Majesties Stile, of King of Great Britain, &c." in \textit{Stuart Royal Proclamations}, pp. 94-8, and "A Proclamation for Coynes" in \textit{idem}, pp. 99-101.} To justify the last of these claims to an English House of Commons determined to block the naturalisation of the post nati from gaining statutory sanction, James cited the authority of the judges. In the end, of course, James took the question of whether or not naturalisation of the post nati was the automatic result of his accession to the English throne to the courts, where the majority of advocates and judges turned to the legal doctrine of king as corporation to resolve the issue of sovereignty. Accordingly, where the physiognomy of the metaphorical body politic was up for renegotiation, so, it seemed, was the actual structure of the state.

\textbf{Scope and Methods of the Argument}

This linkage between political structure, the legal fiction of the body politic, and the extent of royal corporate capacity has persisted to profound effect in legal
history. Thus in a recent, much-praised, though highly idiosyncratic, study, *The Law is a White Dog* which takes up legal treatises and case law governing issues as diverse as present day solitary confinement and early modern university disputations on the law governing ghosts, Colin Dayan examines the ways in which states and communities have developed law to control personhood literally as well as legally. Dayan's methodology, which tends to depend on sometimes-tenuous links to move between concepts taken from radically different sources, is fundamentally unsuitable as a model for historiography. Yet the theoretical framework of *The Law is a White Dog* is a useful, if provocative, starting place. Dayan's focus on figures on the margins of the law, particularly felons and enslaved persons, powerfully invokes the equally marginal, though paradoxically central, figure of the king with two bodies. Dayan thus offers rich arguments for the continuing role of metaphor, analogy, and even "magical thinking" in the development of a jurisprudence of personhood and capacity. Her line of reasoning also suggests some of the insights that might reward a more conventional effort to think through the relationship between languages of embodiment, capacity and authority.

This attempt to untangle the various political and legal strands of meaning combined in a particular term is not, in and of itself, a novel effort. Instead it has its origins in the efforts of the so-called Cambridge School of political historians, and their push for greater attentiveness to "political languages", to use J. G. A. Pocock's

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26 For her claims that "magical thinking" has formed part of opinions in probate issues, see Dayan, *The Law is a White Dog*, pp. 11-2.
Pocock, even more so than other scholars of the history of political theory has emphasised the connections between conceptions of law and history in early modern history in his first book, The Ancient Constitution and the Feudal Law (first published in 1957 and reissued in 1987), in which he made strongly articulated arguments contrasting the insular and immemorialist approach he attributed to common lawyers in sixteenth- and early seventeenth-century England with the historical and comparative approach he attributed to their university educated colleagues in France. Reading the magnificently oracular English-language writings of Lord Edward Coke and Sir John Davies, Pocock argued that their works, and their thought, were characterised by a belief that English law was an immemorial body of juridical customs which predated the arrival not only of the Normans but even of the Romans.

Pocock's conception of a Cokeian-immemorialist common law mind has proved highly influential since 1957 and, not surprisingly, it has attracted critics and defenders alike. Within histories of political ideas focused on parliament and the thinking of parliamentarians, Glenn Burgess and J. P. Sommerville have debated the validity of Pocock's observations and their relevance to a debate about the utility of broad pre-revisionist concepts of absolutism and constitutionalism. While Burgess is suspicious of readings of seventeenth-century thought which pit "absolutist" royalists against "constitutionalist" commons men, he argues that what political consensus existed before the 1640s was a matter of a shared terminology of politics and

rhetoric. J. P. Sommerville has sharply criticised Pocock's insular interpretations, arguing that even where English political theorists did not cite their Continental counterparts explicitly, they were both aware of and influenced by them.

Sommerville's astute intellectual history, *Royalists and Patriots: Politics and Ideology in England, 1603-1640* (1999) has done much to reassert the role of ideological conflicts in the build up to the conflicts of the 1640s, but he has been inclined to dismiss analogies as mere rhetorical flourishes. Somerville is right to caution devotees of close textual analysis that analogies offered Stuart readers "illustrations, not proofs". Yet it is equally important to note that in the case of the body politic, a popular analogy shared identical terminology with a legal construct that did, in Calvin's case, provide proof, or at least grounds for the judges to cite the common law and find in their king's favour. Meanwhile Janelle Greenberg has expanded in depth on Pocock's insights as to the relationship between law and history in shaping political rhetoric in *The Radical Face of the Ancient Constitution: St Edward's 'Laws' in Early Modern England*, which argued for the sixteenth- and seventeenth-century political significance of the so-called "laws" of St. Edward, an almost certainly forged body of law purported to originate in Saxon statutes. Overall, Greenberg mounts a persuasive case for the theoretical and rhetorical importance of both law and historiography in early modern English parliamentary thought.

Unfortunately, her arguments sometimes depend on the broad course of parliamentary decision making rather than attentiveness to specific language. This is particularly evident in her analysis of the English parliamentary debates about James's proposals

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for union, which suggests that members of the House of Commons feared that James would use the union to covertly introduce "conquest theory" into his governance of England, ignoring the economic components to concern over union, which did much to shape objections in the Commons. Recently, Rei Kanemura has offered a more nuanced account of the role of conquest theory in the parliamentary and pamphlet debates on union.

In his remarkable early study of Sir John Davies's Irish career, Hans Pawlisch has offered a careful corrective to Pocock's claims about Davies, noting that despite the English rhetoric of the preface to his Irish law reports, the reports themselves, published in the traditional law French, and indeed, Davies entire legal career, demonstrated extensive interest in and familiarity with the techniques and logic of continental civilian traditions. Other legal and intellectual historians, Christopher Brooks and Alan Cromartie prominent among them, have concurred that ideas emerging from the Inns of Court and English law have had an important role in shaping political discourse without entirely accepting the model of the insular and ahistorical "common law mind" that Pocock based on his readings of Coke and Davies. Both of these scholars' studies have attempted to synthesise concerns for the circulation and context of political ideas between juridical and parliamentary spheres with the fruits of the archival turn that has characterised legal history in recent decades.

The success archival turn owes much to the energies of the legal historian J. H. Baker, whose *Introduction to English Legal History*, currently in its fourth edition, remains an invaluable resource.\(^{35}\) In addition to having written extensively on medieval and early modern legal practice and education, Baker has also edited a remarkable number of legal manuscripts. Moreover, he has sounded helpful cautionary notes about the problems of relying too heavily on law reports, particularly printed law reports, as indicators of the legal principles governing any particular point or question.\(^{36}\) At this point Baker's warnings about law reporting, particularly print law reporting, have been too widely borne out to ignore or even dispute them. Nevertheless, in this study, where I take up reports, particularly those concerning *Calvin's case*, I continue to prioritise printed matter. I do so, however, with the caveat that I am not arguing that what Coke and Ellesmere printed represented a settled concurrence among lawyers, nor even necessarily the two judges' candid opinions. Instead, my argument rests on the way the two lawyers manipulated the circumstances of the case and the technologies of print reproduction to publicly position their opinions. Quentin Skinner's pithy observation that it has been necessary for recent generations of intellectual historians to remain interested not only in “what they [the theorists under study] say, but in what they are up to, and thus in the force of what is said”, is instructive.\(^{37}\) Accordingly, this thesis is less interested in how ideas of the body politic were conceived and more interested in the contexts, political, legal, and public, into which they were directed and in which they were received.


Attempting to map the contexts in which ideas about authority and metaphors like the body politic has been work that historians have of late shared with literary and cultural critics. Generally this scholarship has focused on “literary” texts and performances, emphasising plays and poetry particularly. Assessing every intervention of literary scholars into the new history of ideas would require a full-length study in itself: what follows is necessarily a sharply limited account, with a particular focus on how these interventions have developed practices of “literary” analyses even of early modern texts intended to appeal to small, highly-trained professional audiences – such as law reports geared at students at the Inns of Court and lawyers. There have been remarkable affinities between the attentiveness to historically-contingent languages among historians writing about political ideas since the ascendancy of the Cambridge School and the cultural materialism that has pervaded English literary criticism since Stephen Greenblatt's *Renaissance Self-Fashioning* (1980) secured virtual theoretical hegemony for the new historicism. Cross-disciplinary collaboration and mutual influence have been especially rich in the past three decades. Thus in writing *Forms of Nationhood: The Elizabethan Writing of England* (1995), Richard Helgerson considered not only Michael Drayton's chorographical poem *Poly Olbion* and Shakespeare's history plays, but also the law reports of Lord Edward Coke and Richard Hooker's *Laws of Ecclesiastical Polity*, arguing that despite their generic differences all of his sources gesture towards an effort to invent, or perhaps reinvent, the idea of England. Steven N. Zwicker envisioned his book *Lines of Authority* (1994) as an attempt “to describe a historical

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moment in ways that allow us to read its politics and literature together” in order to make an argument for the role of literary polemic in both shaping and reflecting partisan attitudes in mid-seventeenth-century England, a line of argument of considerable interest to political and intellectual historians. Scholars like Andrew Hadfield and Willy Maley have tracked the political thought and ambitions of writers such as William Shakespeare and Edmund Spenser through their writing. Perhaps the most effective integration of the techniques of recent intellectual history and literary criticism occurs in David Norbrook's *Writing the English Republic* (2000), which shares Quentin Skinner's interest in reading literary and political texts as “speech acts” in the tradition of J. L. Austin. Though Norbrook's title emphasizes an English dimension, literature scholars who have adopted the methodological approaches of recent generations of intellectual historians have been diligent in adopting not only J. G. A. Pocock's 1957 calls in *The Ancient Constitution and the Feudal Law* for attention to the language of political inquiry, but also to his 1975 call for “a new British history” which consciously placed English history in dialogue with Irish, Scottish and Welsh history. In editing an influential collection of essays considering the role of literature in shaping a sense of shared “Britishness” in the early modern period, the literary scholars David J. Baker and Willy Maley

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41 Both scholars have been prolific upon the canonical English literary writers such as Shakespeare, Spenser and Milton in their Scottish, Irish and Welsh, as well as their international contexts, but see particularly, Andrew Hadfield, *Shakespeare, Spenser and the Matter of Britain* (London: Palgrave MacMillan, 2004), and Willy Maley, *Nation, State, and Empire in English Renaissance Literature: From Shakespeare to Milton* (London: Palgrave Macmillan, 2003).


incorporated responses from the historians Jane Ohlmeyer and Derek Hirst to the chapters of their fellow literary and cultural critics.  

Similarly critics of English literature have been quick to seize on the insights of legal historians and philosophers. Thus, Lorna Hutson has drawn on the work of the legal historian Barbara Shapiro to argue a connection between early modern jury service and play-going to the development of broader approaches to judgment and scepticism. Yet as the subtitle of Hutson's remarkable study, *The Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama*, indicates her focus in that text was fairly narrowly on links between court procedure and plotlines. Brian C. Lockey has made claims that literary writers like Sir Philip Sidney used their texts, particularly prose romances like *The Old Arcadia*, to advance claims that only a "transnational" Roman law would suit English colonial schemes in Ireland and the Americas; Lockey's analysis raises interesting questions about the preference of some English writers for ancient Roman and civil law rather than English common law, but unfortunately it considers only a narrow spectrum of English opinion about union with Scotland, mostly considering it with reference to Ireland. Moreover, Lockey's efforts to justify his preference for the anachronistic terminology of "transnational law" are not entirely successful. Though no less historical in its emphasis, the literary critic Bradin Cormack's book-length study of English literary considerations of jurisdiction, *A Power to do Justice*, for its part, has

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taken Peter Goodrich for its inspiration. Goodrich has been a prominent exponent of critical legal studies, particularly close readings of English law that prioritise psychoanalytic criticism and semiotics. While Goodrich's intensely theoretical approach has not always appealed to historians, his insights about the relationships between legal writing, legal authority and everyday use of language provide a valuable theoretical framework for an investigation of how law and politics produced differing, yet conflated, accounts of the body politic.

Indeed, Goodrich's study of sign-systems through legal history, which include not only printed and manuscript texts, but also courtroom architecture and judicial robes and rituals, posits early on that "the legal tradition founds the legitimacy of social speech; it institutes an order of lawful discourse and prohibits those heterodoxies of speech and writing that are deemed to threaten the security of legal meaning or the order of legal and political reason." To substantiate this thesis, Goodrich turns first to Abraham Fraunce's text, *The Lawiers Logike* (1588), a call for legal reform from a remarkable source. Fraunce was a Cambridge-trained academic with a strong affinity for Ramism and a thorough grounding in civil law. After his university training, Fraunce continued on to Gray's Inn, where he acquired training in the common law; after he had been called to the bar, Fraunce published *The Lawiers Logike*. Combining the techniques of the Ramists of Cambridge with the concerns the lawyers at Gray's Inn to propose (and demonstrate) a more systematic approach to publishing and propagating law reform. In a technically dense argument, Goodrich

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argues that Fraunce's failure to create the substantive reform in legal publishing and pedagogy he sought provides evidence of precisely the way in which the law "prohibits" heterodox writing such as Fraunce's. Goodrich's reliance of Fraunce has been a source of some concern among legal scholars, with one critic noting that had Abraham Fraunce not existed, "it would have been necessary for Peter Goodrich to invent him." Nevertheless, Goodrich's argument has enough merit to overcome any potential overdependence on Fraunce. In the context of the attempted Anglo-Scottish union of the first decade of the seventeenth century, English common lawyers focused not on techniques but on individual terms: specifically legal language tended to circumscribe the ways of discussing the body politic.

Thus, Peter Goodrich's insistence on the relationship between language and legitimacy provides a helpful entry into a consideration of a metaphor which is, to borrow F. W. Maitland's phrasing, "so apt it is hardly a metaphor". For Maitland, this metaphor was the body of the laws. Yet I would contend that the notion should be extended across metaphors of embodiment in law. Corporations sole, such as the king, had actual bodies, just as sole proprietors, or officers, stockholders, and employees, of modern corporations do, but they also had bodies conferred by incorporation (literally embodiment). For all of the fruitful cooperation among scholars of intellectual and legal history I have in part described above, little has been done to break the habit - shared with scholars of law - of refusing to consider the basis of this metaphor in the literal (or in this case in the physical). A study of the language of the body politic in the period leading up to and immediately following the

Anglo-Scottish union of 1603 thus has the advantage of exposing the adaptability of a widely-adopted metaphor and exploring the effect of this adaptability on political and legal writings about the union.

**The Shape of the Argument**

Because this study prioritises points of intersection and confusion between different conceptions of the body politic, it begins with pre-Union legal treatises focused on the body and embodiment. Specifically it opens with the Lancastrian Chancellor of the Exchequer Sir John Fortescue's c. 1469 Latin text, which remained unpublished until the 1540s. In 1567, Fortescue's treatise was republished and retroactively given its current title *A learned commendation of the lawes of Englande* (or in Latin, *De laudibus legum Anglie*). This edition placed the original Latin alongside a new translation credited to Robert Mulcaster, brother of Richard Mulcaster, the pedagogue, lexicographer and member of the House of Commons. Though I have drawn on the modern, critical translations made by S. B. Chrimes and more recently by Shelley Lockwood, to check Mulcaster's translation, I focus on the sixteenth-century editions of the text, and Mulcaster's translation, to examine the ways in which Mulcaster's sixteenth-century English rendering of Fortescue's

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52 Sir John Fortescue, *A learned commendation of the politique lawes of England, wherein by moste pithy reasons & evident demonstrations they are plainly proved farre to excell aswell the Civile laws of the Empiere, as also all other lawes of the world, with a large discourse of the difference betwenee the. ii. governments of kingdomes: wherev the one is onely regall, and the other consisteth of regall and politique administration conjointed. written in latine above an hundred yeares past, by the learned and right honorable maister Fortescue knight, lorde Chancellour of England in the time of Kinge Henrye the. vi. And newly translated into Englishe by Robert Mulcaster* (London: Richard Tottill, 1567).

language contrasted the “good” English laws with the “bad” civil law of the French
through conclusions about each system’s role in mediating between the state and the
bodies of subjects and the ways in which Fortescue’s arguments impinged on Tudor-
Stuart legal debates.

I contrast Fortescue’s facile ability to move between individual subjects’ actual
bodies, a national body politic, and a body of laws with Sir Edmund Plowden’s more
limited, highly technical conception of a body politic *qua* legal corporation. As his
biographer, Geoffrey de C. Parmiter has argued, Plowden was a recusant Catholic
whose sheer skill with the law did much to preserve his relative comfort and security
under an Elizabethan regime even as his Catholicism prevented him from
advancement. In his own time, Plowden’s reputation rested in part on his two-
volume set of case reports, *Les Comentaries ou les reportes de Edmunde Plowden*
(1571). Yet he also produced an important manuscript treatise on the right of Mary
Stewart to ascend the throne of England, which provided a fuller account of his
conception of the nature of the body politic than the *Commentaries* had. An attentive
reading of the treatise as well as the *Commentaries* demonstrates the extent to which
his conception of the body politic, as corporation sole, was tied to the monarch’s
physical person.

That even that most technical concept of the body politic was, for Plowden,
intimately linked with the monarch’s body provides a link between the first and
second chapter of the thesis. Having considered some of the most enduringly popular
fifteenth- and sixteenth-century sources for English legal thought about the

54 Geoffrey de C. Parmiter, *Edmund Plowden: An Elizabethan Recusant*, Catholic Record Society
55 Edmund Plowden, *Les Comentaries ou les reportes de Edmunde Plowden* (London: Richard Tottel,
1571). Henceforth in the text, I will follow convention and refer to the text as Plowden’s
*Commentaries*, taking the English title.
corporation sole, I turn to the rather less specifically or technically legal accounts of
the metaphorical body politic that shaped James's deployment of it. To begin, I
consider the Scottish political thinker and scholar George Buchanan's anonymously
published 1571 text justifying the deposition of Mary Stewart, the Detectio Mariae
Regiane Scotorum. In this text Buchanan, who was to go on to assume responsibility
for educating James VI, who became king of Scotland as an infant on his mother's
deposition, offered an international readership a cutting account of Mary's immorality
and her inadequacies for the throne. In the immediate political context, it was
essential that Mary's deposition, which shook the fragile nexus of political
relationships among France, Scotland and England, be explained. Moreover, as the
literary critic John Staines has argued, the Detectio established the paradigm for
portrayals of Mary as a promiscuous, profoundly unstable figure. Yet for the
purposes of this argument what is most striking about Buchanan's text is the extent of
its emphasis on the queen's physical person. Accordingly, I analyse the text's focus on
Mary's appetites and her nobles' surveillance of her person, comparing Buchanan's
account of this supposedly ordinary surveillance with the scrutiny of Mary by the
English officials who presided over her imprisonment after her dramatic flight from
Scotland into England.

From Buchanan's initial, particularly vitriolic account of an individual queen, I
turn to his much more massive consideration of the Scottish monarchy in the Historia
rerum Scotica rum (1582), the history of Scotland which Buchanan dedicated to his

56 [George Buchanan], Ane detectioun of the doings of Marie Quene of Scottis tuitching the murther of
hir husband, and hir conspiracie, adulterie, and pretensit mariage with the Erle Bothwell. And ane
defence of the trew Lordis, mantenaris of the kings grace actioun and authoritie. Translatit out of the
Latine quhilke was writtin be M.G.B. (Imprintit at Sanctandros: Be Robert Leprevik, 1572).
57 John D. Staines, The Tragic Histories of Mary Queen of Scots, 1560-1690: Rhetoric, Passions, and
royal pupil and which was finally published in 1582, the year of Buchanan's death. In the *Historia rerum Scotica rust*, Buchanan offered a lengthier account of how he understood the relationship between aristocratic scrutiny of the monarch and royal authority, particularly early in Scotland's history. He also carefully positioned his account of Scottish history in opposition to other antiquaries' approaches to their nations' history and historiography. As Roger Mason has argued, Buchanan's reputation as a scholar meant that among subsequent generations of scholars and theorists, even those who trenchantly disagreed with his theoretical conclusions tended to assume that the *Rerum Scoticarum Historia* was accurate. Buchanan, however, also drew on Biblical narratives to relate philosophical and moral maxims to his pupils and readers when he created didactic plays based on the stories of John the Baptist and Jephtha for his students to act in while he was on the faculty at the University of Guyenne in Bordeaux. Accordingly, I discuss how these plays confront questions of embodiment and sovereignty.

The fourth chapter moves from Buchanan's theoretical and pedagogical writings to his most prominent pupil, James VI and I, who opened his first English parliament in 1604 with a speech commending his hopes for a more thorough-going union of England and Scotland to the assembled Lords and MPs. Peers in the House of Lords were generally amicable, but members of the House of Commons proved more resistant, and their efforts to thwart plans for union ultimately came to dominate the events of James's first English parliament. James's inability to achieve most of his plans for legal, political, and cultural union between the kingdoms of England and

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Scotland has been well-documented by political and parliamentary historians: Bruce Galloway and Brian Levack both wrote monograph-length studies of the union of England and Scotland, Galloway's organised as a comprehensive narrative account, and Levack's tracking themes and political concerns from the Jacobean union through the Cromwellian union and the ultimately successful union of 1707. More broadly organised political histories of early Stuart parliaments also, of necessity, consider James's struggle with the House of Commons often in the context of the more dramatic conflicts that were to emerge in the 1620s. Thus while Wallace Notestein argued for parliamentary resistance to James on the grounds of the development of concern about royal prerogative, Conrad Russell attributed that resistance primarily to simple English xenophobia. Though Russell's pragmatic reading has remained influential, recently, scholars such as Richard Cust and Chris R. Kyle have offered "post-revisionist" readings of parliamentary debates in the first decade of the seventeenth century. These accounts read parliamentary activity in the context of a wider public sphere. Accordingly, they assert that though revisionists were right to question arguments for entrenched alliances and divisions among MPs in the early seventeenth century on the bases of shared economic, religious, or ideological positions, MPs were starting to develop differing arguments of who should participate in political debate and where, and technological and cultural changes were making it easier for some interested parties outside of Westminster to follow parliamentary

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debates. Such differences, they argue, shaped the more turbulent disputes in the 1620s and after. Union debate in the first decade of the seventeenth century has also provided grounds for contention among intellectual historians considering the extent of MPs' awareness of, and political debt to, various continental and indigenous approaches to law and political authority.

Despite the wealth of scholarship devoted to James's first parliament, a chapter considering James's abortive efforts to win MPs to the cause of union remains essential here. A more attentive consideration of James's conception of the body politic than it has previously received has its rewards: taking metaphorical embodiment seriously as a legal and rhetorical construct can broaden our understanding of how James and his parliamentary supporters and opponents formulated and related their positions. Accordingly, drawing on Kevin Sharpe's helpful prescription for reading James's speeches as literary, and his literary and theological works as political, I focus my examination on his heavy use of body-politic imagery. Louis Knafla has argued that James had a remarkably fully developed sense of how law in his dominion should function. Yet England's new king was not an expert in the country's legal jargon: his sense of the body politic draws on Classical

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and Biblical imagery, as well as discourses linking politics and medicine; the body politic as a site of legal capacity is strikingly absent here. Contextualising James’s language alongside similar and related uses, however, demonstrates that it is too simple to conflate this purely rhetorical use of the metaphor with James’s argument for increased royal sovereignty. More interestingly, James’s references to a monstrous, ailing, and bigamous body politic that is, one which resisted union, also had connotations within English law, though James certainly did not intend to invoke the term’s common law valences. Accordingly, in providing an analysis of James’s language in 1604, as well as that of MPs, chapter three does some of the work of establishing the ways in which a body politic drawn from law collided with and competed against other versions of this metaphor.

Chapter five traces the union project’s flagging momentum from parliament to the courts, where Jacobean lawyers achieved what was arguably one of the most important judicial coups in English legal history: Calvin’s case. When James succeeded to the English throne, legal scholars made a distinction between the ante nati, born before James’s succession, and the post nati, born after it. The judges of England, giving their opinion to both houses of parliament in 1607, had argued that while the status of the ante nati in England would depend on parliamentary statute, the post nati were already subjects of the king of England, and thus English subjects, irrespective of which side of the border they had been born on. When parliament declined to acknowledge this point through the declaration he hoped for, James urged the point in a final 1607 speech before turning to the Privy Council to organise a test

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case and provide the opportunity to the judges to rule on the status of the *post nati* as subjects in England. I analyse the MP Francis Moore’s account of the conference between the Houses at which the judges offered their opinion on the *post nati*; contextualising the judges’ arguments about naturalisation in terms of the medieval statute *De Natis Ultra Mare* (On Those Born Beyond the Sea), which concerned the subject status of children born to English parents overseas. I draw on Keechang Kim’s invaluable study of the statute, and medieval English law about aliens more generally to bridge the gap between the ideological background and the immediate political context of *Calvin’s case*.69

Finally I turn to judges’ accounts of the circumstances of the case, specifically the print reports which Thomas Egerton, Baron Ellesmere, Chancellor of the Exchequer and Lord Edward Coke, then Chief Justice of the Common Pleas, produced. Unusually, Coke printed his report of Calvin’s case, contained in the seventh part of his reports, in English. His reports were usually first printed in Law French, or at least appeared in English and Latin.70 For Ellesmere, who was not as addicted to reporting as was Coke, the unusual fact was that he published his *Speech Touching the post-nati* at all.71 Both jurists provided extensive justifications for their

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68 [Francis Moore], "The Conference held the 25 February 1606 [1607], between the Lord’s Committees and the Commons, touching the Scots," in *A Collection of Scarce and Valuable Tracts, on the most interesting and entertaining subjects: but chiefly such as relate to the history and constitution of these kingdoms. Selected from an infinite number in print and manuscript, in the Royal, Cotton, Sion, and other public as well as Private Libraries; particularly that of the late Lord Somers*, ed. Walter Scott, Vol. II (London: Printed for T. Cadell and W. Davies, Strand; W. Miller Albemarle-Street; R. H. Evans, Pall-Mall; J. White and J. Murray Fleet-Street; and J. Harding, St. James’s-Street, 1809), 132-43.


decisions to publish in prefaces, offering their own explanations of why the case was so important not only in the immediate political context but also in the larger scope of the law. Accordingly, I argue that both judges saw publishing on Calvin's case as an important opportunity to stake out public claims for the bench's authority over the issue of naturalisation.  

Chapter six deals with the arguments that emerged from the case themselves and thus forms the heart of the examination of the early Jacobean body politic. Though both Coke and Ellesmere recognised the opportunity afforded them by accommodating James's desire to establish the post nati as subjects, their differing rationales for doing so indicate what each man wanted to suggest publicly about his, and by extension the law's, underlying ideological concerns. Yet both men carefully considered the notion that the king possessed a separate, politic capacity, which required a separate, but conjoined, politic body. I argue that in doing so, not only were both men openly drawing on the thought of Edmund Plowden, they were also reacting, albeit in differing ways, to James's non-technical conception of the body politic.

In considering the technical, legal account of the body politic that underpinned the findings in Calvin's case, at least in Coke's account, it is essential to remember that a body politic was not a legal embellishment of royal sovereignty: it was a kind of corporation. So, I begin chapter seven by considering another of Coke's case reports, the case of Sutton's hospital (1612). The case concerned the Charterhouse

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72 For this reason, I have tended to pass over Sir Christopher Yelverton's manuscript notes on the case, which demonstrated that not all of the judges had been persuaded by the notion of the king as corporation sole, but for Yelverton's notes, see “Sir Christopher Yelverton’s Argument in the Exchequer Chamber in the Case of the Post Nati”, 7 May 1608, BL, Hargrave MS 17, f. 38v.
73 Sir Edward Coke, La Dixieme Part de Reportes de Sr. Edw. Coke Chivalier, chiefe Justice Dengleierre des plees deste tenus devant le roy mesmo assigness, & del Counseil prive d'Estat: des
Hospital in London and a property dispute, and it was, famously, the source of Coke's oft-quoted assertion that "a corporation hath no soul". Less famously, it afforded Coke an opportunity to expand on his conception of the relationship between the king and other bodies politic, including corporate groups as well as corporations sole. The doctrine of the corporation sole and the body politic, however, continued to have ramifications for lawyers and others who drew on Coke's report of *Calvin's case* and Ellesmere's speech on the *post nati* to construe an approach to allegiance under Anglo-American law. I briefly consider the the post-*Calvin's case* body politic as a source of ammunition in the pamphlet wars of the 1640s, devoting particular attention to the clergyman Robert Austin, and his 1644 polemic *Allegiance not Impeached*, which defended parliament's right to muster arms even against Charles I's wishes. Austin deployed a highly idiosyncratic and justifiably obscure reading of *Calvin's case* to argue his point. While Austin's interpretation hardly marked a political, intellectual, or literary consensus, his work is an indication of just how wide the scope for reinterpretation of the idea of the king's body politic became as tensions escalated over the course of the seventeenth century. Finally, I conclude by considering a much better-known figure: William Blackstone, the creator of the first university courses in English common law, which, crucially, were not necessarily geared toward law students. Blackstone's reluctant reliance on imagery and language that linked the body, the corporation, and the state helped to legitimate connections between the three. It also demonstrates the conceptual fertility of a particularly embodied body politic. Paradoxically, the less metaphorical a body metaphor seemed, the easier it

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*divers resolutions & jugements donez sur solemne arguments & avec grand deliberation & conference des tresreverend juges & sages de la ley, de cases en ley queux ne fueront unques resolus ou adiuges par devant: et les raisons & causes des dits resolutions & jugements* (London: Printed for the Society of Stationers, 1614).
was to combine it with other metaphors, rooted in the same physical antecedents but gesturing towards distinctly different abstract ideas.

With this in mind, I close with an appendix once again juxtaposing the legal understanding of the body politic with those that emerged from political discourses. Whether it is fleshing out the corporation as a term, and construct, of the legal art, or providing an extended metaphor to stress the interconnectedness of members of a state, the language of the body politic was difficult to avoid during the Jacobean union. Despite, or perhaps because of, this pervasiveness, neither the technical nor rhetorical sense of the phrase ultimately prevailed; nor were they, however, necessarily incompatible. Instead, the confusion of the metaphor was, ultimately, a major part of the intellectual and ideological outcomes of the attempt at and ultimate failure of the Jacobean union. As Charles I was to discover first hand, by the mid-seventeenth century, there was general consensus that the body politic in both sense of the word could exist with or without the natural body or person of a monarch.
2. The Drowned French Subject and the Drowned English Duke: The Violent Power of the Body Politic in Fortescue and Plowden

When James VI and I, and many of his contemporaries, turned to the metaphor of the body politic to advocate for, or against, the union of his realms that he hoped to effect, they drew on a construct over a millennium old. Early-modern rhetoricians could point to, and invoke, authorities such as St Paul, Aristotle, and Livy, when they employed the rhetoric of the body politic. Alternatively, seventeenth-century political thinkers in England could point to an indigenous tradition of fictional embodiment in legal writing. In this chapter, I will focus on the writings of two lawyers who epitomised this domestic tradition, Sir John Fortescue (1394-1480) and Edmund Plowden (1518-1585) because each man deployed unusually vivid vocabulary in exploring the ways in which the body politic not only resembled, but profoundly affected the actual bodies of subjects and sovereigns. Working chronologically, I begin the chapter with a consideration of Fortescue’s De Laudibus Legum Anglie, which first began appearing in print in the first half of the sixteenth century. I turn from Fortescue to the publications of Edmund Plowden, the recusant lawyer and Elizabethan law reporter, who, in addition to his influential printed Commentaries (1571), wrote a lengthy treatise justifying the right of Mary Stewart to the English throne. Finally, I note the paradoxes which inhere in both Edmund Plowden and Sir John Fortescue’s thinking about bodies, different though their approaches were.

On a cursory examination, the works of Fortescue’s works and Plowden seem to have nothing in common aside from being the products of the pens of men trained in English common law. Fortescue’s works, born of his support for the Lancastrian
cause, advanced a highly philosophical, theoretically-broad defence of limited
monarchy and English common law. Edmund Plowden, on the other hand, took a
largely pragmatic approach to the issue of Mary Stuart's claim to the throne,
supplementing his arguments with legal theories borrowed from the law reports he
compiled and published in 1571. Nevertheless, I have found it useful to consider
Fortescue and Plowden together. Both became popular in the print turn that
characterised late sixteenth- and seventeenth-century legal cultures: Fortescue's
encomium on English law found a wide audience when it was translated into English
by Robert Mulcaster; Plowden insisted that he was printing his Commentaries to
forestall overeager students at the Inns of Court from pirating his work (the more
tendentious succession treatise remained unpublished).¹ Both writers offered
intellectual ammunition available to lawyers, politicians and others interested in
advancing arguments about the shape that the proposed union with Scotland should
take. As the examination of the parliamentary union debates and Calvin's case below
indicates, both Sir John Fortescue and Edmund Plowden were pressed into the service
of the judges, lawyers, and MPs working to advance, or delay, James's plan.

Finally, given their mutual popularity as sources of legal theory in the
sixteenth and seventeenth century, it is instructive to note that Sir John Fortescue and
Edmund Plowden were both preoccupied with bodies and embodiment and to see
where their accounts differed. Interestingly, despite his theoretical inclinations,
Fortescue's imaginary body was focused on the physicality of bodies: he explored the
physical body as a metaphor for envisioning the state, but he also tracked the effects

¹ Edmund Plowden, Plowden, Les comen taries, ou les reportes de Edmund Plowden un apprentice de
le comen ley, de dyvers cases esteantes matters en ley, & de les arguments sur yceux, en les temps des
raygnes le roye Edwarde le size, le roign e Mary, le roy & roigne Philipp & Mary, & le roigne
Elizabeth, ([London]: In aedibus Richardi Tottelli, [1571], f. sig. iii"-sig. iv".

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of law on the physical bodies of those bound by it. The failure of French law, he suggested, was evident in the physical deprivation of the French people. In contrast, though Plowden's work stressed legal specifics, he concentrated on the king's multiple bodies, focusing on the points of conjunction and disjunction between the king's legal body politic and his physical body natural. Even so, as I will argue below, Plowden could not entirely excise the physical from his account. In fact, Plowden's language frequently displayed a rhetorical violence that indicates the potential for violence inherent in the joining of the body politic and the body natural.

Beyond the fact that both Fortescue's and Plowden's texts exerted considerable influence on the union debate, they provide a useful indication of the breadth of the legal language of the body politic which already existed in 1603. Moreover, both Fortescue and Plowden offer historically and politically contingent engagements with the body as both metaphor and physical object. Accordingly, in this chapter I begin by tracking Sir John Fortescue's engagement with the language of the body politic and particularly his concern with the effect of French law on French bodies, focusing on his discussion of the effects of torture. I turn from an analysis of torture in Fortescue to his invocation Biblical texts and its possible significance for debates about the succession.

Succession, however, occupied Edmund Plowden to at least as great a degree as it did Sir John Fortescue, since Plowden's treatise advanced the case for Mary Stewart's succession. Accordingly, the issue of succession provides an ideal point for considering how, even when considering similar questions, Plowden and Fortescue deployed the language of the body politic in entirely different ways and to entirely different ends. For Plowden, a seemingly technical, legalistic conception of the body politic overlaid a more naturalistic, physically embodied vision of the body politic.
Like Fortescue's extended consideration of subjects' bodies, Plowden's interest in the nexus between bodies politic as legal fiction and the physical rituals of the transfer of land during the livery of seisin provides both a closing point for the first chapter and a glimpse at the broader link between imagery and substance that would inform legal understanding of James's kingship.

Sir John Fortescue Among the French

The starting place for any investigation of the background of sixteenth- and seventeenth-century English images of the body politic is nearly inevitably Sir John Fortescue. Fortescue was, by any measure, a gifted jurist. His father had been a steward in the service of the Courtenay family. John, along with his elder brother Henry, entered Lincoln's Inn no later than 1420. A talent for jurisprudence ran in the family. In the 1520s Henry Fortescue served as chief justice of the king's bench of Ireland. By 1438, young John had become a serjeant at law. The crown secured his services in 1441 as a king's serjeant and in 1442 Fortescue became chief justice of the king's bench. In this capacity, he established his reputation as a staunch supporter of Henry VI and the Lancastrian cause. In 1461, Henry VI appointed Fortescue Chancellor of the Exchequer.²

In 1463, Fortescue followed the beleaguered Lancasters into France, and it was there that he composed his most famous work, the De Laudibus Legum Anglie (c. 1460s). He was tutor to the young Prince of Wales in exile. The text took the form of a dialogue between Fortescue and his charge the young prince Edward Lancaster,

whom Fortescue strove to interest in acquiring a basic grasp of the English legal system. Though the work was not published until the reign of Henry VIII and was only translated into English in 1567 by Robert Mulcaster, it quickly became a significant source of encomia on the benefits and virtues of English law. Indeed, Blackstone’s famous, if unfairly credited, formulation stipulating that it were better that a ten guilty men should go free than a single innocent man be convicted is originally lifted from the *De Laudibus Legum Anglie*.  

Thanks to Fortescue’s prominence in seventeenth-century debates, his effusive praise of the supposedly immemorial English legal system, and his frequent use of the language of the body politic, enthusiasm for his texts among modern scholars has equalled that of English politicians during the sixteenth and seventeenth centuries. Specifically, both Ernst Kantorowicz, in his magisterial 1957 study *The King’s Two Bodies: A Study in Medieval Political Theology*, and J. G. A. Pocock in his studies, *The Ancient Constitution and the Feudal Law*, published in the same year and *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975) made extensive use of Fortescue’s writings. Inevitably, these references have indelibly shaped subsequent references to, and work on, Sir John Fortescue and the *De Laudibus Legum Anglie* in particular. Despite the undoubtable value of both of these studies, and those that followed, they both focus narrowly on their authors’ individual concerns. Pocock dealt with Fortescue’s concerns with

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3 Fortescue, *A Learned commendation of the politique lawes of England wherein by mosty pitthy reasons & evident demonstrations they are plainelye proved farre to excelle aswell the civile lawes of the Empiere, as also all other lawes of the world, with a large discourse of the difference between the. II. Governemens of kingdomes: whereof the one is onely regall, and the other consisteth of regall and polytique administration conjoyned. written in latine above an hundred yeares past, by the learned and right honorable maister Fortescue knight lorde Chancellour o/ England in the time of Kinge Henreye the. vi. And newly translated into Englishe by Robert Mulcaster [Imprinted at London: In Fletestrete within Temple Barre, at the signe of the hand and starre, by Richard Tottill, 1567], f. 62v. Henceforth, I will refer to Fortescue’s text as *De Laudibus Legum Anglie*. 

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English law’s antiquity while Kantorowicz emphasised Fortescue’s employment of body politic metaphors. The historian Arthur B. Ferguson, noting that Fortescue “recognizes that a system of law and government will affect the social and economic conditions within the realm”, argued that this recognition established Fortescue as an early proponent of a species of realism in English political commentary. Yet Ferguson did not remark upon Fortescue’s insistence, in the De Laudibus at least, on tying the success or failure of a legal and political regime to the physical health or illness of its subjects. The result of this focus on the sources and significance of Fortescue’s intervention into a variety of fifteenth-century political debates has been a tendency to neglect of the rhetorical forms and literary techniques that Fortescue employed.

Locating the violent and the physical in Fortescue’s prose is accordingly my aim within this chapter. For this reason, I have prioritised a close reading of the De Laudibus Legum Anglie over Fortescue’s other works, particularly his lengthy, two-part succession treatise, De Natura Legis Naturae (On the Nature of Natural Law), and his best-known defence of “politic monarchy” (“dominium politicum et regale”, in Fortescue’s phrasing), The Governance of England. Neither of these texts

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circulated widely in print until the nineteenth century (as Plummer notes in his 1885 edition of the *Governance*, editions of that text had appeared early in the eighteenth century, but they were scarce).  

More significantly for this study, while both texts invoke the idea of a “body politic” neither did so with the same visceral vocabulary that characterises the *De Laudibus Legum Angliae*. Instead, while Fortescue reprised some of his argument about the deprivation of French peasants from the *De Laudibus* in the *Governance*, in the *Governance*, Fortescue carefully grounded his argument in the over-taxed French peasantry’s inefficacy as an agricultural workforce or a fighting force, as I argue below, in the *De Laudibus*, Fortescue let his depiction of the stark misery of the peasants’ poverty and deprivation speak for itself. Fortescue did not repeat his extensive analysis of the evils wreaked by torture on French justice and jurisprudence in the *Governance* at all. Shelley Lockwood has traced the changing terms in which Fortescue discussed the idea of *dominium politicum et regale*, from “reforming idea” in the *De Laudibus* to “concrete institutional reforms” in the *Governance*. Yet while Fortescue’s thought on reform did indeed evolve from the descriptive ideal to concrete prescription, his descriptions of the physical deprivation and violence that were the results of lacking a politic government lost much of their visceral impact.

The *De Natura Legis Naturae*, Fortescue’s succession treatise predated either the *De Laudibus* or the *Governance* (Fortescue referred to it in the *De Laudibus*). Though it has generally been known by its shorter title, it is worth noting that the text’s full title was *Opusculum de Natura Legis Naturae et de Ejus Censura in*

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Successione Regnorum Suprema (A Treatise Concerning the Nature of the Law of Nature, and its Judgment upon the Succession to Sovereign Kingdoms). In it, Fortescue first imagined and then resolved a question of disputed succession among a deceased king’s younger brother, his only daughter, and her son. In order to resolve the question, Fortescue turned to natural law, which in turn offered him an excuse to expound upon the nature of natural law, its relationship to divine law, and the superiority of politic and royal government over mere royal government. To make his case that the law of nature demands monarchy, Fortescue drew on Aquinas and Aristotle to argue that just as a human body was regulated by its soul and human passions by reason, so the body politic must be regulated by a king. Similarly, Fortescue drew on the trope of king-as-physician to justify a king who ordinarily ruled politically but was compelled by circumstance to rule by royal authority alone.

Yet though Fortescue was happy to deploy the usual metaphors of the state as body politic, and analogies between the state and abstract rules governing all bodies, in the De Natura unlike the De Laudibus, he made no effort to juxtapose the metaphors of political embodiment with considerations of the physical wellbeing or hardships of individual subjects. The embodied state remains an abstract notion in the De Natura. Thus in considering the political circumstances of Fortescue’s career in the service of the Lancastrians and the De Natura, the historian Anthony Gross has commented that “the juristic formulae which had developed over the centuries to distinguish the royal body politic from the ‘defects and imbecilities’ of the body natural had done more to highlight the disparity between flesh and dignity than to

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circumvent the political and spiritual malaise which it could cause." Given the turmoil that prevailed over the course of Fortescue's career, Gross's diagnosis of a continuing "political and spiritual malaise" is particularly apt. It seems to me, however, that Fortescue himself was, at least in the *De Laudibus Legum Anglie*, if not the *Governance* or the *De Natura Legis Naturae*, particularly interested in bridging the gap between flesh and dignity – subject flesh and royal dignity that is. This effort to demonstrate, and perhaps dramatize, the links between the exercise of royal power and the wellbeing of subjects' bodies injected significant notes of rhetorical violence into the text of the *De Laudibus*.

This concern with violence, and the concomitant use of violent language, which I highlight below, also reflects the intellectual historian Alan Cromartie's observation that, "Fortescue's works have often been presented as if they were examples of 'common law thinking', but it would be more cautious to describe them as pamphlets written by a common lawyer." Certainly, in the *De Laudibus*, Fortescue's mode of expression as well as the intellectual content of his text set him apart. Yet scholars of his works, seeking to elucidate and appraise the whole of Fortescue's political theory, across all of his surviving work, have been reluctant to acknowledge this seemingly anomalous violence: Cromartie, for example, mentions Fortescue's concern for subjects of a violent, lawless regime in France, but ultimately he is concerned with pinning down the meaning of Fortescue's concept of "politic monarchy" rather than the colourful prose with which Fortescue argued for such an approach's benefits. Other scholars have taken more interest in Fortescue's

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“anthropological” interests, but even they remain frustratingly disinterested in the focus on physical injury and deprivation in Fortescue's assessment of the problems of realms whose kings are not bound to work within the law.¹⁵

Fortescue began his text with violence, an account of his successful attempt to persuade the young Prince Edward Lancaster to begin studying English law as well as war. Significantly, he stressed the relationship between the young royal’s studies of arms and the benefits of the study of law. As a character in his own dialogue, Fortescue urged, "I would wish your grace [Edward Lancaster] to be with as earnest zeale given to the study of the laws, as you are to the knowledge of armes, because that like as warres by force of chivalrie are ended, even so judgments by the Lawes are determined."¹⁶ Here, Fortescue's Biblical references linked the role of "chivalrie" – noble force of arms – with the rhetorical force of the law. Fortescue built on this analogy between law and the chivalric arts to insist that a ruler must know both “to the end that he may be able rightly to execute the government of both times aswel of war as of peace.”¹⁷ Most obviously, this connection Fortescue drew between law and war was meant to pique the interest of Edward Lancaster, as well as any other potential noble readers. It also, however, paved the way for Fortescue’s interest in the physical effects of law and his implicit analogy between these and the effects of war.

Fortescue boldly lectured his royal charge about the dangers of armed forces unchecked by law. Men-at-arms in service to French kings, he pointed out, took up residence in French towns, where they provisioned themselves and their "concubines

¹⁵ See, for example Edwin T. Callahan, "The Body Politic of Sir John Fortescue: a Late Medieval Political Theology" (PhD diss., University of Chicago Divinity School, 1994).
⁰ Fortescue, De Laudibus (1567), f. ⁴ᵛ. In the Totill edition, quotations from Classical and Biblical sources are in Roman type to distinguish them from the rest of Mulcaster’s translation, which appears in blackletter. Since I cannot reproduce the blackletter, I have italicized the Roman portions of Tottill’s version.
¹⁷ Ibid, f. ⁴ᵛ.
and harlots” at the towns’ expense, “even to the lest [for "least"] point or lace.” In Mulcaster’s translation of Fortescue’s account, townsfolk could attempt to resist the importunate men-at-arms, but “they were anon by plaine Stafford Law forced to do it.” Stafford Law was a sixteenth-century term that punned on “staff” to describe the extrajudicial corporal punishment imposed on thieves by local tribunals. That Mulcaster introduced the phrase to Fortescue’s emphasised the indignity of the French soldiers’ exactions from townsfolk. It also allowed both translator and commentator to project their anxieties about such common forms of justice in England onto France and French law. “Stafford law” was a pun on an English place and an English term for cudgel. Displacing Stafford law onto France thus became a way for sixteenth- and seventeenth-century writers to mock French law by assuring themselves that what seemed low, unsanctioned practice in England was in fact standard procedure in France.

Yet for Fortescue, even the more official, licitly-collected tax revenues carried distinctly physical consequences: writing of the people who bore the brunt of French taxes, Fortescue insisted:

Neither do the inferior sort tast any other licor, saving only at solemne feasts. Their shamewes are made of hemp, much like sackcloth. Wollen cloth they weare none except it be very course, and that only in their coates under their said upper garments, neither use they any hosen, but from the kne upward: the residue of their legs go naked. Their women go barefoot saving on holidaies, neither men nor women eate any flesh there, but onely larde of bacon, with a smal quantity whereof they fatten their pottage and broths. As for rosted or sodden

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18 Fortescue, De Laudibus (1567), f. 79\(^{-}\)80\(^{8}\).
meat of flesh they taste none, except it be of the inwards sometimes &
heads of beastes that be killed for gentlemen and marchants.20

Here again, Fortescue physicalized the effects of taxation, making evident the appeal
of his text to opponents of Ship Money and other Stuart exactions. The French
peasants Fortescue described were deprived of the bare necessities of adequate food
and clothing because of unjust taxation permitted by the law of the land. Rather than
inviting pity for them, Fortescue’s account dehumanized the French people who were
reduced to going barefoot and eating the less desirable scraps of meat left behind by
richer men.

Yet even richer men fared poorly under French civil law. Fortescue moved
immediately from the freedom of nobles from the excessive exactions of their
monarch to their vulnerability to royal justice: when a nobleman was accused of a
crime, Fortescue wrote,

he hath in that behalfe beene talked with in the Kinges Chamber, or
elsewhere in some private place, and sometimes onely by a Pursevant
or Messenger: And immediately as soon as the Princes conscience
hath, through the report of others, judged him guilty, hee is without
any fashion of judgment put in a Sacke, and in the night season by the
Marshalls servants hurled into a River, and so drowned. After which
sort you have heard of many more put to death, then that have beene
by ordinarie processe of the Lawe condemned. Howbeit the Princes
pleasure, as say the Civill lawes, hath the force of a Lawe.21

Though the physical burdens of taxation Fortescue described did not reduce
aristocrats to the nearly subhuman status he imagined for the ordinary people, the law,
or rather the king’s pleasure, did deny them the acknowledgment of a public judgment
or execution. Indeed, Fortescue’s linking of French justice and the ignominy of the

20 Fortescue, De Laudibus (1567), f. 81v.
21 Ibid, f. 82v-83r.
mode of condemned aristocrats’ deaths was further proof of the dangers of the civil law. The Roman assertion that the prince’s pleasure had the force of law was, of course, endorsed by English jurists too. The implication here was thus not that French monarchs were unique in claiming a prerogative right but rather that French national law was so poorly construed as to invite monarchs to associate pleasure with the perversion of justice. Fortescue’s sense of the relationship between royal prerogative and national law has been the subject of considerable scholarly scrutiny. For this study, however, the physical consequences of poor governance are more significant than the question of the form a good government should take.

The complicated reaction Fortescue developed to the French law he described became clearest as he considered the problem of torture. Fortescue averred that “offenders and suspect persons are in that realme with so many kinds of rackings tormented, that my penne abhorreth to put them in writing.” Despite this disclaimer, Fortescue managed to describe several techniques. He devoted particular attention to the techniques around the so-called water cure:

Some also have their mouthes so long gaged open till such abundance of water bee powred in, that their belly swelleth like a hill or a tonne, to the intent that then the belly being piersed with some boring instrument, the water may issue and spout out thereat, and at the mouth streamwise, not much unlike a Whale, which when he hath supped up, and swallowed downe a great quantitie of Sea water, with herrings and other small fishes, gusheth out the same water againe, as high as the toppe of any Pine apple tree. In analogizing the torture victim’s body with a hill, tonne and even a whale, Fortescue rendered the relationship of French law to French subjects nearly comic – foreign not

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23 Fortescue, De Laudibus (1567), f. 46v.
24 Ibid, ff. 46v-47r.
58
only to the English prince he instructed but to the human experience as a whole. Mulcaster’s translation emphasized the brutality as well as the strangeness of this account, interpolating the word “thereat,” and the implication that water flowed from the pierced and distended stomach of the victim, neither of which correspond with Fortescue’s Latin text. 

Having finished impressing his young pupil with the foreignness of French “rackings”, Fortescue began his discussion of civil law judges’ responsibility for the torture they ordered, asking “O how cruell is such a Lawe, which in that it can not condemne the syely innocent, condemneth the Judge?” Yet Fortescue traced the origin of all these flaws to much broader problems with the ways in which civil law organized the hierarchy of the French justice system: “O Judge, in what Schoole hast thou learned to bee present, while the offendor is tonnented. For the executions of judgment ought to be done by men of base degree: the doers wherof do purchase themselves present infamie by the deede doing, insomuch that ever after they are disabled from the preferment of a judge.” 

The difficulty, to Fortescue, was that conducting torture was socially lowering for civil law judges who ran the risk of torturing innocent subjects. His emphasis on civil law’s physicality offered his pupil—and subsequent generations of readers—insights into how it disrupted hierarchies, impoverishing ordinary people, denying aristocrats adequate trials, and destroying judges integrity and social standing simultaneously. Mulcaster’s employment of “Stafford law” and even his expanded description of the torture made civil law an

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25 The Latin reads: “quo tunc venter ille, foslorio vel simili percussus instrumento, per os aquam illam evomat, ad instar Balenae,” see Fortescue, De Laudibus (1567), loc cit.

26 Ibid, f. 49R-V.
object of mocking fantasy while also displacing onto it the most worrying elements of English law.

Yet as the historian of judicial torture, John Langbein, has pointed out, echoing Maitland, English lawyers hardly eschewed torture on moral grounds alone, “rather they were the beneficiaries of a legal system so crude that torture was unnecessary.” Expanding on this rather startling remark, Langbein has demonstrated persuasively for evidentiary burdens as the difference between Continental legal models, which openly embraced torture, and the English system, which employed torture only covertly. Because in England, conviction required only the assent of a jury, and not the two witnesses or confession demanded by civil law, English courts could forgo torture without sacrificing their ability to punish crime or maintain order. Fortescue, however impressed upon Edward Lancaster that “none may condemn [a defendant] but his neighbours, good and lawfull men, against whom hee hath no matter of exception. Indeed I would rather wish twentie evill doers to escape death through pittie, then one man to bee unjustly condemnpned.” Here Fortescue carefully linked the elements of his analysis. The superiority of England’s government, he argued, prevented the kind of taxation that kept ordinary Frenchmen too deprived to make effective members of juries. England could therefore, in Fortescue’s argument, eschew torture, not because its evidentiary standards were crude but because it linked the capacity to hold land under law with the capacity to weigh evidence; subjects’ capacity under law thus became the buffer between their bodies and the state’s potential use of investigative force.

29 Fortescue, *De Laudibus* (1567), f. 62v.
Meanwhile, Fortescue combined his emphasis on the relationship between Englishmen’s legal and economic protections and their relative physical safety from the state with an Aristotelian analysis of the shape of that state. Fortescue dedicated the thirteenth chapter of the *De Laudibus* to how the conceit of “Kingdomes of politque governance were first begun”. He began the chapter with an analysis of St Augustine’s account of how people formed communions of wealth by the consent of the law, noting:

yet such a people beeinge headlesse, that is to say, wythout a head, is not worthy to be called a bodie. For as in thinges naturall, when the head is cutt off, the residue is not called a bodie, but a truncheon, so likewise in thinges politique; a communaltie without a head is in no wise corporate: Wherefore, Aristotle in the first booke of his civil philosophy sayeth, that whensoever one is made of many, among the same, one shall be the ruler, and the other the ruled, wherefore a people that rayse them selues into a kingdome, or into any other bodie politique, must appoynt one to bee chiefe ruler of the whole bodie, which in kingdomes is called a King. After thys kind of order, as out of the embrion ryseth a bodie naturall ruled by one head, even so of a multitude of people aryseth a kingdome, which is a body mysticall grounded by one man as by an head. And lyke as in a naturall body, as sayth the Philosopher, the hart is the first that lyveth, having within it bloud, which it distrybuteth among all the other members, whereby they are quickned and do lyve; sembably in a body politique, the intent of the people is the first lyvely thing having within it bloud, that is to say, politike provision for the utilitie and wealth of the same people, which it dealeth forth and imparteth aswell to the head, as to all the members of the same bodie, whereby the body is nourished & mainteyned.\(^{30}\)

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\(^{30}\) Fortescue, *de Laudibus* (1567), ff. 30\(^{R}\)-31\(^{V}\).
Here, Fortescue analogized a model of the relationship between king and sovereign that James VI and I would reiterate in his explanations of his own role in the English state. Yet for Fortescue, crucially, while the king might be the nation’s head, the necessary force for the transformation of a community from a multitude of people into a body politic came from the people. It was their desire for mutual “utilitie and wealth” that provides the initial impetus for the state’s quickening into life. They, not the king, provided the nation’s heart. This is not to say that Fortescue was unwilling to countenance royal authority once this primacy of the popular desire for good governance was acknowledged. Just as a head was necessary to the body, the king was necessary to a body politic, but only insofar as he protected the “wealth” of his subjects. In Mulcaster’s translation, the word “wealth” obviously carries its usual, broad early-modern valence of “well-being”, but given Fortescue’s preoccupation with the lack of a strong class of small landowners he perceived in fifteenth-century France, it is likely that it also carries its modern meaning. Fortescue’s concern with the “bloud” transmitting the sustenance of political will is also highly significant. When Fortescue remained loyal to Henry VI, Edward IV’s parliament had attainted him. A bill of attainder allowed the government to confiscate the property of someone convicted of a felony or treason by appealing to the fiction that claimed that criminality had tainted the blood not only of the attainted person but also of his or her heirs – hence their inability to inherit. Here, Fortescue reversed the model of blood contagion resulting from treasonous actions against the state and instead imagined the good will of subjects toward the state as its lifeblood.

Having settled the significance of blood in the body politic, Fortescue turned to the sinews of the body politic – the law:
Furthermore the law under which a multitude of men is made a people, representeth the semblance of sinewes in the body natural: because that like as by sinewes the joyning of the body is made sound, so by the law, which taketh then name a ligando, that to wit of bynding, such a mistical body is knit & preserved together & the members & bones of the same body, whereby is represented the soundnesse of the wealth whereby the body is sustayned, do by the laws, as the natural body by sinewes, retein every one their proper functions: And as the head of a body natural cannot change his sinewes, nor cannot deny or withhold from his inferior members their peculiar powers, and severall nourishments of blood, no more an a King, which is the head of a bodye politike, chaunge the Lawes of that bodye, nor withdrawe from the same people their proper substance against their wills and consentes in that behalfe.  

Here, Fortescue imagined law, whose Latin etymology he wrongly connected to *ligando* (binding), as the sinews of the body politic physically linking subjects to one another and to their monarch. In linking law and binding etymologically, he also linked the former to allegiance, a term that is derived from *ligando*. For Fortescue, this matter of allegiance via law is a strikingly two-way street: law may bind the people to their monarch, but it also limits the range of political movement available to the monarch. He may not freely alter English laws nor take from the people “their proper substance”. To think of this latter condition in terms of modern protections against the state’s unlawful seizure of property would be highly anachronistic. Yet, as Fortescue’s continued emphasis on “wealth”, with all of the meanings it carries, demonstrates, he was highly attuned to the links between subjects’ legal capacities and the law’s protection of their property as well as a broader wellbeing.

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31 Fortescue, *De Laudibus*, ff. 31r-32r.
Significantly, when Fortescue came to contrast this account of the brutality of French royal government with the rationality of English political governance, he imagined the benefits in terms as strikingly physical as he had the deprivations for the French. First, he offered an important caveat, noting that even in England, “the King, though the owners would say nay, may by his Officers take necessaries for his house, at a reasonable rate, to be assessed by the discretions of the Constables of the towns. Neverthelesse, he is bound by his Lawes to paye therefore, either presently in hande, or else at a day to bee lymitted and set by the higher Officers of his house.” Because of their very system of government, Fortescue’s English can rest secure in the knowledge that their property is protected even from their monarch himself. Accordingly, as Fortescue reassured the prince, “the men of that lande are riche,” “eate plentifully of all kindes of fleshe and fishe,” and “weare fine woollen cloth in all their apparel.” Fortescue even adds the wonderfully odd detail that “they have also aboundaunce of bed coverings in their Houses, and of all other woollen stuffe.” The proof of the legal system, in Fortescue’s account at least, is in the sleeping. This physical well-being then, which for Fortescue was explicitly connected to the law’s function as a sinew that bound both monarch and subject, was itself a crucial factor in ensuring that subjects had the legal capacities necessary to form competent juries and adequately give and weigh evidence.

The notion of a “mistical body” of the state took on similar significance as Fortescue anatomized that body. Clearly, here, he has returned to the Pauline conception of the church as one body in Christ. Mulcaster’s translation, which he first produced in 1567 inevitably linked Fortescue’s language not only to that of Paul but

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32 Fortescue, *De Laudibus* (1567), f. 84r-v.
33 Ibid, f. 85r-v.
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that of the liturgy of the Eucharist, which summarized the Pauline thought to remind communicants that participation in the Eucharist had rendered them “very membres incorporate in thy [Christ’s] Misticall bodye”\(^\text{34}\). The legal historian Peter Goodrich has argued persuasively that just as Eucharistic ritual was a way of physically reminding communicants of the presence of Christ’s mystical body in their lives, the rituals of courtrooms offered a similar reminder of the presence of the “spirit of law” in quotidian life.\(^\text{35}\) In Goodrich’s account then, Mulcaster’s language – an invocation not only of the “mystical body” as a Christian community but, more specifically, as a significant phrase within the liturgy of the Eucharist – gave the law a similar role tying the physical to the mystical. Mulcaster’s translation also stressed the continuing relevance of Fortescue’s conception of the king’s mystical body even after the Reformation had created new room for diversity of opinion about the individual Christian’s relationship with Christ’s mystical body.

Yet, significantly, Fortescue’s king was not a simple Christ-figure. He was, as we have seen, bound by the legal sinews of his body politic just as other men were. Indeed, Fortescue quoted Aquinas, reminding his readers that “Saint Thomas in hys booke, which he wrote to the king of Cyprus, of the regiment of princes, sayeth, that the king is gyven for the kingdome, and not the kingdome for the king.”\(^\text{36}\) As his preoccupation with the body politic’s development from its “embrion” indicates, Fortescue’s was not merely a formulation to remind the prince of his obligation to

\(^{34}\) This usage appears in the Anglican liturgy as early as 1549. As far as I can determine nearly identical language appears in every subsequent liturgical text until the interregnum. See *The Booke of the common praiyer and administration of the sacramentes, and other other rites and ceremonies of the churche: after the use of the Churche of Englands* (Londini: in officina Edwardi Whitechurch, cum privilegio, 1549), f. cxxxii[132]\(^\text{8}\).


\(^{36}\) Fortescue, *De Laudibus* (1567), f. 86\(^\text{v}\).
govern justly, it was a reminder that the political biology of Fortescue’s rhetoric made it impossible for him to do otherwise.

At the prince’s urging, Fortescue returned from his digression on the nature of royal authority to the differences between English law and civil law. Interestingly, he focused on problems of succession and inheritance on which subject Fortescue informed the Prince that:

The Civill Law doth legitimate the child borne before matrimony, as well as that which is borne after: and giveth unto it succession in the Parents inheritance. But to the childe borne out of matrimony, the Lawe of England alloweth no succession, affirming it to bee natural onely, and not lawful.37

Fortescue explained that according to the logic of the civilians, lawyers practicing Romano-Canonical law, a subsequent marriage eliminates the prior sin. This logic, he acknowledged, was fitting in the context of canon law: it was the role of the Church as a “great mother” to accept a marriage, even after the birth of offspring, as a sign of sincere penitence for premature copulation. Such logic, however, did not justify the secular civilians.38 English law, he argued, inspired potential fornicators, as potential parents, to an appropriate degree of fear for their sinful actions; they would be more concerned for the legal consequences for their children than they would for themselves.39

Interestingly, Fortescue here adopted an instrumentalist and highly pragmatic approach to this aspect of English law: its function was normative and immediately concerned with regulating behaviour rather than with protecting property from falling into a lineage tainted by illegitimacy. Not until Fortescue turned to Biblical precedent

37 Fortescue, De Laudibus (1567), f. 90v.
38 Ibid, f. 91v-92r.
39 Ibid, f. 93r.
did he acknowledge the metaphorical blood taint that emerged from illegitimacy. He quoted first from the deuterocanonical book of Wisdom, noting that, "holy Scripture reprehendeth all unlawfull children under this metaphore, saying, bastarde slippes shall take no deepe roote, nor lay any fast foundation,"\(^40\) and that the Church itself required dispensation before it allowed illegitimate sons to serve as priests.\(^41\) Finally, Fortescue cited a belief that the blind man to whom Jesus granted sight in chapter nine of the Gospel of John had been a bastard, and that his blindness was a reflection of the added burden of sin under which he was born. Taking blindness as a metaphor for the lack of a "naturall disposition to knowledge and learning, as a lawfull child hath,"\(^42\) Fortescue affirmed the validity of the logic of the English law, which disinherited such illegitimate, and thus incurious, children. Yet the force of the chapter was the contrast that Jesus drew between the blind man whose sight was restored and the Pharisees who, despite their sight and their knowledge of the law, did not see His divinity. Ultimately, Fortescue chose an odd source for his claims about the biological taint inherent in bastardy. It is tempting to assume that here a man sensitive to the problems of legal fictions of blood taint through his own attainder was conscious of its dangers. While such a reading is not impossible, it is unlikely.

Nevertheless, in Fortescue’s discussion of succession legitimacy and the taint of blood, it is impossible to ignore the enactment of a bill confirming that Fortescue’s own blood was tainted for his very support of the Lancastrian dynasty whose scion he wrote the De Laudibus to instruct. Yet Fortescue’s legal talents eventually restored him to Yorkist favour. The reversal of the attainder was a legal fiction as curious as

\(^{40}\) Ibid, f. 95\(^R\). C.f. Douay-Rheims, Book of Wisdom 4:3.

\(^{41}\) Fortescue, De Laudibus (1567), loc cit.

\(^{42}\) Fortescue, De Laudibus (1567), f. 97\(^v\).
that of the attainder itself: it was not a case of blood tainted by treason being cleaned; rather it depended upon the fiction of new blood. No such alteration was possible in the persons of those excluded from inheritance by their illegitimacy. This kind of specificity about who had the hypothetical capacity to inherit, a crucial element of full legal personality, became especially significant when royal succession was up for debate.

**The Body and the Succession in the Writings of Edmund Plowden**

Whatever the reason for Sir John Fortescue's use of the Gospel of John, his interest in lines of legitimate succession was highly significant in 1567, when Richard Mulcaster first translated Fortescue's text into English. During this period, there was a furious debate in manuscript over the legitimacy of the possible succession of Mary Stewart, Queen of Scots, if Elizabeth should die without issue. John Hales had initially produced a tract arguing that under the common law, Mary Stewart, the queen of Scotland, had no standing to inherit, which produced a flurry of pro-Stewart ripostes. Arguably, the most influential of these treatises was that of Edmund Plowden, at least within the legal community.

Edmund Plowden was an astute and dedicated lawyer. He entered the Middle Temple late in the 1530s, and according to legend he was so diligent that he did not the Inns of Court for the next three years. He began keeping case records (in manuscript) in 1550. He was elected to the House of Commons in 1553, and became a bencher in the Middle Temple in 1557. A bencher was a senior member and official

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of one of the Inns of Court, permitted, among other things, to sit on the bench during
moots and readings. In 1558, he was called to serve as a serjeant-at-law, usually a
precursor for crown service and even appointment to the judiciary. Unfortunately for
Plowden, Mary I died before his new status came into effect. His continued adherence
to Catholicism under Elizabeth I prevented his further elevation. Nevertheless,
Plowden retained his reputation as one of the preeminent legal thinkers of his age, and
after Elizabeth came to the throne he devoted his considerable professional energies
to his law reporting and a treatise advancing the case for Mary Stewart, Queen of
Scotland, to succeed Elizabeth.

In a wider study of recusancy in the Elizabethan Inns of court, Geoffrey de C.
Parmiter has noted that because members of the Inns studied, practiced, lived, ate, and
celebrated holidays together, “the Inns thus formed tightly knit communities with
common interests that bred a tolerance and forbearance among their members which
tended to mitigate the religious and political animosities that were noticeable outside
their walls.” Thus, in the early days of Elizabeth’s reign, despite the refusal of
Anthony Browne, whom Elizabeth knighted in 1566, to take the Oath of Supremacy,
he remained on the Common Pleas bench as a puisne lord, exchanging roles with the
more conformable Sir James Dyer, who, in turn took over as Chief Justice of the
Common Pleas in 1559. Nevertheless, over the course of the 1570s, Elizabeth’s
government began to enforce religious conformity in the Inns of Court more
stringently, and Edmund Plowden was named as a recusant who forbore to attend
Anglican services while in residence at the Middle Temple. Furthermore, an

44 Geoffrey de C. Parmiter, Elizabethan Recusancy in the Inns of Court, Bulletin of the Institute of
45 Parmiter, Elizabethan Recusancy in the Inns of Court, p.21.
anonymous complaint denounced him as not only a Catholic, but one who interfered in the efforts of Protestant lawyers to investigate recusancy.

Nevertheless, in the opinion of Geoffrey de C. Parmiter, a scholar of Plowden’s life and recusancy in the inns more broadly, because Plowden did not commit the more grievous sin of proselytization, he was spared most of the severer ramifications of his recusancy. He did not attain the rank of Queen’s Council under Elizabeth, but her government employed him. In Parmiter’s words his professional services were, “too valuable for the government to allow itself to be deprived of them”. 46 Yet Plowden never took the Oath of Supremacy, and though Plowden was not, apparently willing to sacrifice his career in the name of public non-conformity, in private, among his coreligionists and colleagues, he supported Mary Stewart’s claim to England’s throne.

Plowden’s son Francis offered a text of his father’s succession treatise to King James in an elegant manuscript version of 1603. He combined two different elements of two versions of his father’s treatise; one concerned the king’s two bodies and the logic for a royal succession that differed in law from the rules governing the inheritance of property. Another portion, which occurred only in a later manuscript refuted Hales’s claim that Henry VIII’s will had specifically excluded his Scottish relations from the English succession. 47

Since my interest is primarily in James’s own adoption of the rhetoric of body politic and body natural, I will focus on this element of Edmund Plowden’s treatise.

46 Parmiter, Elizabethan Recusancy in the Inns of Court, p. 50.

Unlike Fortescue, who had been careful to situate his analysis in Aristotelian and Augustine political thought, Plowden was perfectly happy to appeal specifically to the law of the realm, noting in his first lines that,

it is to be considered that the Lawe of the Realme, doth adjudge in the kinge of this Realme two bodies of two severall natures, the one body is the body of a man, respecting consistencie of fleshe and blood, and of naturall members, a bodie visible and tangible a bodie passible, subject to all infirmities comming by nature and by events, and in that bodie he suffereth infirmitie and other deserts of nature, and that bodie is subject to age, and death. And that bodie if it be considered alone is in qualitie and degree as the natural bodies, of all other persones, bee. The other bodie is a bodie politike, a bodie (if it be considered alone) not visible, nor tangible, a body impassible, not subject to force, or violence and is void of infamie, and of age and of all imbecillities, and defects that the bodie naturall susteyneth, and wanteth visible substance, and is a bodie constituted & devised by reason, and pollicie and of meere necessitie, for preservation of the people whose exercise is in government and direction of his subjects. And as the bodie naturall hath members of divers degrees, soe hath this bodie pollitike, for his subjects who be of divers degrees and sortes be his members and they be incorporate to him.48

At first glimpse this would seem to be a textbook illustration of the theory so powerfully articulated by Ernst Kantorowicz in 1957. Yet Plowden was not such a convenient advocate for Kantorowicz’s approach as at first he seemed. As Paul Raffield has argued, “[Kantorowicz’s] selective use of quotations from Fortescue and (especially) Plowden serves well the argument that the mystical nature of the king’s body politic came to dominate judicial thinking in England, but this is not an accurate

picture of the juridical landscape in relation to the resolution of disputes concerning property.⁴⁹ Similarly, Lorna Hutson has recently, and persuasively, argued that Plowden was far more influential as an advocate of equitable interpretation than as a defender of the idea of a royal body politic; it seems to me, however, that her castigation of Kantorowicz’s account of Plowden as a “fiction” overstates the case.⁵⁰ Though Plowden’s primary early modern legacy was not his articulation of the doctrine of the body politic, jurists with a pragmatic need to deploy that doctrine could turn to his writings for justification and illustration. Caution in endorsing Kantorowicz’s reading of Plowden wholesale is entirely appropriate, but it should not obscure one of the most interesting elements of Plowden’s use of the body politic, his conviction that it owed its existence to the “meere necessitie” of governance.

Fortescue’s body politic was also a mystical body, even if its lifeblood was a desire for good government common among subjects. Plowden’s body politic, on the other hand, was one formed by necessity and reason, what future generations of lawyers, writing of corporations, would call a “creature of the state”. Nevertheless, Plowden’s assertion that subjects are “members” of the monarch’s body, “incorporate to him” carries the same liturgical resonances as Mulcaster’s English translation. Given that Plowden was a known and only rarely conforming Catholic, these resonances, displacing references to the liturgy of a church which Elizabeth claimed to head, are all the more suggestive of a lawyer perhaps more in awe of the mechanism by which mere necessity incorporated the crown than he would admit.

⁵⁰ Lorna Hutson, “Not the King’s Two Bodies: Reading the “Body Politic” in Shakespeare’s Henry IV, Parts 1 and 2” in Rhetoric and Law in Early Modern Europe, ed. Victoria Kahn and Lorna Hutson (New Haven, CT: Yale University Press, 2001), pp. 167-77, passim and p. 177 for her assertion that the Plowden familiar to Kantorowicz’s readers is fictional.
By the end of the second chapter, Plowden began employing language more familiar to disciples of Kantorowicz. Specifically, he commented that "the office of this body politike of the kinge is to governe well. And the office of the subjectes to obey." Nevertheless, Plowden was far from advocating that kings should have unrestrained power as a result of their bodies politic. Indeed, Plowden seems profoundly attuned paradoxical vulnerability of the monarchial body politic. The good of subjects makes governance a necessity, but that governance comes from a body politic that itself "wanteth visible substance". "Wanteth" here, obviously carried its typical early-modern sense of something lacking, but it also very nearly personified the body politic: oddly, the body politic wanted the body natural so it could want. Only once it had become linked to a site of "all imbecillities and defects" (the body natural) could theorists assert that the body politic could transcend them. That it should transcend the indignities of the flesh was essential. In Chapter 4 of his treatise, Plowden noted that "albeit the bodie naturall which is but base be conjoyned to the bodie politike, which is the more precious and one bodie is made of both, yet that union doth nothing abase, or blemish the acts done that apperteihn to the bodie politike or other things done to both the bodies generallie for in those Cases the bodie politike draweth all the effects to him." Plowden’s focus was on the physicality of the king rather than the physical conditions under which his subjects lived, but like Fortescue, he was quick to relate this physicality to the abstract and concrete requirements of the law itself. Specifically, this meant that Plowden could argue, drawing on legal precedent that where the king bought, sold or rented lands, it was his

51 Plowden, BL Cotton MS, Calig. B IV, f. 2v.
52 Plowden, BL Cotton MS, Calig. B IV, f. 2r.
53 Ibid, f. 5v.
body politic that did so. Whether the king was in his nonage or his dotage, his grant as a king was good and could not be broken, even on the urging of his heirs.

**The Case of Wil lion v. Berkley and Royal Leases**

In order to make that argument, Plowden cited *William v. Berkley* a case that he himself reported and was later to include in his *Commentaries* (1571). *William v. Berkley* had come before the Common Pleas in Michaelmas term of 1561. In brief, the case arose when Henry Willion sued Henry Berkley, knight of Hereford, on grounds of forcible ejection. Berkley claimed that Willion had no grounds, not because he had not been forcibly ejected, but on the grounds that his ancestor William, the Marquis of Berkeley was seised of the manor from which Berkeley was ejected. Through a series of legal manoeuvres the Marquis of Berkeley had been seised, or put in possession, of the land during the reign of Henry VII, under an arrangement that stipulated that if the marquis should die without heirs, the land would escheat, or revert to King Henry VII and his heirs. The marquis had had no son at the time of his death, so the land had reverted to Henry VII and from him to Henry VIII. From him, it descended to Edward VI, who, as the advocates of Henry Berkeley noted, had died without a male heir of his own body. On these grounds, they argued, the manor should revert back to the Barkley family. This was how he justified having ejected Henry Willion from the manor.

Accordingly, with three advocates arguing for the plaintiff and three others, all serjeants-at-law, on the side of the defendant the case at last came before the Common Pleas. The complexity of the arguments regarding royal capacity on both sides meant that the pleading and even the writs were far from straightforward, and the presence of three advocates on each side added additional layers of complexity. It
did not help that in the original writ of *eiectione firmae* Henry Willion’s attorneys had neglected to include a clause alleging that Willion’s goods and chattels had been carried away from the property by the defendants.$^{54}$ Indeed, Justice Anthony Browne, Plowden’s friend and fellow succession-treatise author, opined that it was essential that lawyers should stick to the recognized formulae. For the lawyers, then, as now, the devil was in the details. Fortunately for the plaintiff, the Justices Weston and Dyer disagreed, arguing that ejection from land and taking of goods were two separate clauses in writs as well as two separate concepts in law. By that logic, it would thus be inappropriate to include distraint of goods, since in fact the plaintiff did not allege that the defendants had taken anything.$^{55}$

After a slew of similarly technical exceptions, the judges and attorneys finally came to consider the matter of law: how exactly the king had property in the manor. As the defendants argued:

that first the Capacities of the King are to be considered, and how many capacities he has; and if he has several Capacities, then in what Capacity had the Remainder; and whether or no after Issue had, he had Power to alien, as every such Donee had before the Statute *de Donis conditionalibus*, or if he shall be bound and restrained by this Statute, as every other Donee is, and if he shall, then it follows from thence that when the Issus Males coming from King Henry 7. were extinct, the Lord Berkley, now Defendant, might enter.$^{56}$

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$^{54}$ Plowden, *Les commentaries*, f. 228$^\mathrm{v}$. Plowden’s reports were published in English in 1816 as Edmund Plowden, *The Commentaries, or Reports of Edmund Plowden, Of the Middle-Temple, Esq. An Apprentice of the Common Law: Containing Divers Cases Upon Matters of Law, Argued and Adjudged in the Several Reigns of King Edward VI, Queen Mary, King and Queen Philip and Mary, and Queen Elizabeth* (London: Printed by S. Brooke, Paternoster-Row, 1816). The editors of the 1816 faithfully reproduced the foliation of the original 1571 edition, so it is possible for modern scholars to cite both editions with one footnote. All translations are taken from the 1816 edition, unless otherwise noted.

$^{55}$ Plowden, *Commentaries*, 229$^\mathrm{r}$.

$^{56}$ Ibid, 233$^\mathrm{v}$.
The Statute *de Donis Conditionalibus*, enacted in 1285, established the practice of inheritance by entail in English law. Accordingly, in Plowden’s reporting, the defence, despite claiming that they would begin with by defining the king’s capacity, were thinking not in terms of a politic capacity derived from the body politic but rather in terms of kingly capacity which allowed the king to ignore the strictures of a statute like that of *de Donis Conditionalibus* at his pleasure. In other words, the king’s stake in the land, and thus Henry Willion’s possession, depended on the whether the king, regardless of in what person, had the capacity to hold and grant land as if the thirteenth-century law regarding entails had not yet been enacted.

On the plaintiff’s side, however, and among the judges, it was argued that the king had two capacities, not from his own will or power, but because:

> the King has two capacities, for he has two Bodies, the one whereof is a Body natural, consisting of natural Members as every other Man has, and in this he is subject to Passions and to Death as other Men are; the other is a Body politic, and the Members thereof are his subjects, and he and his subjects together compose the Corporation, as Southcote said, and he is incorporated with them, and they with him, and he is the Head, and they are the Members, and he has the sole Government of them; and this body is not subject to Passions as the other is, nor to Death, for as to this Body the King never dies.\(^57\)

The distinction between the approaches of the plaintiff and defendant here are crucial. Whereas the defendants imagined royal capacities in purely temporal terms, for the plaintiffs there was a significant, and added, physical element. It was not, the plaintiff’s attorneys argued, that the king could choose to leave land out of tail, appealing to an age before statute prevented the custom. Rather, whether the king’s land was left in or out of tail was immaterial because, as a rule, the king held land in

\(^{57}\) Plowden, *Commentaries*, 234\(^R\).
his body politic, which despite the indignities of its embodiment in the body natural, never experienced natural death.

In short, the king could not be a tenant in tail or in fee simple because he could not die. Or as Serjeant Harper argued, “his [the king’s] natural Death is not called in our Law...the Death of the King, but the Demise of the king, not signifying by the Word (Demise) that the Body politic of the king is dead, but that there was a Separation of the two Bodies, and that the Body politic is transferred and now dead, or nor removed from the Dignity royal to another Body natural.”58 Literally, the word “demise” indicated the “move from” the body natural to the next body in the king’s lineage. The body politic’s point of embodiment moved when it was absolutely necessary, but it could not die precisely because the corporation that exists between the king and his subjects needed to exist in perpetuity. It could not be dissolved to allow for the death of every individual monarch. Thus the fact that the king was unaffected by the statute of Donis Conditionalibus was only a matter of royal prerogative only insofar as the needs of the subjects and government demanded it.

The judges shared this thinking, and the case was decided in the plaintiff, Henry Willion’s favor. Accordingly, Edmund Plowden, having reported the decision in manuscripts, published it in his Commentaries in 1571. In the interim, he was able to lean on his own manuscript reports in his treatise on Mary Queen of Scot’s right of succession. This manuscript treatise encompassed an extensive exploration of the scope and quality of the king’s body politic. Plowden insisted that the body politic was unique: it could be analogized to other corporations but those were all the product of letters patent. The king’s body politic was not. This meant that the descent of the

58 Plowden, BL Cotton MS, Calig. B IV, loc cit.
body politic from monarch to heir followed a particularly rigid version of inheritance patterns governing ordinary subjects' holdings in fee simple. Precisely because inheritance of the body politic was considered useful to the whole state, even an attainder could not prevent its transfer to the next heir in law (the eldest male in the blood and, barring male heirs, the eldest female). Moreover, since the body politic overcame any imperfections in the body natural, the transfer of the body politic expunged the tainted blood that, in theory, justified attainders of commoners.

It is important to differentiate Plowden's articulation of the body politic's inexorable movement from each monarch to his or her closest heir from a theory of divine right. Certainly, it was not explicitly contractarian nor yet constitutionalist, at least borrowing Alan Cromartie's succinct definition of the latter phrase: "the claim that ordinary law defines the monarch's power". Certainly, it is easy to understand why Kantorowicz claimed Plowden for cause of political theology. Yet Plowden's treatise owed less to theological imagination than it did to legal necessity. Ultimately, the body politic passed from one ruler to the next because public order demanded it. Law, or rather lawyers, could not control the connection between the body politic and the natural body, but it could comprehend it. Moreover, though the movement of the body politic from one person to another was beyond the lawyer's control, the body politic was subject not only to the dictates of law, but to the dictates of the law's sense of decorum. Once the body politic became associated with a body natural, it cost individual monarchs much of their capacity to hold land privately. Lands held by Elizabeth I would pass, along with the body politic, to whomever succeeded her.

61 Ernst Kantorowicz, The King's Two Bodies, pp. 7-9.

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could not, without considerable legal inconvenience and uncertainty, hold land as Elizabeth Tudor.

Moreover, for Plowden, these rather stunning differences from the standard course of fee simple for ordinary subjects came at a high price. Indeed, the body politic was able to overcome the body natural only with recourse to considerable violence. Plowden referred frequently to the fact that the body politic did not merely “extoll” the body natural, it “drowned” it. Similarly, the body politic and the royal dignity that came with it drowned the name of Duke of Lancaster in Henry VII – where there was any concern about succession, taking on the role of head of the body politic raised the stakes considerably: under Plowden’s reading losing the crown meant losing title and licit claim to any lands that the monarch had held personally before his accession. Fundamentally, Plowden’s careful deployment and extensive consideration of the language of the body politic served to set the monarch apart from other landholders: to elevate and “extoll” him certainly, but also to sharply circumscribe the legal options available to him. Thus, if the king wished to grant or convey lands, he must do it via letters patent. His physical body, now elevated to a status commensurate with his rank, could no longer engage in the now unseemly ritual of a physical exchange of earth necessary for the process of livery of seisin. Instead, Plowden insisted:

If he [the king] be disposed to give the land to an other it shall not passe by livery of seisin nor he cannot goe in his naturall bodie to deliver seysin but the kinge goth [for "goeth"] withall, and that wer impertinent to the kinge to goe to his subject or to have a lawe to bind

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62 Plowden, BL Cotton MS, Calig. B IV, ff. 9r-11v, passim.
63 Plowden, BL Cotton MS, Calig. B IV, f. 10r.
him therto. And therfore it shall pass by letters patent without liveryes.64

Livery of seisin was a means of land conveyance during which the person conveying the land (usually a liege lord) and the person receiving it (usually a vassal) met, theoretically within sight of the land being conveyed. The conveyer of the land would then formally give his permission to the recipient to take possession and give the recipient a twig, clod of soil, or even a door handle.65 In the context of this elaborate ritual, Plowden was most troubled by the notion of the king being required to deliver physical tokens of the transfer of the land to one of his subjects. Such a longstanding legal custom, though perfectly acceptable for ordinary people subject to English law, was incommensurate with the dignity required for the body natural to which the royal body politic had attached itself, or indeed which it had forcibly displaced by drowning.

**Plowden's Body Politic in Literature and Royal Sacrifice in Tragedy**

To illustrate the constraint under which adherence to the body politic forced the king to act, Plowden turned to literary sources suggesting that, “as our Lawe doth acknowledge in the kinge two bodies of distinct natures soe doth the Philosophers and others that have writen of comen welthes and other Lawes, and even soe doe manie other learned men.”66 Among those learned men, Plowden has chosen a single poet because “poetts in manie places of ther workes doe covert [illegible] manie deep pointes of both naturall and moral philosophy.”67 Immediately, insisting that philosophers and others were as willing as common lawyers (or at least Plowden himself) to acknowledge two aspects to monarchs lent weight to his assertion that the

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64 Ibid, f. 8
66 Plowden, BL Cotton MS, Calig. B IV, f. 18
67 Ibid, *loc cit.*
king had two bodies. Imagining a corporate second body for the king might be a technical process, but it had real-world ramifications and real-world origins, just like the mystical ties Fortescue imagined bound the polity together and the livery of seisin resulted in a transfer of land. Indeed, Plowden's assertion that the king's two bodies were as obvious in philosophy as they were in common law reflected the parallels between the Eucharist and the rituals and doctrines of the common law for which Peter Goodrich has argued.68

The specific poetic narrative with which Plowden made his case was the tragedy of Iphigenia, though Plowden never credits Euripides as its author or Erasmus as the author of a translation into Latin from Greek, which Plowden cited.69 Why Plowden chose Erasmus's translation of Euripides's tragedy remains a mystery; the Classicist Sean Alexander Gurd, in his study of textual multiplicity in the tragedy has noted that Erasmus speculated that the play had been improperly attributed to Euripides,70 which might explain Plowden's reluctance to name Euripides as the author.

In the story, which is set in the lead-up to the Trojan War, the Greek armies are trapped in Aulis, where the goddess Artemis has becalmed the seas because Agamemnon had killed a hart that was sacred to her. Discovering that Artemis demands the sacrifice of his daughter Iphigenia, Agamemnon sends for the girl, assuring her and his wife Clytemnestra that he has arranged for her to marry Achilles. Agamemnon later regrets the summons and attempts to send another message countermanding it, but his brother Menelaus intercepts it, and Iphigenia duly arrives.

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68 Goodrich, Languages of Law, pp. 54-7.
Meanwhile, Achilles, having discovered the deception, is furious that he has become unwittingly involved in Agamemnon's plot; he swears he will defend Iphigenia. Clytemnestra too protests the sacrifice, but the rest of the Greeks, eager to get to Troy and slake their blood thirst insist. Accepting that her sacrifice is inevitable, Iphigenia begs Achilles to leave her to her fate.

Agamemnon does not have a second body in the plot of the *Iphigenia at Aulis*. Rather than referring to a specific moment of double embodiment, Plowden argued that Agamemnon was torn between his desire to protect his daughter and his need as king and commander to generate the necessary winds. He argued that

> For albeit he wer a kinge and ought to do as seemelie was for that estate, yet in the kinge ther was a father saieth the Poett and in his bodie politike ther was a bodie naturall. The bodie politike respectinge the Commoditie of the Armie would shee should be killed in sacrifice[,] the bodie naturall which begatt her and Loved her entirelie would she should be preserved. The scepter moved her slaughter earnestlie but nature impugned it vehementlie.\(^{71}\)

In assigning duty to the body politic and paternal affection to the body natural, Plowden established the constraints under which a monarch worked. Where sceptre and nature clashed, sceptre prevailed. Placing duty in opposition to nature in such an extreme context had also had other valences: it established that the part of Agamemnon that urged the "commodity" of the army was unnatural, even supernatural. Where even literature and philosophy imbued the body politic — or at least its capacities and responsibilities — with such power, Plowden could argue that such an imaginary body would naturally take precedence over the natural body to which it was subtended.

\(^{71}\) Plowden, BL Cotton MS, Calig. B IV, f.19\(^{R-V}\).

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Plowden's choice of a classical proof-text which focused on the divinely-mandated sacrifice of a daughter was nevertheless surprising in the context of a treatise arguing for the one queen to succeed another. The first English translation of Euripides's play was produced by Lady Jane Lumley, née Fitzalan, who translated it in manuscript in the 1550s. Stephanie Hodgson-Wright, in her commentary on an edition of Lumley's *Iphigenia* in a modern anthology, has suggested that Lumley was in part inspired to take up the play by the execution of her first cousin, Jane Grey. Hodgson-Wright argues that Lumley's alignment of the play's women with calls for mercy bore out Mary I's reluctance to execute Jane Grey in the face of mounting pressure from male councillors in the aftermath of Wyatt's rebellion.\(^{72}\)

Edmund Plowden's relationship with female rule had been more ambivalent than Lumley's. As a Catholic, as well as a talented lawyer, Plowden had seen his career flourish under Mary, but his recusancy cost him advancement under Elizabeth I. In his narrative, despite his ultimate goal of making the case for Mary Stewart's accession to the throne of England, Plowden never considered either Iphiginia's sacrifice nor the purported marriage with Achilles – king of the Myrmidonians in his own right – in dynastic terms. On the contrary, Plowden distinguished sharply between the man who begot Iphigenia and the king who sacrificed her. Though Plowden's immediate interest was only in Agamemnon's nature, he turned from his literary evidence to the assertion that princes in the blood could inherit the crown after having been disabled from holding lands or titles by conviction of felony and attainder. What was important was not the survival of a specific heir to whom the

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body politic would pass, like the potential Iphigenia, but rather that the body politic would pass down the royal bloodline, immediately, and violently, transforming the actual body (body natural) of whomever it lit upon.

Conclusion

For purposes of landholding, and by extension for purposes of legal capacity and even legal personality, Plowden's king existed outside of normal conditions of the common law. The common link between the legal bodies imagined by Edmund Plowden and Sir John Fortescue, different though they were was their profoundly paradoxical character. Fortescue pointedly aligned the English polity with physical comfort, contrasting it with his account of a French nation where arbitrary rule and physical deprivation went hand in hand. Accordingly, though he placed the monarch at the head of the state's imaginary body, Fortescue nevertheless envisioned the laws as the ties that bound monarch as well as subjects. Similarly, though Plowden insisted that the legal fictions that surrounded the body politic mirrored the realities of the natural world to such an extent that poets and philosophers endowed kings with bodies politic, the capacities of the body politic he imagined were almost supernatural. Yet, Plowden argued, not entirely persuasively, that when Euripides (and Erasmus) pitted Agamemnon's royal duty against his paternal affection, they were implicitly aligning his sense of duty with an imaginary body that passed from monarch to monarch without ever dying, being underage or going mad. In attempting to assert that his legalistic model was universally recognisable, Plowden was ultimately attempting to demonstrate that exceptional legal capacity inevitably accompanied sovereignty. From that point, he could argue that this exceptional legal capacity bound each individual sovereign to honour his or her predecessors' grants.
and leases, just as Fortescue had argued that the law as a ligament, created mutual obligations between the kingly head and the subject members in the body of the state. In Fortescue and Plowden's hands, the body politic, as rhetorical trope or as legal fiction, set kings and queens apart from their subjects only to more fully articulate their obligations.

As we shall see in the next chapter, which examines body politic rhetoric and political philosophy in the work of James VI and I’s Scottish tutor George Buchanan, a version of the theory that emphasized the king’s exceptional status, or supernatural capacities, must have had tremendous appeal for James. Buchanan favoured schema, in his drama, his polemics, and his historiography, that based the mutual obligation between sovereign and subject not on divine right, nor on legal capacity, but rather on the ease with which a tyrannical monarch could be replaced.
3. Legal Curbs and Royal Passions in the Works of George Buchanan

Where English lawyers, like Sir John Fortescue and Edmund Plowden invoked the body politic to construe corporate capacities, they tended to write with limited interest in the body natural. After all, that body's idiosyncrasies must give way to the perfection of the body politic, at least in the eyes of the law. When Plowden felt the need for an analogy from literature, he depended upon the *Iphigenia at Aulis*, a play that included no explicit references to the idea of a body politic nor a king with split capacities. Plowden imagined those split capacities as the impulses which left Agamemnon torn between saving and sacrificing his daughter Iphigenia. In doing so, Edmund Plowden tied the king's possession of a body politic to his capacity to do horrifying, necessary things; he used the most graphic example available to him – the sacrifice of a child – to link his common law inflected model of the king's imaginary body with the obligations that belonged to the sovereign. Such a gesture on Plowden's part might seem to modern political theorists like it anticipates Carl Schmitt's sovereign with the power to declare a state of emergency and suspend law, or Giorgio Agamben's sense of a king who, like the condemned man, stands outside law and social relations.¹ For Plowden, ever the legal pragmatist, invoking one of the worst things a human could be called upon to do was primarily a way of indicating the separation between the natural and politic capacities. A body politic that could sanction the death of a daughter could certainly inherit and hold properties differently from a natural body. Though it was a strange example, ultimately, for Plowden, it did not invite comment on the king's behaviour, nor did it necessarily indicate that he

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stood outside the law's judgment; rather Plowden's use of the *Iphigenia* indicated illustrated his conviction that kingly and natural capacity could be separated for purposes of property holding and inheritance.

As Plowden imagined, and argued for, the eventual accession of Mary Stewart, Queen of Scotland, to the throne of England, Scotland was undergoing political and religious upheaval. By May 1568, relations between Mary and many of the Scottish earls had deteriorated so badly that they forced her to abdicate in favour of her infant son, born in 1566, who became James VI of Scotland. Meanwhile, Mary made an attempt to reclaim her throne. When she met with crushing defeat, Mary fled to England to seek the protection and aid of her cousin, Elizabeth I. For Catholics like Edmund Plowden, Mary was an attractive alternative to Elizabeth. For Elizabeth I and her government, Mary Stewart thus presented a problem. Accordingly, Elizabeth kept Mary Stewart under house arrest in Carlisle Castle, before moving her in 1568 to Bolton Castle, which was further from the Scottish border. Of necessity, Mary's guards and Elizabeth's representatives took a profound interest in controlling access to her person and carefully scrutinised Mary's correspondence, companions, and even her health.

Sir Francis Knollys, writing to Cecil about the issue of Elizabeth's royal prisoner, noted that, "the Quene of Skottes state of bodie and countenance beginneth to refreshe and amend muche." He was quick to hypothesise as to the reason for this change: "I doe conjecture by hyr pleasantnes & increase of courage with some other circumstances that she lookes for some relieffe presently out of France to the advancement of hir faction in Skotland; And because she knowethe that the bringing
in of Frenchmen into hyr cuntrye wolbe odious to the Quenes hyghnes.\textsuperscript{2} If Mary thrived, it was because Elizabeth suffered. While Knollys claimed "other circumstances" added to his suspicions that Mary was plotting, he relied on his description of Mary's illness and recovery to persuade Cecil of her treachery. To Knollys, the frustrations attached to reading and interpreting Mary's "bodie and countenance" were recent, but for the Scots such problems had been a concern since Mary's deposition. The link between Mary's body and her role as monarch preoccupied her fellow countrymen; their concern, in turn, has provided considerable fodder for modern scholars.

Scholarly interest has focused on the writings of George Buchanan, who, at the request of his patron, the Earl of Moray, helped write the first, and most potent, justification of Mary's deposition in favour of her infant son.\textsuperscript{3} The text in question became the 1571 \textit{Detectio Mariae Regiane Scotorum}, which depended heavily on Buchanan's notes for his multivolume history of Scotland, the \textit{Rerum Scoticarum Historia}, though Buchanan did not complete the full text until 1579 (it was not published until 1582). Buchanan dedicated the \textit{Rerum Scoticarum Historia} to Mary's own son, Buchanan's pupil, the young king James VI. As scholar, polemicist, and tutor, Buchanan was thus remarkably well-placed to use his considerable intellectual talents to contribute to Scotland's urgent debate about the appropriate nature of the relationship between sovereign and subjects. Buchanan thus makes an ideal starting point for an investigation of the metaphorical and theoretical concern with bodies, and more particularly bodily appetites, in this debate about authority and subject status.

\textsuperscript{2} Sir Francis Knollys, "Letter to Cecil", 8 June 1568, PRO SP 53/1, ff. 17\textsuperscript{R}.\textsuperscript{V}.
Indeed, Buchanan's opposition of royal appetites and law, through the medium of public scrutiny, formed a vital component of his justification of limited monarchy. Moreover, Buchanan’s interest in publicly-scrutinised appetites rather than legally-constituted capacities marked an important alternative mode of construing significance of the body politic and its role in mediating between sovereign and subjects.

Scrutiny and Surveillance in the Life of George Buchanan

Before turning to the significance of scrutinising the monarch in Buchanan’s writings, however, it will be helpful to consider the significant, contextualising roles of scrutiny and imprisonment in Buchanan’s own life. George Buchanan was born in 1506, in Sterlingshire, though by the age of fourteen he had left Scotland to study in Paris. After a brief stint in the French army, he took his BA at St Andrews before following his mentor there, John Mair, back to Paris. He returned to Scotland in 1536 and had his first brush with the forces of religious controversy when he wrote the Somnium and the Palinodiae, two Latin poems that mounted satirical attacks on the Franciscan order. Though the poems remained unpublished at the time, their circulation angered the Franciscans in Scotland. They, in turn, took note of Buchanan’s habit of eating meat in Lent and his interest in Lutheranism and in 1539, Buchanan was arrested. He escaped to London, where he briefly lived among Lutherans, before returning to France.

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4 I. D. MacFarlane, Buchanan (London: Duckworth, 1981) is the best account of Buchanan’s life available, but P. Hume Brown’s eminently readable George Buchanan: Humanist and Reformer (Edinburgh: David Douglas, 1890), remains a valuable supplementary resource, and includes the Latin text of George Buchanan’s Vita, which Buchanan apparently penned himself, though as Brown notes George Chalmers had argued that Buchanan’s fellow royal tutor Peter Young was the author (see pp. 364-9).
In France, Buchanan became a professor at the University of Guyenne in Bordeaux, where he wrote Latin verse dramas for his students to perform. André de Gouvea, the Portuguese humanist recruited Buchanan to come to the college of Coimbra, where de Gouvea had just become principal. Unfortunately, de Gouvea died shortly after returning to Portugal, and his uncle Diogo became the new principal of the college. Before his nephew’s death Diogo de Gouvea had accused him, and Buchanan, of Lutheranism, denouncing them to the Inquisition. Thus Buchanan’s irascible heterodoxy had once again resulted in his imprisonment. Buchanan spent nearly a year in the custody of the Portuguese inquisitors, before making his public abjuration in July 1551. Then Buchanan had to spend an additional seven months in the monastery of San Bento, for further religious instruction. Buchanan’s time in the monastery does not seem to have been unduly arduous: while there, he completed his Latin verse paraphrases of the Psalms, which he subsequently published with a dedication to the young Queen Mary. Nevertheless, Buchanan left Portugal as soon as possible, returning first to France and subsequently to Scotland.

In Scotland, Buchanan broke decisively with Mary after her marriage to the Earl of Bothwell in 1567 and transferred his loyalty to the Earl of Moray. This timely shift, and his literary and scholarly talents, earned Buchanan a place as a senior tutor to the young King James VI. In this capacity, Buchanan became a draconian disciplinarian. According to one infamous story, when the Countess of Mar, James’s governess, rebuked Buchanan for laying such severe hands on “the Lord’s anointed”,

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5 For Buchanan’s appearance before the Portuguese Inquisition, see Guilherme J. C. Henriques, George Buchanan in the Lisbon Inquisition, The Records of His Trial with a Translation Thereof into English, Fac-Similes of the Papers and an Introduction (Lisboa: Typographia da Empreza da Histora de Portugal, 1906), particularly pp. viii-xix, passim, for the political background of Buchanan’s denunciation.
Buchanan offered the caustic reply, “Madam, I have only whipped what, if you please, you may, but I will not, kiss.”

Though this remark itself may be apocryphal, James never overcame a visceral fear of Buchanan, though, as his own political writings, discussed below, indicate, the young monarch’s unease did not stop him from sharply rejecting Buchanan’s political theories. Buchanan, for his part, had the advantage, unique among resistance theorists and advocates of limited monarchy of having legitimate power to whip a king. His access to the young king James makes Buchanan a particularly apt subject for this study: Buchanan could put into practice the kind of scrutiny of the monarch’s conduct which he envisioned as a check on royal authority. Certainly, after two denunciations for relatively minor infractions of conduct and appetite – speaking to flippantly of monks and eating sausage in Lent – and his own periods of imprisonment, Buchanan appreciated the dire outcomes in which surveillance and even simple gossip could culminate. In the 1560s, and especially in the 1570s, Buchanan employed his hard-won appreciation for the power of public scrutiny to shape the political and legal fortunes of the whole Stewart line. This shaping began in the aftermath of Mary’s deposition, and it is to this period in Buchanan’s literary career that I now turn.

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6 This story exists in several versions, but the earliest one I have found occurs in the “vindication” of Buchanan which appears in the 1799 English language edition of the De iure Regni apud Scotos. See Robert Macfarlan, translator, George Buchanan’s Dialogue Concerning the Rights of the Crown of Scotland Translated into English; with Two Dissertations Prefixed: One Archaeological, Inquiring into the Pretended Identity of the Celts ad Scythians, and of the Getes and Scots; and the Other Historical Vindicating the Character of Buchanan as an Historian, and Containing some Specimens of His Poetry in English Verse, (London: Printed by S. Hamilton, Falcon-Court, Fleet-Street: For T. Cadell, Jun. and W. Davies in the Strand; and W Creech, Edinburgh, 1799), pp. 64-5.
Queen as Traitor and King as Construct, Mary and Darnley in the *Detectio*:  

The *Detectio*, Buchanan's first intervention into the debate about the legitimacy of Mary's deposition, is not prepossessing. The *Detectio* drew up a case for Mary's complicity in the murder of her second husband, Henry Stuart, Lord Darnley, in terms that even those modern scholars most sympathetic to Buchanan have characterised as "thoroughly mendacious". Certainly, the *Detectio* took the authenticity of the so-called Casket Letters, which supposedly contained correspondence between Mary and her third husband James Hepburn, Earl of Bothwell, discussing stratagems for Darnley's assassination, as a matter of course. It was quickly translated into French and into Scots, though the Scots version was translated by Thomas Wilson at the behest of Robert Cecil, Earl of Salisbury. By 1571, was eager to make the text available to an English readership in the aftermath of the Ridolfi plot but hoping to suggest that it had been the Scots who had, without any English intervention, translated, if not published the text. Shortly after John Day published the his first edition, he, again under Cecil's instructions, helped Robert Leiprovik produce the first Scottish edition. This Anglo-Scottish version of the *Detectio*, published as *Ane detectioun of the duinges of Marie Quene of Scottes touchand the murder of his husband, and hir conspiracie, adultereie, and pretensed* touchand the murder of his husband, and hir conspiracie, adultereie, and pretensed...

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8 *Histoire de Marie Royne d’Escosse* (Edinburgh [=La Rochelle]: Thomas Waltham, 1572).
9 *Ane detectioun of the duinges of Marie Quene of Scottes touchand the murder of hir husband, and hir conspiracie, adultereie, and pretensed mariage with the Erie Bothwell. And ane defence of the trew Lordis, mainteineris of the kingis graces actioun and authoritie. Translatit out of the Latine quhilke was written by G.B.* [London: John Day, 1571].
10 *Ane detectioun of the doings of Marie Quene of Scottis tuiching the murther of hir husband, and hir conspiracie, adultereie, and pretensit mariage with the Erle Bothwell. And ane defence of the trew Lordis, mantenaris of the kingis grace actioun and authority. Translatit out of the Latine quhilke was writin be M.G.B.* (Imprintit at Sacntandrois: Be Robert Lekprevik, 1572); for the best clear account of Cecil's role in publishing and circulating the *Detectioun*, see John D. Staines, *The Tragic Histories of Mary Queen of Scots*, pp. 37-8.
marriage with the Erle Bothwell, reads like an exercise in tabloid journalism. As John D. Staines has persuasively argued in his recent study, *The Tragic Histories of Mary Queen of Scots*, Buchanan's attack on Mary, however unsubtle, achieved tremendous political importance, not just as the fallout from Mary's deposition and execution shook the delicate web of Scotland's relations with England and France, but also as genealogical background in propaganda battles with subsequent generations of Stuarts in England and Scotland.11

The *Decteclion's* account of meetings between Bothwell and Mary in Edinburgh was typical of its tone:

Bothwel was through the garden brought into the Quenis chamber, & there forced hir agaynst hir will forsothe. But how much agaynst hir will Dame Rerese betrayed her, tyme the mother of truth hath disclosed. For within few dayes after, the Quene intending as I suppose to reaquite force with force and to ravish hym agayne, sent Dame Rerese (who had her selfe also before assayit the mans strength) to bryng hym captive unto her hyghnes.12

The savage irony of this dismissal of the possibility that Bothwell assaulted Mary was supplanted almost immediately by slapstick. Another of the Queen's ladies, Margaret Carwood aided the Queen in attempting to lower Rerese to the ground when disaster struck, since, as Buchanan wryly reported:

in sic weirlike affaires, all thynges can not ever be so well foreseen but that some incommodious chaunce may overthwartly happen. Behald, the stryng sodenly brake, and downe with a great noyse fell Dame Rerese, a woman very heavy baith by unweldy age & massy substance. But sche an auld beaten soldiar, nothyng dismayed with the darkenes of the night, the heighth of the wall, nor with the soddenness

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12 Buchanan, *Decteclion*, ff. sig BiiR-V.
of the fall, up sche getteth, & winneth into Bothwels chamber, sche gyt the dore open, and out of his bed, even out of his wives armes, half a slepe, half naked, sche forceably brings the man to the Quene.\textsuperscript{13}

Here, the model of monarchy as theatrical spectacle was twisted in the direction of farce, complete with detailed descriptions of its staging. The language describing “Dame Rerese”, undeterred by her pratfall, was mock-heroic, but this description of the lady's descent into the garden rendered it as ignoble as it was ridiculous. The imagery of Dame Rerese pulling Bothwell, half-naked and half-asleep from his wife's arms, however, reminded readers of the serious content underpinning the farcical encounter. In summoning Bothwell back to her, Buchanan's Mary relied on Rerese's physical force rather than her own royal authority, but the narrative made it impossible to ignore the fact that Mary's authority extended to such summonses. Indeed, Buchanan's sarcastic avowal that Mary was ordering Dame Rerese to “bryng [Bothwell] captive unto hyr hyghnes” conflated Rerese's kidnapping with an arrest. That conflation reinforced the sense that something was severely wrong with Mary's reign, which in the context of this encounter with Bothwell profoundly upset political, social, religious, and even familial order: as Bothwell was, apparently, powerless to resist his former lover's brute strength. Gender roles were disordered, and Bothwell's masculinity was called into question. Yet as Staines has argued in \textit{The Tragic Histories of Mary Queen of Scots}, unlike John Knox, in his now infamous \textit{First blast of the trumpet against the monstrous regiment of women} (1558), George Buchanan was not advancing an argument that femininity was an automatic bar to Mary's monarchy.\textsuperscript{14} Though he shared John Knox's concern with “inordinat appetites”,\textsuperscript{15}

\textsuperscript{13} Buchanan, \textit{Detectioun}, f. sig Bi\textsuperscript{v}.
\textsuperscript{14} Staines, \textit{Tragic Histories}, p. 42.
\textsuperscript{15} John Knox, \textit{The first blast of the trumpet against the monstrous regiment of women} ([Printed in Geneva: by J. Poulain and A. Rebul], 1558), f. 12\textsuperscript{v}. 94
where Knox argued that such appetites were endemic to womankind, Buchanan was interested exclusively in the appetites of one woman, Queen Mary Stewart. Even the detail that Dame Rerese had "assayit" Bothwell's strength served only to emphasise the extent to which Mary had in her court and behaviour upset social norms. His case is highly personal and highly contingent on Mary's misdeeds. Yet the scurrilous tone of Buchanan's treatise should not distract readers from its wider political implications. To consider those, it is necessary to examine Buchanan's depiction of Mary's consort, Lord Darnley.

The first thing worth noting is Buchanan's mode of discussing Darnley. Instead, to quote one critic, "Darnley [became] the noble and innocent victim of a designing woman",\(^1^6\) in large part because Buchanan reliably and insistently referred to Darnley as "the king". The text did not merely suggest that Darnley was the put-upon spouse of a devious woman. Certainly, a woman who "began secretly by littil and littill to sow sedes of dissentioun betwene the king and the Lordes that were than in Court"\(^1^7\) in order to pre-emptively avoid suspicion of murder was conniving, but more than that, she was committing the crime of *lèse majesté*, at the very least, or treason at worst. Mary's refusal to secure the crown matrimonial from the Scottish Parliament for Darnley was a point of contention between the couple, so Buchanan's consistent references to "the king", rather than "the king consort", were highly significant. Moreover, there was no indication in this text that Mary was the queen by birth and Darnley the king by marriage. Because of this linguistic sleight of hand, which remained constant across all three versions, in Latin, English, and French,


\(^1^7\) Buchanan, *Detectioun*, f. sig. Aiii".
sympathetic readers could ignore the fact of Mary's monarchy and suggest that she was plotting against the king.

Since Mary was, of course, still queen, whatever Buchanan suggested she was plotting against Darnley could have been murderous but not treasonous. Buchanan's sly suggestion to the contrary is far from the monarchomach declaration that his contemporaries (and some modern critics) expected from him. Buchanan was far from rejecting kingship as an ideal. Indeed, his refusal to name Darnley specifically, or to set out his individual characteristics, reduced Darnley to an abstract concept. Ironically, Buchanan conflated the husband against whom Mary plotted with the office that, he argued, she was unfit, by virtue of her plotting, to hold. The fact that Buchanan was so invested in the wrong monarch, one who was not, in fact, a monarch, was highly significant. In the immediate context of the Detectioun, Buchanan's preference for idealising the character of the highly unpleasant Darnley, rendering him entirely two-dimensional, was entirely appropriate to his propagandising purpose. In the context of Buchanan's wider interests in kingship, however, Buchanan's preference for Darnley over Mary Stewart became highly significant. To consider Buchanan's views on hereditary kingship, I turn to his historical writing.

Ethnography and Kingship in the Historia Rerum Scoticarum:

In assembling the Detectio, Buchanan depended heavily on the final chapters of his massive Rerum Scoticarum Historia (History of the Affairs of the Scots). Accordingly, it would seem sensible to first consider the final books of Buchanan's historical treatise, those dealing with Mary herself. Yet the first chapters of his history offer valuable insight into the methodologies and attitudes that Buchanan brought
with him to his history writing. Though he had manuscript sections of the text to hand when he was composing the *Detectio*, the *Rerum Scoticarum Historia* remained unpublished until 1582, the year of Buchanan's death. As John Staines has noted the first English translation of the *Historia*, published in 1690, in the context of another Stuart succession crisis: the fight of James VII and II, Mary's great-grandson, to regain his crown from his protestant daughter and son-in-law. For Staines, the late-seventeenth century interest in Buchanan's *Historia* is further evidence of the significance of the accounts of Mary's reign for the development of political thought in England. Nevertheless, the first books of the *Historia* offer important insights into Buchanan's understanding of the relationship between royalty and ethnicity.

In a dedicatory epistle addressed to his pupil James VI, Buchanan laid out his reasons for writing a history, citing his own illness and inability to offer the instruction for which he had been appointed:

> an incurable Distemper having made me unfit to discharge, in Person, the Care of Your Instruction, committed to me, I thought that sort of Writing, which tends to the Information of the Mind, would best supply the want of my Attendance, and resolved to send You Faithfull Counsellors from History, that you might make use of their Advice in Your Deliberations, and imitate their Virtue in Your Actions. For there are amongst Your Ancestors, Men Excellent in every Respect, of whom Posterity will never be ashamed.

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There was considerable irony in such a claim for James's ancestors in the context of Buchanan's claims for an ancient practice of elective monarchy in Scotland: where nobles elected their kings, a previous king's excellence was no guarantee of his offspring's election. Yet before he began an investigation of James's illustrious ancestry, Buchanan began with a critique of the techniques of other writers of history, particularly the antiquary and mapmaker Humphrey Llwyd. Hugh Trevor-Roper suggested, in an influential 1966 monograph, that Buchanan's vitriolic attack on Llwyd was inspired by Llwyd's earlier attempts to dismantle the *Scotorum Historia* of Hector Boece. Roger Mason, offering a measured critique of Trevor-Roper's claims, has noted that for Buchanan, the most significant aspect of Llwyd's critique was that it invalidated Scottish claims for autonomy by dismissing the Boece's accounts of early Scottish kings. Mason, following William Ferguson, has also noted that Buchanan's knowledge of Gaelic allowed him to reconstruct a detailed explanation for the origins of various British tribes. Ironically, by his own account Buchanan objected primarily to what he saw as Llwyd's overdependence on the ancient languages of England, Wales Scotland and Ireland. He dismissed the utility of the "vain and ridiculous Labour" of attempting to find the origins of any language's words: not only was it difficult to the point of impossibility, it was — unless attempted in the service of Latin — lowering, or as Buchanan insisted:

I had rather be ignorant of the doting Fables of the old Britains than to forget that little of the Latin Tongue, which I imbibed, when I was a Youth. And there is no other cause, why I take it in less disdain, that

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the old *Scotic* Language doth by degrees decay, than that, thereby, I
joyfully perceive those barbarous Sounds, by little and little, to vanish
away, and in their place, the sweetness of *Latin* Words to succeed: And
in this Transmigration of Languages, if one must needs yield to
another, now, of the Two, let us pass from Rusticity and Barbarism, to
Culture and Humanity, and by our Choice and Judgement, let us put
off that uncouthness which accrued to us by the Infelicity of our
Birth.\(^22\)

Though this bold assertion proved awkward for subsequent generations of historians
eager to draw on Buchanan’s work to glorify Scotland’s past, it is hardly surprising in
a Latinist as highly regarded as he. Buchanan’s mention here of the Latin he acquired
as a boy was significant. The *Vita* of George Buchanan, which he himself wrote,
made mention of his studies under John Mair. Despite having followed Mair to Paris,
Buchanan, by the time he came to write the *Vita*, was dismissive of his teacher. In his
account, Major “though very old, Read Logick, or rather Sophistry in that university
[St Andrews].”\(^23\) Buchanan’s disdain for his training at St. Andrews was, in part,
inspired by his discovery of the “new learning” upon his arrival in France. For
Buchanan, France and the strains of humanism he acquired there – and the
opportunity that they provided to expand his neo-Latin networks – were an important
instance of using his “choice and judgement” to move on from what his biographer P.
Hume Brown noted was a relatively undistinguished career as a student at St

\(^22\) Buchanan, *History*, p. 6. Compare: “Quod ad me attinet malim ignorare veterem illam, & anilem
priscorum Britannorum balbutiwm, quam dediscere quodcumque hoc est sermonis latinii, quod magno
cum labore puer didici. Neque aliud est cur minus molestè feram priscam Scotorum linguam paulatim
in tormi, quam quod libenter sentiam barbaros illos sonos paulatim evanescere, & in illorum locum
Latinarum vocum amoenitatum succedere. Quod si in hac transmigracione in alienam linguam necesse
est alteros alteris concedere, nos a rusticitate & barbaria ad cultum & humanitatem transeamus: & quod
nascendi infelicitate nobis event, voluntate & iudicio exuamus” in Buchanan, *Rerum Scoticarum*, f.
sig. Aii\(^v\).

\(^23\) George Buchanan, *History*, p. 2. The Latin version of the *Vita* does not appear in the 1582 Latin
dition of Buchanan’s text.
Andrews. In embracing Scotland’s potential transition from indigenous languages to Latin, Buchanan thus envisioned his own successes writ large for his nation: where his own efforts and judgment had improved his fate, his fellow Scots could make similar improvements.

Certainly, Buchanan expected James to follow his example, or at least those of the long list of monarchs he set out as examples for James to follow. Buchanan established the pattern of his account of the transfer of power in Scotland with his account of the kingship of Feritharis, the second king of Scotland:

Fergus dying, left Two sons behind him, Ferlegus and Mainus; neither of them yet able to manage the Government; so that the Chiefs of the Clans meeting together to declare the succeeding King, there was great Contention amongst them; Some of them urging the late Oath, whereby they had bound themselves to preserve the Scepter for the Fergusian Family; others alleging, What great hazards they might run under an Infant King. At last, after a long Dispute, a Medium was found out...which was, That whilst the Children of their Kings were Infants, one of their Kindred, who was judged most accomplished for the Government, should weild the Scepter in their behalf; And if he dyed, the Succession of the Kingdom should descend to the former Kings Sons.

Having decided on this course of action, according to Buchanan, the clan chiefs chose Feritharis, the brother of Scotland’s first king Fergus and uncle to his two sons, Ferlegus and Mainus. This account had the advantage of closely paralleling James’s

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24 P. Hume Brown, George Buchanan, p. 48.
25 Buchanan, History, p. 97. Compare "FERGUSIO defuncto, duo filii, sed nondum regni potentes restabant, Ferlegus, & Mainus. Eō factum est, ut Phylarchis ad prodendum Regem coēntibus, magna contentione res transigeretur, aliis iusiurandum iactantibus, quo adacti erant regnum stirpi Fergusianae se conservatuos: aliis quanta domi, forisque Rege puero instarent pericula commenmorantibus. Tandem post longam discepcionem ratio inita est, qua nec puer aetate nondum regno matura imperaret, nec iurijurando fraus fieret: ut videlicet regnum liberis nondum adultis propinquorum, qui maxime videretur regno idoneus, is rerum summæ praesiceretur. Eo mortuo regni successio ad Regis superioris liberos perueniret" in Buchanan, Rerum Scoticarum f. 34.
own situation: he assumed the throne in his infancy and had his uncle, the Earl of Moray, for a regent. Yet, as quickly appeared, Ferlegus’s example was a poor one to follow. After fifteen years of Feritharis’s beneficent reign, despite his good guardianship, Ferlegus became impatient and, with an army in tow, he confronted his uncle and in Buchanan’s words “demand[ed] the Kingdom of him, which he held (as he alleg’d) not as his Own, but in Trust only for him.” While Feritharis was entirely willing to accede to his nephew’s demand, the nobles of the kingdom were not so willing to accede to the change in governance: “such was the Respect and Love, all did bear to Feritharis, that they utterly disliked this overhasty Desire of the Kingdom, in Ferlegus, which they manifested, not only by their Countenances and Frowns, but by the loud Acclamations of the whole Convention and Assembly.” While Feritharis’s kingship was only possible because his nephews were too young for kingship, his popularity with the nobles ensured that he kept his throne. So great was the clan chiefs’ dismay at Ferlegus’s precipitate demand for the throne that they planned to condemn him to death. Ferlegus, according to Buchanan was spared, not because of his royal birth, but rather because of his father’s memory and his uncle’s goodwill. Instead of executing Ferlegus, “they set Keepers about him, which should watch over, and pry into, all his Words and Actions.” Here, Buchanan provided a historical justification for the close surveillance of the potential heir to the throne of Scotland.

26 Buchanan, History, p. 97. Compare “regnum paternum reposcit, quod ille non ut suum, sed ut fiduciarium tenebat” in Buchanan, Rerum Scoticarum, f. 34r.
27 Buchanan, History, p. 97. Compare “tantum omnium fuit erga Feritharem studium, tantaque charitas, ut hanc praeproperam in Ferlego regni cupiditatem non modò vultu, sed increpationibus, atque adeo clara totius concionis acclamatione sint auersati” in Buchanan, Rerum Scoticarum, f. 34r.
28 Buchanan, History, p. 98. Compare “Custodes tantum adhibiti, qui facta, dicta, eius omnia specularentur,” in Buchanan, Rerum Scoticarum, f. 34r.
In writing his history, Buchanan continued this practice of scrutinising the behaviours and practices of monarchs. He noted approvingly that Domadilla, the son of Mainus and nephew of Ferlegus, "spend much of his time in Hunting, as judging that Exercise to be proper enough in a time of Peace, and healthful; as also very beneficial to harden the Body for War. And besides, the mind did suck in the purest pleasures therefrom and was greatly strengthened thereby, against Covetousness, Luxury, and other Vices, which spring from Idleness." Buchanan clearly here prioritised his Domadilla’s physical pursuits over his adoption of his father’s brand of equity, in describing traits James was to emulate. The proof of Domadilla’s fitness to rule was, here, in his decision to spend his time improving his body and mind by going hunting.

As Buchanan worked his way through his list of assorted Scottish monarchs, he focused on the personal crimes of a surprising number of them. Of Durstus, Scotland’s eleventh king, Buchanan noted that in addition to “giving up himself wholly to Wine and Women” he also prostituted his wife, the daughter of King of the Britains, out to his noble cronies. To be sure, then Durstus compounded his sins by assuring his people that he had reformed, before hiring men to slaughter them. Nevertheless, it was his early social and sexual misdeeds that first led the nobles to plot. As Roger Mason has suggested, this emphasis on the sexual misdeeds that justified depositions resonated nicely with the case of Mary. In the Historia, however, Buchanan was as concerned with shaping Mary’s heir as he was with

29 Buchanan, History, p. 98. Compare “Magnam enim temporis partem ventioni dedit. Id studium in pacem decorum, & corpori salubre ratus, & ad robur militare confirmandum maxime vile. Animum praeerea voluptates maxime puras inde capere; & adversus auaritiam, & lusiruam, caeteraque vitia, quae ex oicio gignuntur non modice roborari” in Buchanan, Rerum Scoticarum, 34V.
30 Buchanan, History, p. 102. Compare “tum demum se totum epulis & Veneri dedit” in Buchanan, Rerum Scoticarum, f. 35V.
legitimising his decision to remove Mary from power. It was essential that James understand that his own conduct would receive the same scrutiny from his own nobility, and, in James’s case, from the clergy they patronised.

To hammer this point home, Buchanan explained that after Durstus had died, the nobles had doubted the wisdom of electing one of his relations to take his place:

> After his death, in a Publick Assembly of the Nobles, here was a very fret Contest; some alledged, that, according to their Oath made to King Fergus, the ancient Custom was to be observed; others, fearing, that if they made any one of the Kindred of Durstus King, that either the Similitude of Manners would incline him to the same Wickedness; or else the Propinquity of Blood would make him study Revenge.\(^{32}\)

Though here Buchanan acknowledged the notion of hereditary traits that were passed down though the king’s blood, this recognition was a far cry from any kind of acknowledgment of a divine or even hereditary right to kingship. Indeed, if Buchanan’s account resembles any legal or political construct, it was the imagined blood taint that justified attainders. The concern that Durstus’s close relations might have inherited his unregal behaviours or might desire, closely associated as it was with the propinquity of blood, had particular resonance for Buchanan, since he was charged with ensuring that the infant King James repudiated the habits that cost his mother her throne. Since it was impossible for parliament to elect Mary’s successor, George Buchanan, in tutoring the young James, was taxed with ensuring that the “propinquity” of James’s blood to Mary’s did not further damage the Scottish throne.

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\(^{32}\) Buchanan, *History*, p. 103. Compare "IN comitiis Regis fuit inter proceres contentio aliis censentibus iuxa sacramentum Fergusio praestitum veterem esse morem seruandem, aliis metuentibus, ne si quem e Dursti propinquis facerent Regem, vel similitudo morum eum ad flagitia, vel sanguinis propinquitas ad vltionem impelleret" in Buchanan, *Rerum Scotiarearum*, f 36\(^{\text{b}}\). (A printer's error, however, has led to this page being misfoliated as a second f. 35.)
Despite his responsibilities, or perhaps because of them, Buchanan regarded the tradition of elective monarchy he claimed for Scotland with approval.

Yet for all the scope of the power Buchanan imagined for his ancient clan chiefs, they were not infallible. Electing their monarchs did not guarantee the chiefs good kings. As Buchanan noted of the twentieth king of Scotland, Dardanus, elected by the estates:

> No man, before him, entred upon the Government, of whom greater Expectations were conceived, and no Man did more egregiously deceive the Peoples Hopes. Before he undertook the chief Magistracy, he gave great Proof of his Liberality, Temperance and Fortitude. So that in the beginning of his Reign, he was an indifferent Good and Tolerable King, but he had scarce sat Three years on the Throne, before he ran headlong into all sorts of Wickednes.\(^33\)

Here, Dardanus was able to trick the estates by behaving with appropriate decorum until his election. The kind of scrutiny required for judging Dardanus’s suitability as king was impossible until he actually became king. It was only when Dardanus was in a position to rid himself of the councillors of the prior king, his own father, that his unsuitability for office became evident. Buchanan offered a strongly articulated case for the need, not only for an elective monarchy, but also for a monarch whose on-going rule depended on working closely with, and retaining the approval of, his counsellors and the Estates. Such a monarch's ability to placate his observers was, moreover, as much a matter of personal habits as it was of good governance.

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Appearance and Judgment in the *Baptistes*

To provide James with examples of good and bad kings, George Buchanan drew on his own career as well as Scotland's history. As a university professor in Bordeaux, Buchanan had written several Latin plays for his students to perform. Among them was the *Baptistes*, a drama along Senecan lines concerned with the execution of John the Baptist by King Herod. The *Baptistes* was Buchanan's most broadly political play, exploring the mutual responsibilities of ruler, religious élites, and common people.

Buchanan remarked in his own *Vita* that he composed the *Baptistes* in Bordeaux, early in the 1540s, and university records bear out his account. Nevertheless, like the rest of Buchanan's plays it remained unpublished during his time in France, and it was not until 1577 that the *Baptistes* was finally published, with a dedication to James VI. Buchanan used the dedication to express his hope that like the rest of Buchanan's "little books", all of which have come under his young king's patronage, claiming that:

> although it is abortive, yet it is my first offspring, and it may call forth the young from the common habit of stage fables to the imitation of antiquity, and it exerts manly spirits to the study of religious zeal, because it was then everywhere attacked. But it can be regarded as of particular interest for you to observe, because it plainly sets out the torments and miseries of tyrants, while they seem to prosper most greatly.\(^{34}\)

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Buchanan's wording here was highly significant: "cruciatus" (torments) was also a term for legitimate punishments such as execution and torture. Accordingly, the idea of tyrants falling prey to torments and miseries whilst seemingly at the height of their powers conflated earthly and providential justice. It also firmly fixed the punishment for tyranny as a physical reality: cruciatus could also refer to the executioner's tools.

Given the further elements of embodiment inherent in theatrical performances, which were, by definition, enacted, Buchanan could probably safely count on drawing pupil's attention from regular fabulous plays and "stage fables".

Nevertheless, Buchanan continued to experience some unease over the potential reception of his text: as he wrote on niggardly theatre-goers, "If anyone produces an ancient ploy, they make annoying interruptions, they cough and retch. But if anyone introduces a new one, they at once demand and approve and praise and love the old." Because he was telling a Biblical story of corruption that resembled modern day malfeasance, Buchanan insisted that discerning readers could make up their own minds as to whether "how the Baptist of old was crushed by royal lust and the crafty calumnies of jealous people" was an old story or a new one.

From the first lines of the opening scene, Buchanan emphasised the relationship between physical and political misfortune: the Pharisee Malchus complained, "Wretched old age, and imminent finality of my last breath, and unhappy fate, have you committed the end of my extended life that I should behold our land in

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slavery, our temples sacrilegiously polluted, things sacred and confounding?"\(^{38}\)

Malchus proceeded to detail the misfortunes suffered by the Israelites, explicitly connecting his own suffering with the excesses of tyrannous foreign kings and queens:

> All that the greed of Gabinius could grab or the extravagance of Antony could devour has one, and we have been the butt too for Cleopatra's gluttony, and unspeakable fate. And so that no humiliation would be lacking on any side, savage King Herod, great-grandson of the half-Arab Antipater, wields his cruel sceptre.\(^{39}\)

For Malchus, as in Buchanan's Scottish *Historia*, the problems of the entire population began with the irrational and uncontrolled appetites of their foreign monarchs. It was the greed, or lust, of Gabinius, Antony, and Cleopatra that weakened Israel. As Malchus noted, his people fared better with the "empurpled Senate", which had begun to adopt Jewish law. Yet this slight improvement in conditions was, according to Malchus, under threat from John the Baptist, who had so stirred up the mob that they were ignoring the same legal tradition that the Senate had finally been persuaded to adopt.

The dismay with which Malchus regarded the Baptist's evangelising efforts identified him as an unreliable interpreter of political and religious events. Indeed, his fellow rabbi Gamaliel cautioned Malchus against any rash judgment immediately after his diagnosis of the political situation. Nevertheless, though Gamaliel rejected his colleague's opinion of the Baptist, he had no rejoinder for Malchus's critique of


their monarchs. Instead, ironically enough, it was Malchus who argued that “it is surely not right for any man of the commons to revile his superior” and that “it is the task of the man in authority to lead the commoners, if they stray, back to the path. He must be his own law; if he sins God is there to witness and to punish his crime.”

There was considerable hypocrisy in Malchus’s remarks, given his own admission that John the Baptist was a Levite, and thus a hereditary priest. His hypocrisy became more striking given Malchus’s own opening denunciations of his temporal superiors, the monarchs. Yet Malchus, unaware of the irony and instability of his stance, attempted to position himself and his fellow Pharisees in a middle ground, where they would be both immune from the complaints of restless commoners and able to deliver fiery screeds attacking their kings and queens without fear of reprisals. In short, Malchus aspired to Estates-like status. Accordingly what made him unreliable was not his ambition, but rather his irrational rage, which Gamaliel ruefully remarked upon once his colleague had left to warn the king of his concerns about John the Baptist.

Indeed, as Gamaliel noted, the problem is less with Malchus and more with how his unreliable narrative will be received:

This indeed is always a common fault in almost all kings, that they readily make themselves available to informers. The more cruel a fiction, the more readily it is believed. Kings fabricate for themselves empty fears; they pay attention to the fickle breath of unsubstantiated gossip. The adviser of integrity is accounted cowardly, effete, stupid, dull. We have long ago transformed the senses of virtue because we

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shine with no virtue; but in our arrogance we deceive the ignorant crowd with shining claims to it.\textsuperscript{41}

Gamaliel was concerned about Herod's ability to accurately judge warnings of treasonous behaviour. His comments, moreover, implicitly linked the king and the "crowd" (\textit{vulgus rude})\textsuperscript{42} in their readiness to be manipulated by poor advisers. Yet kings, in Gamaliel's formulation, also shaped the advice they received: counselors who did not feed their fears of unrest were "accounted cowardly, effete, stupid, dull."

The polity which Buchanan depicted in the \textit{Baptistes} thus lacked an obvious source of good governance.

Scholars have noted the suspicion with which all of the characters in the \textit{Baptistes} regard ordinary people at some point or another. Tricia McElroy, in particular, has linked this distrust of the fickle nature of crowds with the play's overarching concern with the nature of hypocrisy. In turn, McElroy has argued, this concern with hypocrisy, and the people's inability to recognise it, made "co-opting" popular attention and approval the secret to political success.\textsuperscript{43} Certainly, for Herod, the rabbi and even John the Baptist himself, the fickleness of the crowd was an abiding concern. Yet this same preoccupation with whether a particular political or religious adversary was persuasive led to an equally pressing interest in how accurately his motives, and mien, could be read. In this respect, an exchange between

\begin{quote}
\textit{hoc adeo cunctis paene semper regibus / commune vitium, facile delatoribus / praebe re sese. quo quid est crudelis / fictum, facilius creditur. vanos metus / fingunt sibi ipsi; mobilis famae levem / sequuntur auram. qui fideliter monet, / timidus habetur, languidus torpens hebes. / virtutis olim vertimus iam nomina, / virtute nulla spendidi; sed splendidis / titulis superbi fallimus / vulgus rude." in \textit{ibid}, p. 105, ll.256-265.
\end{quote}

\textsuperscript{41} Buchanan, \textit{Tragedies}, p. 139. Compare "hoc adeo cunctis paene semper regibus / commune vitium, facile delatoribus / praebe re sese. quo quid est crudelis / fictum, facilius creditur. vanos metus / fingunt sibi ipsi; mobilis famae levem / sequuntur auram. qui fideliter monet, / timidus habetur, languidus torpens hebes. / virtutis olim vertimus iam nomina, / virtute nulla spendidi; sed splendidis / titulis superbi fallimus / vulgus rude." in \textit{ibid}, p. 105, ll.256-265.

\textsuperscript{42} See n. 37 above for Buchanan’s use of the phrase.

\textsuperscript{43} Tricia A. McElroy, "Performance, Print and Politics in George Buchanan’s \textit{Ane Detectioun of the duinges of Marie Quene of Scottes}" in \textit{George Buchanan}, ed. Caroline Erskine and Roger Mason, p. 55.
Herod and his wife, in which she attempted to persuade him that John and his faction constituted a threat, was typical:

HER. The holiness of the man [John the Baptist] refutes this charge.
QUEEN. Crimes often lurk hidden beneath such a cloak.
HER. Violence is to be feared from empurpled viceroyys.
QUEEN. And deceit is to be feared from stern-faced hypocrites.
HER. He is without wealth or arms, river-water slakes his thirst, the woodland gives him food, the earth a grassy bed; what guile will such a man be able to devise against a sceptred king?
QUEEN. You see his clothing, you see his food and drink, but what he has hidden in his heart you do not see."  

Despite the fact that John's status as a genuine holy man or hypocrite formed the crux of Herod's debate with his wife, neither was interested in what John actually said in the course of his preaching. Instead, their argument hinged on physical, rather than rhetorical, evidence: it was John's eating, sleeping, and dressing arrangements that had to hold up to scrutiny. Moreover, it was John's physical condition that had the most pressing ramifications for Herod's own conduct as a king, since he insisted to his queen that, "the condition of kings is wretched if it fears the wretched," prompting her to urge him to "beware that a false appearance of modesty does not seduce your mind from justice". For Herod, it was unseemly and enfeebling to imagine that a "wretch" whose way of life was as simple as the Baptist's should threaten a powerful monarch. For the queen, on the other hand, John's humble external appearance was deceptive and thus any leniency based on that appearance would inevitably be both deceived and deceptive. Leaving John unchecked would ultimately force Herod to far more

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 draconian repression of John's followers. Thus, the queen consistently undermined the possibility of correlation between the personal and the political, just as she did the connection between the physical and the political. Yet her own unreliability discouraged audiences from placing too much faith in her critique. In fact, her distrust demanded even greater attention from spectators who lacked an obviously correct stance with which to align themselves.

The problem of what an audience was to make of the relationship between characters' private behaviour and their political acumen was, however, further exacerbated by the difficulty of assessing that behaviour at first hand. The two most notorious and physical elements of the plot of the story of the Baptist, Salome's dancing and John's beheading, are carefully omitted from the on-stage action. This decision was in keeping with the demands of Senecan convention, but it had the additional ramification of ensuring that the focus remained not on the potential licentiousness of the princess's dancing nor on the blood thirsty nature of the tribute she demanded as recompense, but instead on Herod's actions in response to these stimuli. In the absence of any indication of just what about his daughter's dancing inclined Herod to such rash generosity, the problems inherent in royal appetites were even more apparent. Herod himself was aware of this scrutiny, reminding himself as well as the play's chorus that, "when we go out of doors we must don the mask of respectability. We are compelled to make kindly promises with benevolent countenances, to utter just sentiments openly, to put off anger with feigning heart, to repress hatred until the appropriate time, to utter the greatest threats when the greatest
causes of fear oppress the troubled breast. Even Herod acknowledged that he was constrained while in the public eye to conform to public expectations about kingly behaviour. He followed this admission, however, by resolving to behead the Baptist and “buttress the king’s authority in bloodshed” precisely because John has damaged his public reputation and “manifestly dared to censure me for an unchaste marriage before my face”. Significantly, Herod reasoned that this censure constituted a political threat: a man who accused his monarch of making an unchaste marriage – Herod had divorced his wife in order to marry his brother’s former wife – and defying the law was a man who would shortly challenge that monarch’s right to rule.

By beheading the Baptist, Herod hoped both to forestall the unrest that might arise from John’s censure and to clarify his understanding of his relationship with the law:

I regard as no concern of mine the babbling of the rabbi Malchus about the laws, the meddlesome issues which he raises in accusations undefined, as long as the people realise that this one law is to be observed: to believe that for me anything contrary to the law can be lawful.

The context of this articulation of the king’s right to circumvent the law was crucial to Buchanan’s larger argument about the role of law in the play: Herod uttered this rather programmatic statement in anticipation of his tyrannous execution of John the Baptist. This act of tyranny, in turn, was necessitated by John’s decision to rebuke Herod for making an unchaste marriage. While the latter act was not necessarily tyrannous, it

46 Buchanan, Tragedies, p. 146. Compare: "...cruore auctoritatem regiam / stabilire..." and "...ausus est / videlicet / mihi impudicas exprobrare nuptias / in os;..." in ibid, p. 113, ll. 550 and 553-5, respectively.
47 Buchanan, Tragedies, p. 146. Compare "quid Malchus iste garritat de legibus, / quas curiosas / quaestiones litisbus / inexplicatis iactet, id nihil mea / refere credo, modo populus unam hanc sciat / legem tenendum, praeteret leges mihi / licere quidvis esse legitimum putet" in ibid, p.113, ll. 567-72.
was certainly contrary to the law. Accordingly, it was personal lawlessness that started Herod down a slippery slope towards lawlessness. Indeed, for Herod, as for the kings who animated Buchanan's *Rerum Scotiarum Historia*, such backsliding from licentious disregard for the laws into outright tyranny was inevitable.

**Oath and Sacrifice in the *Jephthes***

Yet the appetites that inspire backsliding in monarchs were not always quite so venal even in Buchanan's accounting. The second play in which Buchanan drew on both Classical and Biblical sources was his *Jephthes* (c. 1545), a narrative taken from Judges 11. According to the Biblical text, Jephtha was the son of Gilead and a prostitute, whose brothers drove him out of Gilead's household because of his illegitimacy. Later, however, when, when the Ammonites attacked Gilead, the Gileadites appealed to Jephtha for help. He agreed to lead them against the Ammonites on the condition that they would make him their ruler after he had rescued them. While fighting with the Ammonites, Jephtha swore to God that he would sacrifice the first thing of his that greeted him when he returned from battle, if God granted him victory over the Ammonites. Jephtha then won the battle. When he subsequently returned home, his only child, a daughter, came rushing to meet him, and though Jephtha was horrified by the consequences of his oath, she urged him to fulfil its terms. After she had spent two months in the desert, lamenting the fact that she would never marry, she returned and Jephtha sacrificed her.

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48 There is some controversy about whether the *Jephthes* was written in 1543, in the immediate aftermath of his composition the *Medea*, another Latin tragedy, or in 1545-7 when he returned to Bordeaux. See I. D. McFarlane, *Buchanan* (London: Duckworth, 1981), p. 94.
The parallels between the story of Jephtha's daughter and *Iphigenia at Aulis* are obvious immediately: in both stories, success in war hinges on the sacrifice of a daughter. Buchanan, noting this similarity, gave Jephtha's daughter, who is never named in the Biblical version of the story, the name of Iphis (which is a cognate form of Iphigenia). Similarly, he names Jephtha's wife, Iphigenia's mother, Storge (the Greek word for maternal love), though she does not appear in the Biblical version at all. The most significant change Buchanan made, however, is in the character of Jephtha, who, in Buchanan's narrative plans to spare his daughter and take her place until she forestalls him.

Deborah Shuger has noted that with the rise of Biblical, and particularly Hebrew, exegesis, scholars in the fifteenth and sixteenth centuries began to interpret Jephtha's sacrifice differently than their medieval counterparts. If, after all, Jephtha had consecrated his daughter for a life of virginity, rather than killing her outright, it would explain the puzzling inclusion of Jephtha among the Old Testament saints listed in Hebrews 11:32.

In Buchanan's version, two conversations represent the play's dramatic centre, the question of what Jephtha will decide to do: he has the first with a priest (who is without a name) and the second with his wife and daughter. In the first the priest, arguing with Jephtha over the nature of his unwitting promise, rebuked him:

> Next, having fallen into wilful blindness you seek praise in your wrongdoing by use of honourable labels. You abolish distinctions of

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49 See Buchanan, *Tragedies*, trans. and ed. Sharratt and Walsh, p. 248
all kinds when you decide that what is just and unjust, mean and
honourable depends on the opinion of the fickle mob.\textsuperscript{51}
The priest urged Jephtha to atone for taking a foolish oath without honouring it, and
indeed by breaking it. Attempts to justify the oath were simply an inappropriate
search for "honourable labels" to attach to a promise that remained unholy. Indeed,
the priest stressed that ultimately divine law must be more significant than any
popular interpretation of those laws, arguing:

If however you think that these matters lie beyond the powers of men
and are subject to the Creator alone, you must believe that the laws
once revealed by him are equally or even more enduring and fixed, and
that men have no rights against them. Even the last day that overhangs
the world will not destroy his commands. The final fire will make
heaven and earth, air and water dissolve, but length of time will not
detract a tittle from the law bestowed by God.\textsuperscript{52}

Here the priest insists on the permanence, and even the immutability, of divine law
against Jephtha’s claim that, "the untaught and ignorant crowd holds fast to vows, and
has no truck with deceit; it regards as ratified what it has once promised to God."\textsuperscript{53}
Jephtha pointedly contrasted this simple sincerity with the priestly knowledge with
which he dismissed as "knowing how to screen one’s guilt and put a fair complexion
on most wicked deeds." Yet even recognising this problem in priestly wisdom,
Jephtha could not see that in citing the simple folk, he too sought a “fair complexion”
on his wicked deeds.

\textsuperscript{51} Buchanan, Tragedies, (translation Sharratt and Walsh’s), p. 85. Compare: “dein caecitatem lapsus in
spontineam / titulis honestis in sclere laudem petis, / rerumque tollis omnium discrimina / dum iniqua
iusta, foeda honesta mobilis / pendere vulgi statuis ex sententia.”

\textsuperscript{52} Buchanan, Tragedies, 86. Compare; “quod di sabitraris haec supra mortalium / vires et uni conditori
obnoxia / quas ille leges prodidit semel, puta / aeque perennes ac ratas aut amplius, / nec ullam in illas
esse ius moralibus. / nec qui summus imminet mundo dies / edicta rumpet illius. caelum et solum / et
aera et aquas solvet ignis ultimus; / de lege vero quae data est divinitus / non carpet apicem temporibus
longinquintas.”

\textsuperscript{53} Buchanan, Tragedies, 84. Compare: “...vulgus indocile et rude / voti tenax est, nescium fraudis;
The priest’s argument against being over trusting of the advice of the common people, however, was not necessarily more stable. As Deborah Shuger has noted, the priest attempted to align his own argument with the dictates of divine and natural law, but he declined to take up the question of which interpreters should determine how divine law should be understood and enforced. Certainly, he was unpersuaded by Jephtha’s insistence that he and his people, who avoided over-interpretation and simply carried out their oaths, but his very inability to convince Jephtha something as awful as Iphis’s sacrifice was not required by divine law was telling. Indeed, the priest’s logic was unlikely to appeal to Jephtha who, as an angel reminded audiences in the prologue, “is not some figure from the ranks of the powerful, a figure imposing with his crowd of dependents or arrogant with his offspring, but Jephtha, an exile from his father’s house, despised by his brothers and sprung from a lowborn mother.”

Jephtha himself, as the angel reminded us, was a commoner, perfectly capable of mistaken exegetics.

Yet so, presumably, was his wife Storge. In a second dialogue with Jephtha and Iphis, she lamented that she would not have Iphis’s marriage and grandchildren as a prop for her old age. Though such regrets were often universal, in this case, they indicated ways in which Storge might be coping with the family’s suddenly elevated status better than Jephtha. Storge thus noted that she had been hoping for her daughter’s marriage to a “glorious” man.

Jephtha rebuked her, remarking that:

though the disaster befalling all of us is savage, my fortune is much more savage than that of the rest. To your evils innocence is harnessed,

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54 Buchanan, *Tragedies*, p. 65. I have silently corrected Sharratt and Walsh’s rendering of the feminine *genetrice* from "father" to "mother," which is in closer tune with both the Latin grammar and the Biblical tradition that Jephtha’s mother was a prostitute. Otherwise, I have followed their translation. Compare: "sed e paternis exsulantem sedibus / Jephthen suisque fratibus pretum, satum / genetrice vili, ne superba gens suis / adsignet armis quod manu gestum est dei," in *ibid* p. 24, ll. 45-8.

and your unhappy wretchedness is free of the taint of wickedness; but I cannot play the criminal without being wretched, nor live disaster struck without crime. I alone am compelled both to do and suffer wickedness.\textsuperscript{56}

Jephtha's daughter eventually resolved his dilemma. Once she realised that he was determined to fulfil the terms of his terrible oath, Iphis voluntarily agreed to act as her father's sacrifice, silencing her mother's complaints and overriding her father's offer to die in her place -- one which Jephtha made only after Iphis expressed her willingness to die.

Even Jephtha's willingness to kill himself instead of his daughter was cast in terms of his reputation, since he insisted that:

A jealous neighbourhood shall not lay it at my door that I, the murderer of my daughter, spared myself in the late period of my life, and that I won the popularity of base fame with the blood of children which cost me little.\textsuperscript{57}

Iphis was unmoved by Jephtha's claims, and she insisted on remaining the victim of the sacrifice. Ultimately, Jephtha offered the sacrifice to which his vow had committed him; Buchanan did not specify whether Jephtha faced the opprobium he feared. The play closed with Storge's bitter grief over her daughter's noble resignation to her death. Jephtha, and his desperate desire to retain his reputation as a Godly, moral, and successful man, dropped out of the sight of the play's audience, a most effective condemnation for a leader who preferred to be liked and obedient than to be just.


Conclusion

Just as Edmund Plowden had taken up the tale of Iphigenia's sacrifice at Aulis, George Buchanan took on Jephtha. Yet where Plowden had tried to argue for Agamemnon's goodness as a king, if not as a father, Buchanan did not offer his Jephtha such generosity. Bowing to the dictates of the Senecan convention, Buchanan set Jephtha's oath and victory and the sacrifice of Iphis carefully off stage. This decision meant that it was difficult for an audience to decide whether Jephtha had correctly interpreted the sequence of events surrounding his victory. Accordingly, what characterises the Jephthes was Jephtha's hunger for approval. While Plowden aggressively tied the sacrifice of Iphigenia to raison d'état, Buchanan's reading of Iphis's sacrifice instead emphasised Jephtha's over-sensitivity to the attitudes, not of his educated councillors, but of the common people among whom he had lived until his defeat of the Ammonites. The Jephthes had an earlier printing than the Baptistes, and it was not obviously directed toward the Anglo-Scottish crown. Nevertheless, the play echoed the concerns of Buchanan's other political writings, preoccupied with questions of the relationship between rule and appetite, in this case an appetite for approbation.

The Baptistes, on the other hand was pointedly directed at the young monarch to whom it was dedicated. Indeed, it deserved the role that Buchanan assigned to it as the most particularly useful of the "little books" he dedicated to his royal charge. It provided dire warnings of the relationship between royal contempt for the law and tyranny. As I have argued, this relationship was not simply a conflation of the two ideas. Instead, Buchanan reasoned that where kings and queens were unwilling to obey the law in private, public censure would quickly drive them to tyrannous action.
Conversely, constant scrutiny must be applied to ensure that monarchs never succumbed to the temptation to abandon law and embrace tyranny -- to escape precisely this scrutiny by summarily dismissing or executing those who attempted to apply it. Despite the circularity inherent in this model, it ensured that both kings and their councillors had a vested interest in maintaining the degree of decorum necessary for royal office holding. Such an approach legitimated the deposition of Mary Stewart, whose guilt in adultery with Bothwell and Darnley’s murder made it impossible for her to rule justly. As Buchanan was at pains to demonstrate, where Mary's public office and licentiousness converged, she had every reason to conspire against the Earl of Moray and fix the trial of the Earl of Bothwell: in other words, as soon as Mary succumbed to her polluting appetites, she became unfit for her royal responsibilities.

For Buchanan, then, the proposition that the monarch was above the law was dangerous indeed. Kings and queens throughout Scotland's history, from Ferlegus down to Mary herself would abuse such a supra-legal status to gratify their desires at will, employing whatever tyrannical means were necessary to achieve their ends. Buchanan, paraphrasing Cicero in the De iure regni apud Scotos, could allow that kings, ideally, were “the law speaking” but only in a context in which the law was “a silent king.” This meant that kings required the law “as a colleague or rather as a curb on [their] passions”. Yet where the De jure regno apud Scotos was coy about where the task of interpreting the law, in difficult instances, fell, Buchanan’s historical and dramatic writings could be more forthright, at least by example. In the Detectioun

59 Buchanan, De jure regni, p. 33.
as well as the *Rerum Scoticarum Historia* and particularly the *Baptistes*, the public and performative nature of kingship were crucial, not merely because kings were to inspire good behaviour by example but also because public scrutiny was necessary to ensure that their passions were, in fact, being curbed by law.

It was, as Herod noted in the *Baptistes*, while he was “out of doors” that he felt compelled to “don the mask of respectability”. By the same token, it was his good behaviour during the period leading up to his election as king and immediately following it that assured the ancient Scots three years of tolerable governance under Dardanus before he revealed his true disdain for the law and Scotland lapsed into chaos. The kings Buchanan imagined behaved as moral exemplars because they knew that the moment they lapsed into immoral behaviour they became unfit for kingship.

Buchanan's neo-Classical model of law, dependent as it was on Cicero and Seneca bore little resemblance to Edmund Plowden’s vision of a relationship between law and kingship anchored in readings of English case law. Nevertheless, it is tempting to see Buchanan’s insistence on the inevitable proximity between lawlessness and tyranny as the inverse to Plowden’s insistence that even a prior attainder could not prevent the descent of the crown and body politic. Where Plowden’s body politic perfected the king’s body natural compensating for physical deformity and legally tainted blood alike, Buchanan’s kings were in constant danger of polluting and distorting public office to gratify personal appetites. Or, to borrow Plowden’s terminology, Buchanan rooted his case for limited monarchy in the notion that the body politic was very much endangered by the body natural.

As I have argued above, though Plowden did not seek to constrain the physical activities of the body natural, he was profoundly interested in circumscribing the landholding capabilities of that law. This kind of control, however, was a matter of
case law and precedent in extraordinary circumstances; certainly, it was a far cry from
the kind of constant scrutiny Buchanan envisaged. James VI and I, who received a
copy of Plowden's treatise justifying his mother's succession shortly after he inherited
the English throne, could be forgiven for preferring Plowden's model to Buchanan's
irrespective of the legal technicalities Plowden was at pains to elucidate. This is not to
say that James's reading of any single political or legal theorist shaped his policy in
England, nor indeed that James regularly invoked either man, even implicitly, in his
interactions with the parliament of 1604-1610. Nevertheless, it is essential to
remember that both Plowden's mode of thinking about the relationship between the
body natural and the body politic and Buchanan's approach to law, kingship and
physical appetites were available to James and his political opponents. As I will
argue, such context does much to clarify the strident naturalisation debates that so
surprised James in England.
4. Bodies at Odds: James VI and I and Competing Discourses of the Body Politic in his Parliaments and Political Writings

In the first sentences of his first remarks to the English parliament that convened on 19 March 1604,¹ James VI and I pointedly linked the imagery of the body politic with lavish rhetoric devoted to his subjects’ physical bodies. James explained that he had convened parliament partly so “that you who are here presently assembled to represent the Body of this whole Kingdom, and of all sorts of people within the same, may with your owne eares heare and that I out of mine owne mouth may deliver unto you the assurance of my due thankfulness for your so joyfull and generall applause to the declaring and receiving mee in this Seate.” Warming to the theme of his appreciation for his new subjects’ enthusiastic welcome, James continued by asking rhetorically:

Or shall it ever bee blotted out of my minde, how at my first entrie into this Kingdome, the people of all sorts rid and ran, nay rather flew to meet mee? their eyes flaming nothing but sparkles of affection, their mouthes and tongues uttering nothing but sounds of joy, their hands, feete and all the rest of their members in their gestures discovering a passionate longing, and earnestness to meete and embrace their new Soveraigne.²

Accordingly, James began by stressing the relationship between parliament’s representative function: if he, with his own mouth, told the lords and MPs of his gratitude, it was akin to telling the whole body politic, since parliament represented the whole kingdom. Yet even as James affirmed his desire to thank parliament as the representatives of the body politic, he reminded of his own immediate connection with the English subjects who “flew” to meet him. This bond, which James

¹ I have kept dates in the Old Style, but taken the new year to start on 1 January.
recognized through his subjects' physical and sensory reactions to his arrival, was
unmediated by parliament or statute. Instead, James emphasized the links between his
subjects, the members of his body politic, and their own members, links that directly
tied his body politic to his subjects’ natural bodies. In the rest of this chapter, I will
discuss James’s deployment of the body politic in parliament in relation to English
legal doctrine, focusing on James’s invocation of monstrosity and bigamy before
turning to James’s more pointed discussions of royal sovereignty in his political
writings. Finally, I will conclude by assessing parliamentary responses to James’s
language and his desire for public union.

From King as Pawn to Government by Pen: James VI’s Rule in Scotland

Before continuing my analysis of the relationship between James’s political
thought and legal thought and his approach to coaxing the English into a closer union
with Scotland, however, it will be useful to consider the Scottish experience that he
brought to his English throne. In 1607, James assured his intractable English
parliament that he could govern Scotland by his pen alone. His claim was, of course,
exaggerated. As Maurice Lee, James’s most sympathetic modern biographer, has
argued, James relied heavily on the services of the rival Scottish politicians George
Home and Alexander Seton, whom he created Earls of Dunbar and Dunfermline
respectively, to continue his Scottish policies in his absence. Dunbar was particularly
effective, but the exertions of frequent travel between London and Edinburgh almost
certainly hastened his death in 1611. Nevertheless, Julian Goodare has argued that
James’s famous claim to govern by pen in Scotland referred primarily to his efforts to
monopolise warfare and bring the Kirk to heel, and that, in 1607, James could claim considerable progress on both fronts.3

Given the circumstances that prevailed for much of the sixteenth century, this progress is something of a testament to James’s political savvy. As Jenny Wormald has noted, Mary’s deposition in 1567 was considerably less disastrous to Scotland than it might have been in a state less accustomed to monarchs who had yet to attain majority.4 After all, Mary’s childhood in France had marked a far more stable period for Scotland than her return to Scotland and a pair of disastrous marriages, or as one scholar pithily noted, an adult monarch “could be a bit of a nuisance”.5 This comfort with monarchs whose age prevented them from exerting too much personal influence on policy meant that Scotland developed a strong tradition of consultation.6 For all of its familiarity with child rulers, however, Scotland remained vulnerable to the potential consequences of such young kings and queens, control of the monarch’s person provided considerable leverage and control of a child monarch was considerably easier than control an adult one. It was this vulnerability that made it imperative for Mary of Guise to bundle her daughter off to France to avoid the importuning of the English who had hoped to marry Mary Stewart to the young Edward VI and were prepared to invade to secure the person of the young queen, and thus the betrothal. In 1572, the Earl of Mar attempted to kidnap James VI out of his uncle Alexander Erskine’s custody at Stirling. This event was to have a significant

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5 Goodare, *State and Society*, p. 69.
impact on the young James. As Maurice Lee has noted, the attack made James realise that, "he was not the king: he was a child with a crown on his head. Possession of his person was everything."7 Thus, the earliest period of James’s Scottish monarchy offered the young king visceral evidence of vulnerability of his person and its importance in politics.

This rather grim lesson in the limitations of royal control was repeated a decade later. William Ruthven, Earl of Gowrie, and several others who shared his ideological and religious alignment with Andrew Melville, kidnapped their teenage king, hoping to sever his relationship with his cousin Esme Stewart, the Duke of Lennox, whose apparent conversion from Catholicism they distrusted. The Ruthven raiders, as they became known, held James for a period of ten months, during which time Gowrie assumed control of the government and pursued a strongly Presbyterian agenda. In escaping from his captors, James threw in his lot with the Earl of Arran, who had unsuccessfully attempted to rescue James from Gowrie immediately after the kidnapping. Arran thus assumed control of the king’s party, and under his leadership, parliament passed the so-called “Black Acts” of 1584, which affirmed James’s place at the head of the Kirk of Scotland and re-established the place of bishops in Scotland’s ecclesiastical hierarchy.8

This initial attempt to curb the independent inclinations of the more radical Presbyterians was not to last, however. Instead, Sir John Maitland, who would later become James’s closest advisor and the first Lord of Thirlestane, persuaded the more

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7 Maurice Lee, Great Britain's Solomon: James VI and I and his Three Kingdoms (Urbana Champaign, IL: University of Illinois Press, 1990), p. 42.
moderate members of the clergy to adopt a compromise: they would follow the law and acknowledge royal jurisdiction over the Kirk as long as the law and the king’s jurisdiction did not conflict with the word of God. This compromise, which Maurice Lee termed “a convenient ambiguity”, was not inherently stable in itself, but after Arran fell from power the parliament of 1587 voted to annex the temporalities and benefices of the bishops to the crown, robbing them of much of their power and prestige. Shepherding this annexation through parliament won Maitland the support of the Presbyterians, and he cemented his relationship with them in 1592, when he persuaded James to push parliament to repeal the Black Acts’ provision for Episcopal jurisdiction.

Ultimately, Andrew Melville and his followers precipitated their own loss of control of the Kirk. By the time the General Assembly convened on 24 March 1596, its relations with James had soured: the assembly opened with a determination to root out the sins of each estate, and the king and queen, through preaching. Alarmed, James himself addressed the assembly the next day, urging the assembled ministers to instruct the synods not to preach against him, the queen, or his advisors without forewarning. In the seventeenth-century Scottish ecclesiastical historian David Calderwood’s account:

the king granted he was a sinner, as other men were, but not infected, he trusted with anie grosse sinne; and therefore required, that no preacher would inveygh against him or his counsell publiclie, but to come to him or them privilie, and tell what is the offence; and as for himself, if he mended not, incace he were guiltie, they might deale publiclie: his chamber doore sould be made patent to the meanest minister in Scotland; there sould not be anie meane gentleman in

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9 See Mullan, *Episcopacy in Scotland*, pp. 79-80; 126
Scotland more subject to the good order and discipline of the kirk than he would be." This guarantee of good behaviour did not entirely reassure the Presbyterian hardliners in the assembly who drew up a series of Articles for presentation to the king, detailing his and Queen Anne's moral failings.

From this point, Andrew Melville and his adherents continued in strident insistence on clerical independence. David Black, a follower of Melville's who preached at St Andrews, offered a fiery sermon accusing the king – indeed all kings – of being in league with the devil, and Elizabeth in particular of being an atheist. When he was called upon to retract his statement, Black insisted that neither king nor secular court had any power to discipline him. Such power was reserved to his fellow godly ministers. Because Black had insulted Elizabeth as well as James, the latter could begin to proceed against Black and his defenders without risk of interference from England. Thus, at the General Assembly of 1597, James began a period of intense personal lobbying. Though he forbore to raise the issue of restoring the power of the episcopacy directly, James had regained the initiative in matters of ecclesiological governance. By 1607, James could thus claim with some authority, if rather obliquely, that he had brought religious affairs in Scotland under crown control.

Yet in doing so, James had, of necessity, confronted the tenuous nature of his own authority. The threat of abduction that had hung over his minority had demonstrated that control of his physical person was enough to legitimize a regime.

Thus James VI developed a keen sense of the importance of his actual body to the fate

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of Scotland’s governance. Moreover, when challenged by the General Assembly, James proved willing and able to put his tutor George Buchanan’s political precepts into practice: while James protested strongly against the threat of public reprimand from the ministers of Scotland, he was at least politic enough to assure them that if they spared him their censure in the pulpit, that they would always be able to criticise his behaviour in private. While in part, James was continuing Maitland’s policy of propitiating the ministers who remained his allies in controlling the less tractable magnates, he was also guided by the examples set out in the *Baptistes* and the *Jephtha*, and inviting the private reprimand of the first estate but not public censure.\(^\text{12}\)

Certainly, once the more radical contingent of ministers had lost the sympathy of the moderate clergy and alienated all but the most devoted of the aristocracy, James made no bones about pursuing his plans for the restoration of the episcopacy. Yet the suggestion that James had possessed a long strategy overstates the case. Instead, he pursued a reactive, pragmatic approach. Meanwhile, James developed a corpus of political writing that consolidated his own attitudes on issues of sovereignty. Yet though James insisted in theory that his kingship was a matter of divine right rather than a matter of aristocratic, public, or ministerial consent, in practice he was willing to propitiate the Scottish clergy when necessary. In short, James VI’s reign in Scotland provided him with ample reason to articulate his understanding of divine right, but it also offered ample experience in compromise and patience. Moreover, James’s encounters with the General Assembly emphasised his court, and even his

own body as contested sites of religious and moral practice that should guide his whole kingdom.

Monstrosity and the Body Politic in Parliament, Law and Popular Print

Perhaps unsurprisingly given the role of his person in his experience of Scottish politics, James’s deployment of the rhetoric of the body politic became even more pointed when he turned his attention to his hopes for a fuller, parliamentary union of England and Scotland. Because he invoked, whether knowingly or not, a number of legal issues, it is worth quoting James’s analogies at length. In language that explicitly echoed religious ceremonies, James announced:

What God hath made conjoyned then, let no man separate. I am the Husband and all this whole Isle is my lawfull Wife; I am the Head, and it is my Body, I am the Shepherd, and it is my flocke: I hope therefore no man will be so unreasonable as to think that I that am a Christian King under the Gospel, should be a Polygamist and husband to two wives; that I being the Head, should have a divided and monstrous Body...But as I am assured, that no honest Subject of whatsoever degree within my whole dominions, is less glad of this joyfull Union then I am; So may the frivolous objection of any that would bee hinderers of this worke...bee easily answered.13

The legal connotations of bigamy, which crossed national boundaries, will be readily apparent to modern readers as well as to James’s audience. The legal connotations of having a “monstrous body” are perhaps less apparent, but no less significant. Though Conrad Russell has rightly noted that James “did not instinctively think in legal terms”, James certainly managed to invoke compelling legal possibilities in his

13 James VI and I, Political Writings, p. 136.
discussion of monsters and bigamists alike. Indeed, Russell’s conclusion that part of James’s difficulty in getting his plans for Union through parliament was his inability to instinctively “conceive of authority separate from the king’s person” points out the remarkable complexity of the ways that royal personhood and state authority became linked rhetorically with the legal personhood of subjects in the course of James’s Union efforts. As we shall see, unpacking the nature of the capacities of James’s English and Scottish subjects, especially the post nati brought about significant developments in thinking about the capacities and obligations of subjects as well as the nature of the royal person. Yet for James, even before that point, clearly there were benefits to insisting upon being the head of an imaginary body even before the naturalisation issue came to a head.

James’s monstrous body politic invoked a number of strains of thought. As we have established, the body politic itself was a established figure of political rhetoric, occurring in both Platonic and Aristotelian philosophy and recognisable in its religious sister trope, the Church as a body with Christ at the head. Yet even John Calvin, echoes of whose thought would haunt James in the fiery arguments of Andrew Melville, acknowledged the similarity between the invisible body of the Church and the bodies that men imagined constituting everything from guilds to nations. To prevent any such confusion, Andrew Melville met with his monarch in September 1596 to remind him that, "thair is twa Kings and twa Kingdomes in Scotland. Thair is Chryst Jesus the King, and his kingdome the Kirk, whase subject King James the Saxt is, and of whase kingdom nocht and king, nor a lord, nor a heid,

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bot a member!" Accordingly to Melville, James’s status as a mere member of the kingdom of Christ’s body obligated the king to provide aid and succour to Christ’s ministers, rather than trying to set their agenda.

Though Calvin, like Melville, was careful to insist that the body of the Church was more substantial than any mere body politic of a state, he nevertheless noted that “it is quite a common thing for any such association or company to be called a body, as, for instance, the body-politic, the governing body, and the body and the people.” Calvin thus noted the possibility of slippage between the common language of the bodies formed by secular associations, and states, but he was careful to differentiate them from the association of Christians in a Church, “for they [Christians] do not constitute a mere body-politic but are the spiritual and mystical body of Christ, as Paul himself adds.” Still, Calvin recognised the rhetorical value of Classical sources pertaining to the mundane bodies formed by men for themselves: “Once, long ago, when Menenius Agrippa wanted to reconcile the Roman people to the Senate, against whom they were rebelling, he told a fable, which bore some resemblance to what Paul is teaching here.” The instance of story telling that Calvin pointed to here was recorded in Livy’s *Ab Urbe Condita* and was a retelling of Aesop’s famous fable of the belly and the members. In the fable, when the arms and legs accused the belly of idleness and greed, to pay them back, the belly refused them nourishment until they realised their interdependence. For Calvin, though such a fable should certainly not be conflated with the Pauline imagery of Christ’s body and its many earthly members,

16 Melville, *Diary*, pp.370-1.
for readers familiar with Livy’s history, it could be a useful, if insufficient, way of coming to understand the significance of Paul’s more mystical account. As Calvin’s account indicates, there was value for the church as well as for politicians in the overlapping of the rhetoric of the body politic with that of Christ’s body on earth.¹⁹

A specifically monstrous body politic also had religious connotations. As Julie Crawford has noted in her book, Marvelous Protestantism, the sixteenth and seventeenth centuries produced a rich pamphlet literature detailing, and often vividly illustrating, monstrous births.²⁰ This literature encouraged readers to construe monstrosity in terms of reprobation and social disorder. This popular genre of pamphlets meant that James inevitably invoked the possibility that a monstrous body politic was not a body politic elected by God. The pamphlets that Crawford considered dealt primarily with the circumstances of births themselves; they rarely followed those of their subjects who survived into adulthood. The immediacy of the pamphlet market ensured that the focus of this discourse of monstrosity remained the birth itself. There was little or no description of how such children, very often understood as evidence of familial or communal sinfulness, were integrated into their families or communities. In this respect, pamphlet literature that focused on monstrous births rather than monstrous lives resembled the legal tradition that denied those deemed “monsters” many of the rights and duties of full legal persons.

In this context, it is worth remembering that in English law, unlike civil and Romano-canonical law, did not legitimise children whose parents married after they

were born. In considering this doctrine Sir John Fortescue noted that nature itself was "marking the natural or bastarde children, as it were, with a certeine privie marke in their soules." Fortescue justified the way in which law echoed nature’s condemnation by insisting that,

> the law, which punisheth the offendours issue, doth more penallye prohibite sinne, then that, which plageth but the offendour alone...Is not this law then chast and pure? And dothe it not more forceably and more earnestly suppress sinne, then the foresayde Civile Lawe, whiche winketh at the sinne of lecherie and leaveth it unpunished? Here, Fortescue’s justification of excluding the illegitimate from English inheritance law was two-pronged: first he wanted to protect property from the “privie marke”, the internal monstrosity; secondly, he envisioned English common law as exerting a normative function. Potential parents, inspired by the harsh necessity of the law that harmed their children, he reasoned, would be less likely to spoil their chances by indulging in premarital sex. Julie Crawford has noted that monstrous birth pamphlets frequently emphasised the sinfulness of the infants’ parents. Pamphlet literature identifying monstrous births as a result of parental sin placed those as types rather than people. Similarly, illegitimate children, in Fortescue’s reasoning, ruptured their family’s bloodlines. They also made their parents public exemplars of the legal and dynastic consequences of premarital sex.

The curious role of monsters in English legal discourse began in the thirteenth century with the influential medieval text, *On the Laws and Customs of England*,

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21 Fortescue, *De Laudibus* (1567), f. 98v.
22 *Ibif*, ff. 91v-92v.
attributed to Henry de Bracton. Drawing on the Italian civil jurist Azo of Bologna, the author of “Bracton,” as the text came to be known to subsequent generations of jurists, opined that “those procreated perversely, against the way of human kind, as where a woman brings forth a monster or a prodigy” should not be reckoned “among children” for purposes of inheriting property, a crucial element of legal personhood. Interestingly, the text carefully differentiated between children born with “three hands or feet,” who should be considered “beasts and monsters” and those who were “crooked or humpbacked” or had too many or few fingers and remained recognizably – and legally children. The legal scholar Andrew N. Sharpe, however, has argued persuasively that conjoined twins were “monstrous” for the purposes of Bracton’s legal taxonomy. When Coke produced his own list of those ineligible to be heirs, in the context of the commentary on Thomas de Littleton’s Tenures that formed the first part of his Institutes (1628), he placed monsters shortly before aliens born out of the king’s allegiance. Indeed, assessing the problem of those who could neither purchase nor retain lands, Coke baldly stated, “A monster borne within lawfull matrimonie, that hath not humane shape canot purchase, much lesse retaine any thing. The same law is de professis & mortuis seculo, for they are civiliter mortui.” As we shall see in the next chapter, Coke’s thinking about the legal personhood of those born outside of the king’s allegiance, under Bracton’s influence, had considerable importance for Jacobean politics. More immediately, the bars to monsters being heirs in England

24 Debate about how much of the treatise attributed to Henry de Bracton were actually written by him continue to this present day. For the best recent account of previous arguments about the authorship of Bracton, see Paul Brand “The Date and Authorship of Bracton: a Response,” The Journal of Legal History, 31, no. 3 (Dec. 2010): pp. 217-44.


conjured a sense of the fragility of the dynastic union between England and Scotland, highlighting the need to shore it up with a stronger legal union as quickly as could be arranged.

As Bracton’s reference to Azo indicates, the English prohibition against “monsters” inheriting, or by extension participating fully in legal personhood, was grounded in civil law, as was much of the law about property and capacity governing sixteenth-century Scotland. It is unlikely but not impossible that James might have known of the full legal ramifications of what he was arguing. Even if he did not, however, the notion of a monstrously conjoined body politic would have been profoundly upsetting to the sensibilities of those in England who endorsed the doctrine of the crown as a body politic. As Edmund Plowden argued within his early Elizabethan law reports, “the Body natural and the body Politic are consolidated into one, and the Body politic wipes away every imperfection of the other body.” The legal and intellectual historian Alan Cromartie is right to caution scholars from following Ernst Kantorowicz and F. W. Maitland into the trap of reading Plowden as any kind of oracle of lawyers’ opinions. Yet Plowden’s own somewhat immodest claim that he was driven to publish in part by the immoderate demand for his reports among clerks and students at the Inns of Court indicates that his opinion was, if not representative, at least influential. More specifically, as we have seen, James VI and

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29 Plowden, Commentaries, f. 238 R.
31 Plowden Commentaires, unfoliated front matter.
I himself received a copy of Plowden’s lengthy treatise arguing the Stuart case during the Elizabethan succession crisis. For Plowden, the perfection of the body politic was a legal necessity, a fiction to be deployed when circumstances demanded – to all intents and purposes, it was a legal constraint, especially for the flesh and blood monarchs who could not revoke grants made in their minorities or purchase lands that did not revert to the body politic without considerable difficulty. A monstrous body politic was thus one that neither any law nor the legal theories of Edmund Plowden could constrain. Where the law could not control incapacities, like those associated with monstrosity, it could not control capacity either.

**Bigamy and Political Rhetoric**

Even James's insistence that it was not lawful for a Christian monarch to "be a Polygamist and husband to two wives" had additional, legal valences for his audience. Primarily, it invoked James’s own emphasis on how inappropriate such bigamy would be for a Christian monarch and stressed concerns pertaining to Ecclesiastical law. Yet it also explicitly referred again, explicitly. For his audience, however, the model of the family as a little kingdom, and a little body politic, had resonances in criminal law as well. In the *Eirenarcha*, William Lambarde’s hugely popular manual for Justices of the Peace, he reminded JPs that wives who killed their husbands committed “petite treason” rather than murder, since such a crime constituted an attack on the natural order and the whole of the familial body politic. In fact, the greater severity of the crime leads Lambarde to give it pride of place in his exhaustive list of “Felonies in

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32 William Lambarde, *Eirenarcha: or Of the Office of the justices of the peace in foure booke*. First gathered in 1579, published in 1581, and now fourthly revised, corrected, and enlarged in this fortie and one yeare of the peaceableaigne of our most gracious Queen Elizabeth (London: Printed by Thomas Wright and Bonham Norton, 1599), p. 404. The English Short Title Catalogue lists twenty-one editions of the Eirenarcha published 1581-1626, a testament to its popularity.
Lay causes” ahead of murder, burglary and rebellious assemblies. Lambarde’s popularity does not, of course, mean that James himself intended to make even an oblique reference to English criminal law’s approach to spousal murder. Nevertheless, the possibility of an irregular marriage of a kingly bridegroom to two mutually suspicious nation-brides would have raised the spectre of petty treason for anyone familiar with Lambarde’s text or the statute of Edward III to which it referred.

James therefore presented his parliamentary auditors with several metaphorical threats of a body politic profoundly disordered by disunion. These metaphors were a masterful stroke: they functioned simultaneously a multiplicity of levels. Both cases stressed the similarity of the body politic to the body natural. More specifically, James’s language not only literalised the metaphor of the body politic, it also emphasised the analogy between the body politic and the body natural as a subject of statute and legal custom. To be sure, James’s assertion that he had no desire to be the shepherd of a divided flock reminded his listeners that as a king he was an emissary of God.33 In the context of his invocation of the familiar terms of the body politic, the suggestion that the king had a dual nature, part king part kingdom, just as Christ did, was well nigh unavoidable. Nevertheless, the main thrust of James’s rhetoric was not toward the dual nature of the king’s body but toward the nexus of connections between the king’s body politic and his subjects’ actual bodies. These connections could be performances of the idea that subjects’ bodies constituted the body politic, as when James fondly remembered his subjects’ physical eagerness to embrace their new sovereign. They could also suggest analogies between the body politic, which, in Fortescue’s formulation, had the laws as its muscles and sinews, and

33 James VI and I, Political Writings, p. 136.
individual, real bodies, which were subject to law. As we shall see, conflating the two senses had considerable significance within James’s case for his vision of the Union.

Parliament’s Response

In the meantime, Sir Edward Phelips, the speaker of the House of Commons, was quick to pick up on the ramifications of James’s language. In responding on behalf of the Commons, Phelips urged the king to “be pleased, of all others most renowned Sovereign, in a few and unfiled Words, to entertain with Your gracious Aspect a comparative Resemblance between a Body by Nature and the Body Politick of this Your Majesty’s Commonwealth, figured and drawn out of the Rules of Law.” In these “few and unfiled” words, Phelips reminded James that the laws, the proper subject of his address as a product of the Middle Temple, as well as the Speaker of the House, were “Nervi Reipublicae et Liamenta, the Bonds and Sinews of this Kingdom.”

Phelips expanded on the metaphor that James had introduced in rather more traditional terms: just as the king was the head of the body politic, so were his “loyal and faithful Subjects” the body itself, while the laws were the “politick life”, and their “execution”, in the form of James’s dispensation of justice under law, was the “politic soul”. Armed with this approach, Sir Edward Phelips moved on to an account of the duties of the people as the body politic: where the king as head must exhibit religious devotion, legislative prudence, magnanimous government, and merciful judgment, his subjects must match his virtues with diligent prayer for his wellbeing, obedience,

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34 CJ I, p. 147.
military support of royal dignity, and willing acquiescence to taxation. Then Phelips remarked that just as the prudence of the actual, physical head protected an individual body from disease, "so the Wisedom, Prudence, and good Guide of the Politick Head, is the sovereign Preservative against the infectious poison of Discord and Disorder." This mention of "infectious poison" may have been an oblique reference to James's own *Basilikon Doron*, which reminded Prince Henry, for whom it was written, that he should consider himself the physician who must prescribe treatment for his kingdom. Indeed in noting the emergence of a literary discourse of disease in the body politic, Jonathan Gil Harris has noted James's fondness for the metaphor within his *Counterblaste to Tobacco* (1604), though Harris inexplicably ignores similar language, which occurs in the *Basilikon Doron*. Strikingly, outside of his speeches to parliament on the Union, James's use of the body politic metaphor was almost entirely abstract. While he frequently deployed the pathogenic account of this language noted by Harris, James generally avoided identifying himself as the head of a body politic, making use of the trope only in his treatise *The Trew Law of Free Monarchies, or the Reciprock and Mutuall Dutie Bewtixt A Free King, and His Natural Subjects*. James first published it anonymously in Edinburgh in 1598 but republished with James's name for the first time in 1603.

36 Ibid, loc. cit.
37 CJ I, loc. cit.
The Trew Law and A Conference About the Next Succession

Peter Lake has argued that James originally composed the *Trew Law* in response to an anonymous and highly seditious contribution to the Elizabethan succession debate, *A Conference About the Next Succession to the Crown of Ingland* (1594), now widely attributed to the English Jesuit Robert Parsons (1546-1610).\(^{39}\) Moreover, he has suggested that James co-opted the body imagery of the *Conference*.\(^ {40}\) Indeed, though Parsons and James were both almost certainly thinking of Aristotelian and Pauline language when they invoked this imagery, the parallels are striking. In Parson’s account, “as the whole body is of more authority then the only head, and may cure the head if it be out of tune, so may the wealpublique cure or cutt of their heades, if they infest the rest, seing that a body civil may have divers heades, by succession, and is not bound ever to one, as a body natural is.”\(^ {41}\) Here the cure, which James was to imagine flowing from the head to the body, instead moved from the rest of the body to a head that was, specifically in the case of the body civil, expendable. Despite the violence of Parson’s imagery, noted by Lake, his body civil seemed far more abstract than James’s. The head might be *prima inter pares* among the rest of members of the civil body, but it was not the only part capable of rational

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\(^{41}\) [Robert Parsons], *A Conference about the next Succession to the Crowne of Ingland*, divided into Two Parts Where-of The First Conteyneth the discourse of a civill Lawyer, how and in what manner propinquity of blood is to be preferred, And the second the speech of a Temporall Lawyer, about the particuler title of all such as do or may pretende within Ingland or without, to the next succession. Where unto is also added a new & perfect arbor or genalogie of the discents of all the kinges and princes of Ingland, from the conquest unto this day, whereby each mans pretence is made more plaine (Imprinted at N. [Antwerp]: Published by R. Doleman, 1594), p. 38.
judgment, otherwise, it would not be expendable. Yet Parsons insisted that a body natural, “if it had the same ability that when it had an aking or sickly head, it could cut it of and take another, I doubt not, but it would so do, and that al men would confesse that it had authority sufficient & reason to do, the same rather then al the other partes should perish or live in payne and continual tourment.” While this explanation does certainly distinguish between the body civil, which can cut off its own had, and the body natural, which cannot, it also increased the visceral force of the metaphor. It is curious, that even in the confines of the body natural, Parsons did not envisage the head as the seat of reason and judgment. Even in his body politic, the head had no especial significance, and the role of individual members and organs was left carefully vague.

Parson’s loose, anthropomorphic notion of the body civil differed even more widely from Plowden’s notion of the body politic than it did from James’s. Yet Plowden’s conception of the king’s body politic neatly sidestepped Parson’s conception of an undying body politic with many mortal heads, since as we have seen, Plowden insisted upon an undying body politic, which was transferred from monarch to monarch. Though Plowden’s construct was necessary for royal landowning, as we shall see, the royal capacity to hold land was closely connected with the capacity to rule, especially in the context of the Trew Law.

The Trew Law, which analyses “the trew grounds of the mutuall duetie, and alleageance betwixt a free and absolute Monarche, and his people,” has spawned considerable interest among contemporary scholars attempting to find the source and

43 [Parsons], A Conference touching succession, p. 38.
44 James VI and I, Political Writings, p. 64, italics original.
nature of the so-called “Stuart absolutism”. Unlike the Basilikon Doron, the Trew Law was explicitly written with a wide audience in mind; James intended it to instruct his subjects in obedience rather than his son in sovereignty. Moreover, even here, the language of the body politic is oriented towards medical, rather than legal, thought about the body. As James noted:

For from the head, being the seate of Judgement, proceedeth the care and foresight of guiding, and preventing all evill that may come to the body or an part therof. The head cares for the body, so doeth the King for his people. As the discourse and direction flowes from the head, and the execution according thereunto belongs to the rest of the members, every one according to their office: so is it betwixt a wise Prince, and his people. As the judgement comming from the head may not onely imploie the members, euery one in their owne office as long as they are able for it; but likewise in case any of them be affected with any infirmitie must care and provide for their remedy, in-case it be curable, and if otherwise, gar cut them and his people. And as there is euer hope of curing any diseased member by the direction of the head, as long as it is whole; buy by the contrary, if it be troubled, all the members are partakers of that paine, so is it betwixt the Prince and his people.

James’s analogies point here, again, to a body natural writ large rather than the distinctively legal body politic envisioned, as we have seen, by Edmund Plowden. Judgment here was tied to “care” rather than a more specific legal connotation. Indeed, the passage was redolent of the language of medicine, from the notion of subjects as members of the body to the language of “infirmitie.” His insistence that

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45 See in particular, Paul Christianson, “Royal and Parliamentary Voices on the ancient constitution, c. 1604-1621”, in The Mental World of the Jacobean Court, ed. Linda Levy Peck (Cambridge: Cambridge University Press, 1991), pp. 77-8 and Glenn Burgess, Absolute Monarchy and the Stuart Constitution (New Haven, CT: Yale University Press, 1996), pp. 40-3 for the debate over whether the True Law is (as Christianson suggests) or is not (as Burgess argues) an absolutist text.

46 James VI and I, Political Writings, pp. 76-7.

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heads determine not only the remedies but also the best plans for prevention went even farther than George Buchanan’s references to physicians and Parson’s claims that heads should bow to the greater authority of whole bodies. Unlike a physician, consulted only after illness took hold, a head is, quite literally, indivisible from a healthy body. Indeed, in aligning kings with both heads and fathers, James staked out his rhetorical territory in opposition to Buchanan’s: not only were free monarchs part and parcel of the natural order, they were utterly necessary for the very engendering and development of a kingdom. In James’s hands, Buchanan’s metaphor of a physician expanded to encompass a much broader sense of natural order, and to place the monarch at the centre of it.

More surprising for modern readers than James’s understanding of the relationship between kings and heads may be his assertion that the head is the natural source of both “discourse and direction”. This language already carried connotations of conversation and exchange, in addition to its now obsolete meanings of progress through a process, particularly progress through reasoning. Paired with “direction” here, and used to describe the head’s relationship to the members of the body, it seemed to carry a communicative meaning; yet this meaning, linked as it is with communication, and by extension mutuality, was at odds with the significance of the passage: the movement of directions was, by definition, from head to body. With whom, then, does the head engage in discourse? Certainly, discourse as a process of reasoning can occur in the head alone, but discourse as an act of conversation requires interlocutors. The head, then, is a conduit for discourse from outside the body: if foreign ideas are to enter into the body of Scotland, it is James’s role as head to
translate this discourse into action. It is the head, and only the head, through which foreign ideas and ideologies pass into a healthy body politic.

Just as there could be no bodies without heads, there could be no children without fathers. James develops his fatherhood analogy considerably further than his references to the realm as body, and it is in the former context that we begin to see his understanding of the socio-legal ramifications of “free monarchy” take shape. Moreover, it seems to be a metaphor that James situated closer to literal truth. Considering the king’s coronation oath, James assured his readers and subjects that “by the Law of Nature the king becomes a naturall Father to all his Lieges at his Coronation: And as the Father of his fatherly duty is bound to care for the nourishing, education, and vertuous government of his children.”47 James considered biological fatherhood in a similar vein, arguing that a father’s role was “in a word, to thinke that his earthly felicitie and life standeth and liveth more in them [his children], nor in himself.”48 In meditations on both regal and biological parenthood, James skirted the specifics of how exactly such care was manifested. Despite the significance of lineal descent in kingship, James made no mention of inheritance. Instead, the emphasis was on the connection between earthly felicity and the behaviour of fathers.

James quickly moved to consider the relationship between property inheritance and monarchical government. Considering the warning against kings that God delivered to the Israelites through Samuel, James provided commentary on the warning that kings would take:

As if he would say; The best and noblest of your blood shall be compelled in slavish and servile offices to serve him: And not content of his owne patrimonie, will make up a rent to his owne use out of

47 James VI and I, Political Writings, p. 65.
48 Ibid, p. 66.
That it is entirely possible for kings to abuse their power and seize their subjects’ lands and properties is a startling admission from a monarch, for all that he acknowledged that this would require an inversion of the laws of nature. Yet James insisted that even where kings had overturned the laws of nature, subjects must still abide by them. It would, according to James’s logic, be unnatural for a king to consume his subjects’ property, but it would not, in his mind, be illegal.

James shored up his argument that dutiful subjects would meekly bear this constant, though remote, threat to their patrimony by drawing on Scottish history as well as legal customs themselves: in some places, James acknowledged that there was evidence of a contractarian notion that the commonwealth should designate a king from among those potentially worthy of the honour; but in Scotland, James argued:

...as our Chronicles beare witnesse, this Ile, and especially our part of it, being scantly inhabited, but by very few, and they as barbarians and scant of civilitie, as number, there comes out first King Fergus, with a great number with him, out of Ireland, which was long inhabited before us, and making himselfe master of the countrey by his own friendship, and force, as well as of the Ireland-men that came with him, as of the countrie-men, that willingly fell to him, hee made hiselme King and Lord, as well of the whole landes, as of the whole inhabitants within the same. Thereafter he and his successors, a long while after their being Kingses, made and established their lawes from time to time, and as the occasion required. So the trewth is directly contrarie in our state to the false affirmation of such seditious writers,

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49 Ibid, 69.
as would persuade us, that the Lawes and state of our countrey were established before the admitting of a king.  

James here insisted that Fergus's right to govern by conquest pertained because he had arrived in a largely uninhabited and uncivilised country. Moreover, the claim that Fergus attained his mastery of Scotland through a mix of friendship and force elided the line between contract and conquest. Given that the end result of Fergus's rule was benevolent law-making by him and his descendents, James could suggest that a precise sense of how that rule was attained was unimportant.

The logical end-result of Fergus as conquering law-giver was Fergus as ultimate land-giver. Ironically, James might here have found himself in agreement with his eventual political sparring parter, Sir Edward Coke, who would famously assert in 1628 that “all the lands and tenements in England in the hands of subjects, are holden mediately or immediately of the King. For in the law of England we have not properly, Allodium [the absolute right to ownership of land vested in a subject].”

In both England and Scotland, across a wide spectrum of opinion, then, the right of monarchs to stand as the ultimate holders and distributors of real property was sacrosanct.

This was a point that James himself emphasised, noting that just as the king had a claim to “hoords,” or treasure troves found under the earth, so he had a right to the lands of any person “inheritour of any lands or goods” who might “dye without any sort of heires”. From this evidence James reasoned that: “the king is over-Lord of the whole land: so is he Master over every person that inhabiteth the same, having

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50 James VI and I, Political Writings, p. 73.
52 James VI and I, Political Writings p. 74.
power over the life and death of every one of them." At base, then, being a free and absolute monarch was a matter of owning the land of the realm freely and absolutely.

In preferring a less legalistic and less anthropomorphic approach to the metaphor, James followed in the footsteps of his own childhood tutor, George Buchanan, who invoked the need of physicians for the body politic in striking ways in his dialogue *De Jure Regni Apud Socotos (On the Law of Kingship Among the Scots).* The dialogue, which Buchanan dedicated to his pupil, forcibly argued for and lauded a tradition of monarchy by consent in Scotland. Indeed, it was in this context that Buchanan invoked the body politic, making his own character in the dialogue tell his friend Thomas Maitland:

...the body politic, like the physical body has its own special equilibrium which, I think, we can most properly call justice. It is justice that oversees the individual parts and ensures that they continue to fulfil their functions; it removes excess, sometimes by blood-letting, sometimes by expelling harmful elements, as if by a purgative; sometimes it arouses despondent and fearful minds, and comforts those lacking in confidence, restoring the whole body to that balance which I mentioned. Once restored, justice exercises the body with appropriate labours and, by prescribing a due measure of work and leisure, preserves as far as possible the health which has been regained."  

From this analogy, George Buchanan argued that the ancient citizenry were wont to choose those most conspicuous for justice from among their own ranks to act as physician of the body politic. Invoking the model of the body politic that placed the king at its head would therefore have been inapt, since the organism of the state Buchanan envisioned depended on the ability of each member to recognise the

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53 Ibid, pp. 74-5.  
symptoms of the whole. Accordingly in Buchanan’s usage, the metaphor simultaneously depended on citizens’ discernment and encouraged their interpretations, since illness was familiar enough to make even the thorniest of political problems seem comprehensible. Buchanan’s body politic needed the intervention not of a head, but of a series of its members in turn.

Needless to say, despite the dedication of the *De Jure Regni*, James did not adopt much of Buchanan’s political theory. Nevertheless, he continued to invoke the terminology of the body politic in need of a physician in terms strikingly reminiscent of Buchanan’s own language. James warned his son and heir apparent Prince Henry “that yee may the readier with wisedom and Justice governe your subjects, by knowing what vices they are naturallie most inclined to, as a good Physician, who must first know what peccant humours his patient naturallie is most subject unto, before he can begin his cure.” Unlike Buchanan, James was firmly invested in the idea that the qualifications of a competent physician for the body politic were closely connected to his birth and divine right. Yet for a king who would go on to assert that “*rex est lex loquens,*” an overeager embrace of the notion of a body politic with the monarch at its head carried its own complications. As a purely rhetorical matter, the concept was not apparently dangerous, but as we have seen, legally, the king had two bodies precisely because the law needed him to have to bodies in order to function. This did not mean that the king was necessarily subject to individual laws, but it did create analogies between the king’s indivisible body politic and his subjects’ constrained natural bodies. Accordingly, invoking this imagery carried as many pitfalls as it did possibilities. Small wonder then, that James had preferred the more

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55 James VI and I, *Political Writings*, p. 25.
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abstract language that Sir Edward Phelips employed as speaker of the House of Commons in 1604.

The Parliamentary Debate

Despite this possible compliment to James’s own sensibilities in discussing the body politic, in his speech Phelips did not touch once on the matter of the Union so dear to his monarch’s heart. Given the opinions that Phelips came to voice with respect to the union, his reluctance to respond to James’s own call for quick parliamentary ratification for the Union was not surprising. Nor it is surprising that Phelips’s oratory lacked the unsettling edge of legal and dynastic threat to a non-unified England and Scotland that marked James’s speech.

James followed up his speech by further urging the Union with greater eagerness than the MPs. Though Sir William Morrice (or Maurice) had introduced a motion for the Union and the name of “Great Britain” on 31 March, James VI and I found it necessary to remind the Commons as well as the Lords on 13 April, that the Union should form the first part of their major business, taking the current session of parliament to prepare its terms and the subsequent session to enact them. The next day, emissaries from the House of Lords descended upon the Commons, urging them to agree to a Conference between the two houses to settle the matter of the Union. The MPs agreed and dispatched committeeemen who included Francis Bacon, Henry Yelverton (son of Sir Christopher Yelverton, who was one of the Calvin’s case judges), the antiquary William Hakewill, and the lawyer John Doddridge, among others.

56 CJ I, p. 171.
others. At last, on Wednesday 18 April 1604, the House of Commons finally began debating the adoption of the name of "Great Britain." Once the debate commenced, it quickly came to dominate the business before the Commons.

Within days, battle lines had been drawn. Opponents of Union suggested that it would be unwise to change the name of the kingdom, arguing that if the Union failed, it would be impossible for parliament to vote on legislation enacted in the name of Great Britain. Interestingly for our purposes, these opponents pithily framed this case on their insistence that it would be foolish to conduct a baptism for the new nation where as yet there had been no birth. Even the opponents of James's union evidently found his inclination to link the body politic with the markers of legal personhood in individuals. Unlike James, however, MPs on both sides of the debate avoided commenting upon the potential monstrosity of the disunited body politic. It is hardly surprising, then, that the Union in name failed in the Commons.

James's reaction was two-fold. Where parliament refused to promulgate legislation, he changed his title by a proclamation issued 17 October 1604, in which he boldly claimed that "divers of the ancient Lawes of this Realme are ipso facto expired...as namely that of Escuage, and of the Naturalization of the Subjects." James reasoned that eliminating these particular "ancient Lawes" would be easier to abandon because in other ancient law, England and Scotland were more alike than any other nations. Since James pointed particularly to matters of property, jury trials, and assembling writs, it seems highly likely that he was aware of the ramifications of

57 For a full list of the committee-men, see Ibid, p. 172.
58 Ibid, pp. 177-8.
59 James VI and I, "A Proclamation for the Uniting of England and Scotland" in Stuart Royal Proclamations, pp. 18-19.

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his earlier claims. Meanwhile, he devoted considerable energy to the organisation of
the union commissioners and a list of topics they were to consider.

James hoped to build upon the momentum of his October proclamation, but
his plan carried pitfalls. At some point in October, the young MP for St Mawes,
Dudley Carleton, had urged the potential pitfalls of issuing the proclamation before
parliament reconvened in February, after the English and Scottish commissioners had
taken the time to consider the elements of the Union before them. Carleton hastened
to state that he was not questioning the breadth of James’s authority, “the question not
being whether his Majesty may of himself assume this style of King of Brittany
without parliament.” Instead, Carleton fretted that

> being onely styled the King of Great Britany, *mutato nomine* he is but
> the same man, and that which may be now done by proclamation will
> be in the kings power to doe then, or at any] time as well as now. This
> benefit may come by ye stay, that happely the Parlement will be more
> inclinable to ascent into it and then it will be more warrantable or at
> lest the will request the king to take it uppon himsef without theyr
> warrant and then can there be no exception taken to his Majestis
> proceding. Whereas now the misconceaving vulgar will take this
> sound reason, and such as skoffingly have owt that so the king had the
> name, he would not much care for the matter, may happily come this
> neere the marke that the more the king takes uppon himself the less
> will be yealded him by Parlement and better it were to attend with
> patience to have the matter preced the name then in all haps to make
> sure the name, and have no matter follow.\(^6^0\)

Since James had issued a proclamation assuming his new style, is impossible to assess
Carleton’s perhaps naive claims that parliament would have willingly granted James

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\(^6^0\) Dudley Carleton, “Notes Urging the Expedience of the King’s not assuming the style of ‘King of
Great Britain’ by proclamation, but waiting to have it conferred upon his by the next session” PRO SP
14/9A f. 215\(^8\).
VI and I the title of King of Britain had he waited until next session. Yet Carleton’s warning, which is undated but calendared before the proclamation itself, did give scope to precisely the sort of backlash James, by his immediate emphasis on the similarity between England and Scotland’s laws, hoped to avoid. His emphasis on the practical similarities between his two kingdoms suggested precisely James’s unwillingness that the name should come at the expense of the matter.

Yet James’s hopes that where the body natural led, the body politic would follow were not fulfilled. The House of Commons resisted the possibility of Union assiduously. The most obviously vehement opponent of union was undoubtedly Sir Christopher Pigott. On what turned out to be a particularly ill-fated Friday 13 February 1607, much to his fellow MPs’ consternation:

In this difference of opinion, Sir [Christopher] Piggott Knight, One of the Knights of the Shire for the County of Buck, with a loud Voice (not standing up bare-headed, with Reverence to the State of the Assembly, as the Order is) pressed to have [summaries of the Articles of Union between England and Scotland] read generally, and at once, concurring in that with the Opinion of divers others. But the House observing his Earnestness and manner of sitting and calling, for Order-sake urged him to stand up and speak, if he were desirous to make known his Opinion. Whereupon he arose, and pretending at the first to deliver some Reasons why he pressed the Reading of the Remembrances generally, he afterwards entered into By-matter of Invective against the Scotts and the Scottish Nation, using many Words of Scandal and Obloquy, ill beseeing such an Audience, not pertinent to the Matter in Hand, and very unseasonable to the Time and Occasion, as after was conceived. Which his Speech, as it was unadvised and rude in Dislike of that which passed from him with so great Distemper; yet, out of a common Care to follow and expedite the
weighty Business then in hand, his said Speech was, for this Day, with a general Amazement, neglected without Tax or Censure. If the House of Commons’ scribes coyly avoided going into the specifics of Pigott’s speech, James’s informants there were not nearly so reserved. The following Monday, James informed the house of his “mislike” of the failure to interrupt Pigott’s speech before its contents became public. The MPs excused themselves on the grounds that they had hoped that their silence would prove censure enough. At James’s behest, however, the Commons agreed to revisit Pigott’s words in greater detail, providing a list of the points in his speech which had most offended the Commons: “Let us not join Murderers, Thieves, and the roguish Scotts, with the well-deserving Scotts. – As much Difference between them, as between a Judge and a Thief. – He would speak his Conscience, without Flattery of any Creature whatsoever. – They have not suffered above Two Kings to die in their Beds, these Two Hundred Years. – Our king hath hardly escaped them: They have attempted him. – Now he is come from amongst them, let us free him from such Attempts hereafter.”

Having reviewed his inflammatory remarks, the Commons decided to expel Pigott from Parliament and briefly imprisoned him in the Tower, refusing to heed his claims that he was merely attempting to differentiate between good and bad Scots. Instead, they dismissed the oratory for which he had failed to so much as remove his hat. Modern scholars have tended to think of Pigott as the only MP incautious enough to voice the general mood of the opponents to union in the House. Certainly, the MPs’ ability to rehearse the main points of the speech suggests that it engaged their

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64 Ibid, loc. cit.
attention, but the elements of the speech that are rehearsed in the summary also illuminate some of the more complex concerns underlying the Commons' reluctant mood.

Pigott's assertion that the Scots were inclined to do away with their monarchs certainly betrayed a rather biased assessment of Scottish history. It also, however, ignored the inconvenient fact that the Union debate had been interrupted by the decidedly anti-Scottish Gunpowder Plot. Treacherous Scots were thus not the only dangers that the "king hath hardly escaped". Moreover, as the next chapter will indicate, the capacity to commit treason, the one instance in which damage to the king's body natural was perceived as a serious threat to the well-being of the body politic, was closely connected with questions of the legal underpinnings of allegiance throughout sixteenth- and seventeenth-century law reports.

Meanwhile, the Lords had at last persuaded the Commons to meet with them in conference, but the opponents to Union in the House of Commons remained implacable in their opposition. Yet they quickly realised that a new strategy for organised opposition was necessary. It came in the form of an embrace of "perfect Union." Suddenly staunch opponents of Union began to insist that they would welcome the indentization of the entirety of Scotland, just as soon as the Scots themselves embraced English law and government. By 7 March 1607, Edwin Sandys, arguing that allegiance was located in the body politic, rather than the body natural, was charged with presenting the Commons approach to the Lords at the two houses

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next conference: “we mean to deal with ante-nati or post-nati, alike: To declare our Meaning in the Word Naturalization: To declare our Meaning in the perfect Union.”

The Commons’ meaning in "perfect Union" was not in accord with the king’s. At the end of March 1607, after the second conference of the Lords and Commons had provided Sandys and opportunity to voice the Commons’ concerns about the dangers of imperfect Union, James addressed both houses, sharply rebuking the Commons for their faulty logic. James too asserted his desire for a "perfect Union," rehearsing the metaphors of the head with two bodies and bigamous spouse to stress that such things were no more possible than “for One King to govern Two Countries contiguous, the One a greater, the other a less; a richer, a poorer; the greater drawing like an Adamant, the lesser to the Commodities thereof.” Since James was certainly aware of the existence of composite monarchies such as those in Aragon and Castile and Poland-Lithuania, his logic in this argument once again depended on a vision of the body politic as the subject of a discourse of legal personhood.

James continued by castigating members of the Commons on the grounds that, “Every honest Man desireth a perfect Union, but they that say so, and admit no Preparation thereto, have mel in ore, fel in corde [sweetness in their mouths, bile in their hearts].” Clearly frustrated by the fact that his opponents could now claim that they desired his own ends more urgently than he himself did, James turned to the problem of naturalisation. He would not, he assured his audience, speak of the common law, of which he professed “no great knowledge”. Instead he turned to the civil law, arguing that it counted the right “to make Aliens Citizens” part of the king’s

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68 James VI and I, *Political Writings*, p. 163.
70 Ibid, *Political Writings*, p. 171.
prerogative and that as common law had set no precedent for the position of the Scots, under the Roman maxims that “rex est lex loquens” and “rex est judex” that he should be allowed to naturalise the Scottish post-nati with or without the support of the Commons or the judges. Ultimately James’s speech failed to persuade the MPs opposing naturalisation in the House of Commons to change their minds. There is little immediate evidence that they were particularly alarmed by James’s recourse to civil law, or even his claims that to be the law speaking, but nor were they willing to bend at his request.

Conclusion

When parliament proved intransigent, James turned to the courts. There, the English lawyers and justices charged with arguing and deciding the Calvin’s case test to the legal status of the post nati assembled a tremendously sophisticated account of the relationship between sovereign and subject precisely to prevent such an event. In doing so, they drew on an anthropomorphic model of the body politic rhetorically while also making extensive use of the technical legal conception of the body politic as a kind of corporation. James VI and I might draw on a body of which he was head – or husband – for rhetorical indications of his indispensability to that body, his realm, and even his similitude to Christ whose vassal on earth he was.

The deployment of the legal conception of the body politic as corporation, as we shall see, was more complicated. We have already seen how, in Plowden’s reading of the cases of the Duchy of Lancaster and Willion v. Berkeley, the doctrine of the king’s body politic could be used to constrain how monarchs held, bought, and granted lands. The challenge of Calvin’s case was to use this account of the body

71 Ibid, Political Writings, loc. cit.
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politic and the body natural to grant the king what he wanted while limiting his power to seize it for himself. After all, the easiest way to convince (or constrain) the king to accept the legal doctrine that gave him an imaginary body, one no less subject to the laws of his realm than his subjects real bodies, was to use this doctrine to fulfil a royal need. In the remaining chapters of this study, I turn to how England's judges fleshed out their monarch's imaginary body in the period surrounding Calvin's case.
5. The Rise of Calvin's Case – Parliamentary Preparation

The opposition to the naturalisation of the post nati in the House of Commons proved to be remarkably entrenched. Accordingly, in 1608, James VI and I turned to the English judges to resolve the issue and in doing so he also arranged the trial of one of the most significant "test cases" in early modern England. This case has had far-reaching consequences for both seventeenth-century politics and for contemporary understandings of citizenship, which have emerged from the debate in Coke's account of Calvin's case around the nature of allegiance and subjecthood. In arguing and deciding the case, lawyers and judges had to consider and explicate the legal idea of a body politic that belonged to the king. For the moment of Calvin's case itself, therefore, the intellectual content of the legal fiction of the body politic mattered. Because of the significance of Calvin's case, it will be useful to consider both the medieval origins of the logic that underpinned the 1607 decision and its immediate parliamentary context. I will next outline specific historical context of Calvin's case, focusing on resistance to the naturalisation of the Scottish post nati in the English House of Commons, and the declaration in favour of naturalisation that the judges of England made before a conference of the Houses of Commons and Lords in the spring of 1607. The arguments the judges advanced then anticipated Coke and Ellesmere's subsequent opinions from the bench, as I will argue when I consider the language of the arguments themselves.

The problem in law that dominated Calvin's case was whether or not the post nati were aliens, born outside of the king's allegiance (a word which is itself derived from the law French ligeanse). This in turn indicated its dependence on the
1351 Statute *De Natis Ultra Mare* (of Birth in Parts Beyond the Sea), which the legal scholar Keechang Kim has argued marked one of the most important moments in the development of English law.\(^1\) The statute, however, did not fundamentally deal with either aliens or foreigners.\(^2\) Instead, it concerned children born to servitors of the English crown living outside of England at the time of the births of their offspring, and it stipulated that such children were, in fact, subjects of the king. In the words of the 1603 edition of Rastell's *Collection in English of the Statutes now in Force*,

> al children inheritable, which from henceforth shalbe borne out of the liegeance of the king, whose fathers and mothers at the time of their birth be and shal be of the faith, and of the liegeance of the king of England shall have and inioy the same benefits and advantages, to have and beare inheritance with in the same liegeance as the other inheritors aforesaid [those born in the territories of England].\(^3\)

This insistence that the children of Englishmen, who are "in the liegeance of the King of England" despite not being on English soil when they are born is juxtaposed with an account of specific children born to English parents but "out of the ligeance of England".\(^4\) The question of who was born inside of the king's, or for that matter England's, allegiance, and who was not, remained ambiguous in this account of the statute. The term “ligeance” works both as a marker of the geographical limits king's authority and in the sense of “faith and ligeance”, a less

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\(^3\) William Rastell, *A Collection in English, of the Statutes now in force, continued from the beginning of Magna Charta, made in the ix. Yeere of the reigne of King H. iii. Untill the end of the Parliament holden in the three and fortieth yere of the reigne of our late Soveraigne Lady Queene Elizabeth, under Titles placed by order of Alphabet* (London, Thomas Wight, 1603), 1\(^5\).
\(^4\) Rastell, *loc cit.*

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tangible but no less legally-binding obligation to the monarch. Keechang Kim has persuasively argued that lawyers first began taking advantage of the wiggle room created by this ambiguity since even before the Statute De Natis Ultra Mare was enacted, focusing particularly on the 1321 case of Rex v. Philip de Beauvais. In this case, Philip de Beauvais, whose grandfather had been awarded the franchise, was having trouble inheriting it because he traced his right through his father who had been born overseas, making it nearly impossible for his son to trace descent through him. This was because birth beyond the seas made it difficult to demonstrate that de Beauvais had been born under the necessary conditions for his son to inherit legally. Serjeant Shardlow, who represented Philip de Beauvais, won the case arguing by that no matter where his client's father had been born, he had been born and remained in the king's service. Even before the enactment of the statute De Natis Ultra Mare in 1351, the language of ligeance occasionally carried enough flexibility to allow for judgments like the one Shardlow won for de Beauvais. Nevertheless, it was to Rastell's printed version of the statute that both Coke and Ellesmere referred their readers, so it is to Rastell's version that I will refer.

It is important to note that in Rastell's often published and re-edited collections of the English statutes this assessment of who was and was not an alien appeared on the first page, under the heading "Abilitie and Nonabilitie." The Rastells' collection of statute law, begun by John Rastell and printed first by his son William, was the first to organize its contents thematically and alphabetically,

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5 Kim, Aliens in Medieval Law (2000), pp. 126-44 passim; see pp. 139-140 in particularly for Kim’s account of Rex v. Philip de Beauvais.
which accounted for its popularity over the course of the sixteenth century. It was an accident of orthography and not a mark of its importance that the concept of "abilitie and nonabilitie" got first billing in Rastell's account of English statute law. Yet as Richard J Ross has argued the relationship between "fixity" in law and a movement towards print exemplified by entrepreneurs like Rastell were closely interconnected; both have done much to shape how law emerged out of the seventeenth century. Particularly as Englishmen crossed the Atlantic portability became a necessary element of a particular case's fitness as a precedent.

The eventual emergence of this kind of fixity carries the risk of teleological readings of law: it is all too easy to forget the role of contingency and chance in enshrining some cases and texts in legal memory and leaving others by the wayside. Indeed, to students of modern-day English, and particularly American, law the role that Calvin's case has played, both detailing legal precedent and establishing new precedents for subsequent generations, has seemed inevitable. There is considerable value, therefore, in Keechang Kim's reminder that "the task of lawyers is to win the case they are arguing at present. Past texts (precedents) are invoked to add judicial authority to the party's present argument, not to elucidate the historical accuracy of the party's understanding of the past." Lawyers, and even judges, had immediate agendas when they wrote even the most influential medieval and early modern case reports. That these agendas carried the day does not mean that scholars can afford to be inattentive to them. Before I turn to the agendas of the judges who reported on Calvin's case, however, it will be useful to

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6 As J. H. Baker has noted, from 1557 through the 1620s, Rastell's abridgment of the statutes was reissued for the end of every session of parliament. See J. H. Baker, "Rastell, William (1508-1565)", in Oxford Dictionary of National Biography, Oxford University Press, 2004-.

7 Kim, Aliens in Medieval Law, 188.
consider the immediate historical circumstances that generated the case’s urgency. In order to properly analyse political role the judges fulfilled in Calvin’s case, it is necessary to understand the way in which the parliamentary debate and union conference in 1606-7 anticipated Calvin’s case.

**1606-7: Political Gridlock and Judicial Opinion in Parliament**

For James possession of a politic capacity was hardly a panacea. Despite his own considerable efforts, and the able assistance of Salisbury in the Privy Council and Sir Francis Bacon in the House of Commons, James could not persuade the English House of Commons of the wisdom of adopting his plans for a fuller union between England and Scotland than his accession to the English throne could, in and of itself, guarantee. Yet the union had occupied the majority of James’s energies since 1604, when, at his behest, the English and Scottish parliaments had each passed acts authorising commissioners – chosen by the parliaments themselves, though James tried to stipulate the membership of the Scottish commission – to negotiate the terms of the union James envisioned. The commissioners would then present their recommendations to their respective parliaments, which would duly enact them.®

Broadly, the commissioners’ recommendations may be broken into three categories: recommendations about the borders and the repeal of "hostile" laws in both kingdoms, recommendations for standardising English and Scottish trading

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8 I have used the term “politic capacity” to differentiate a capacity created, or governed, by human political action (like the body politic in which such a capacity was situated) from a capacity, or a facility, for politics.

overseas, and recommendations respecting mutual naturalisation of subjects of both kingdoms. In the final "Articles" which the Commissioners presented to the parliaments of England and Scotland and to James, the second category overwhelmingly dominated the first and third. Thanks to the terms of the current iteration of the longstanding "Auld Alliance" between Scotland and France, which exempted the Scots from paying standard customs rates in France, English merchants worried that their Scottish counterparts would hold an unfair advantage when their trade with England expanded. Even a cursory reading of the table of contents appended to the "Instrument" indicates the priority of these economic preoccupations: ten headings deal with hostile acts, the borders and extradition between the kingdoms; five concern naturalisation; and no fewer than twenty-six concern relations between England and Scotland with respect to trade. With the further detail that many of the so-called "hostile" acts concerned the prohibition of trade in specific commodities from one kingdom to the other in mind, the commissioners' focus on economic considerations became inescapable.10

Even James, when he addressed his first English parliament in 1604, was careful to stress the economic benefits of Union, noting that "by Peace abroad with their Neighbours, the Towns flourish, the Merchants become rich, the Trade doth increase, and the People of all Sorts of the Land enjoy free Liberty to exercise themselves in their several Vocations, without Peril, or Disturbance."11 James was, in general, more likely to couch his hopes for parliament in the Biblical and Classical tropes of the body politic, as he did in much of the rest of that initial

10 "Articles of Union between England and Scotland", [undated 1604] SP 14/10B, PRO, see pp. 32-7 for the hostile acts and pp. 41-71 for the commissioners recommendations on trade. (This volume of the State Papers is bound horizontally and thus paginated rather than foliated.)
11 CJ I, pp.142-3.
speech. This early assertion that the "piece of [James's] person" was tied to individual and collective economic well-being was clearly aimed at concerns that union with Scotland would be a drain on English purses rather than any fear of a threat to English liberty.

At any rate, the Commons remained unmoved both by James's insistence that union would be to the benefit of England as well as Scotland and by the recommendations which the English and Scottish commissioners returned to their respective parliaments. Sir Edwin Sandys, who -- ironically enough -- had been awarded his knighthood by James VI and I, led the opposition after 1604, as MP for Stockbridge. Despite having become what Theodore K. Rabb came to term "the quintessential 'Commons man,'" Sandys framed his objections to the union in terms that bore little resemblance to the extra-parliamentary debate on allegiance and liberty Greenberg has so astutely tracked through the writings of the exiled English Jesuit Robert Parsons, whose objections to Union were discussed in chapter three. Greenberg is right to draw readers' attention to role of "conquest theory" in Parsons's text, but such theory is less in evidence in Sandys's objections within parliament.

Instead Sandys and his allies warned of "a deluge of Scots" rushing to follow their king to the greener pastures in England. He went on to offer dire predictions that within forty years the daughters of Englishmen would find themselves "married into Scotland and the Scots inhabit here [England]."

Underneath such blatant xenophobia lurked social and economic concerns. Scots

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14 CJ I, p. 955
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who came to England would receive positions of patronage that should have gone to Englishmen. English daughters married into Scotland would take English dowries with them. It was this concern that led Sandys to spearhead the opposition to James’s plans for union in parliament. This opposition ultimately led him to adopt a strategy of so-called "perfect union", arguing that he would support naturalisation for the Scots when there was a complete union of laws and customs, that is, when the Scots adopted English laws and customs. Since neither the English nor the Scots were likely to endorse such a union, such a stance allowed Sandys and others of his ilk to resist union without giving the king an excuse for offence.

Before Sandys was forced into this stance, however, there was a conference between the Houses of Commons and Lords on the issue of naturalisation at which the chief justices of England gave their opinions of the question to members of both houses. Francis Moore (1559-1621), an MP for South Fawley, Berkshire, client of Chancellor Ellesmere, and eventual Bencher in the Middle Temple kept careful notes (later published in Somers Tracts under the editorship of Sir Walter Scott) on the conference between the Lords and the Commons at which the judges, Ellesmere among them, gave their opinions. Moore himself had longstanding reservations about the practical ramifications of union with Scotland, but he offered a full account of the judges’ reasoning in favour of naturalisation of the post nati. Moreover, Moore provided an account of the speech with which Sir Francis Bacon opened the conference, in which Bacon reminded his fellow MPs that, “this conference, and the subject thereof, was not in deliberativo; but in judiciali, not de bono but de vero, not to consult of a law to be made, but to declare
the law already planted”.

Bacon thus established that while James VI and I could not force the Commons to ratify all of the recommendations of the union commissioners in statute form, he could at least, through the judges, dictate what matters relating to union were already settled under law. Ellesmere, taking up Bacon’s language, argued further for naturalisation of the Scots as a fait accompli, insisting that, as the purpose of the conference sessions were descriptive, not prescriptive, under English law, “The king’s proclamaton having divulged it so, it is for his honour to declare it so, if it be not clear otherwise.”

The ramifications of this expansion of Bacon’s initial rhetoric are worth pausing over: Ellesmere’s insistence that parliament ought to honour James’s proclamations depended on “it”, presumably pre-existing English law, not being clear otherwise. In the context of the conference on naturalisation, it fell to the judges to declare what the existing law stated, so in effect, Ellesmere here interposed judicial opinion as a means of mediating between royal will and parliamentary statute.

Henry Howard, Earl of Northampton followed Ellesmere’s pithy reminder that the purpose of the conference was clarifying existing English law with an appeal to civil law, not as a valid source of precedent or irrelevant foreign custom, but rather as a source of “considerations between the union of a body politique and a body natural”. These considerations were, for the most part typical: law was the binding sinew of the body politic, and trade its nourishing blood. Yet Howard

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16 [Francis Moore], The Conference held the 25 February 1606 [1607], between the Lord’s Committees and the Commons, touching the Scots,” A Collection of Scarce and Valuable Tracts, on the Most Interesting and Entertaining Subjects But Chiefly Such as Relate to the History and Constitution of These Kingdoms, Selected from an Infinite Number in Print and Manuscript in the Royal, Cotton, Sion, and other Public, as well as Private, Libraries; Particularly That of the Late Lord Somers, Ed. Walter Scott, Vol. II (London: Printed for T. Cadell and W. Davies, Strand; W. Miller Albemarle-Street; R. H. Evans, Pall-Mall; J. White and J. Murray Fleet-Street; and J. Harding, St. James’s-Street, 1809), p. 134.


18 Ibid, loc cit.
varied the theme by establishing that the king was "like the soul, a blessedness sent from God to dwell in both these nations, as a continual spirit of union", and that because of this, it was incumbent on parliament to support the further union of England and Scotland, so that the benefits of such a unifying, pacifying soul might strengthen every part of the body.19 By this naturalistic argument, James as the soul of his kingdom had already accomplished their unification merely by ascending the throne in England, since a single soul could not possess two bodies.

Unsurprisingly, the Commons men who opposed the union ignored Northampton’s argument in favour of accepting the civil law as the source of an instructive, if trite, metaphor of state as body. Instead, they reiterated their view that the Union of the Crowns in James’s person had not altered the fundamental law in either England or Scotland, and that the jurisdictional boundaries between England and Scotland had not changed. Accordingly they concluded that, since “naturalization is an act or operation of the lawe, therefore it cannot extend to places out of the precinct of the lawes”, and that thus English naturalisation would automatically remain meaningless in Scotland and to those born in Scotland.20 This objection – that naturalisation, and by extension allegiance, were bound by the reach of the law rather than the reach of royal prerogative – was precisely what the judges would argue against when Calvin’s case came before the courts. In the context of the conference, however, it formed just one of the nine objections raised by naturalisation opponents. Accordingly, the conference broke for the day, before the participants reassembled to hear the judges’ answers.

20 Ibid, p. 137.
In response to the union sceptics of the House of Commons, according to Francis Moore,

the said judges answered with one assent to the first reason of the Commons. That allegiance and lawes are not of aequiparation for six causes. 1st, Allegiance was before lawes. 2d. Allegiance is after lawes. 3d, Allegiance is where the lawes are not. 4th. Betweene soveraignty and allegiance lawes are forgotten. 5th Allegiance extends as farre as defence, which is beyond the circuite of lawes. 6th. Allegiance followest the naturall person, not the politique...If the kinge goe out of England with a company of his servants, allegiance remaineth amongst his subjects and servants, although he be out of his owne realme, whereunto his lawes are confined.\(^21\)

Here, the judges' tack answered the Commons opposition's argument that naturalisation would be a product not of sharing the same king but rather of shared laws. After the judges had begun with this insistence that allegiance followed the body natural rather than the politic and existed before and beyond law, they began an extensive summary of English legal cases in which allegiance was a key issue. Having established the common law precedent for naturalisation of the Scottish post nati in England to their satisfaction, the judges,

examined what was given to Scotts if they should be naturalized. First, they being not enemies, if they be aliens, they are to be protected in their bodies and goods, and may bring personal actions; if they buy land, the king, if he will may seize it: But for dignities of honour, or voices in parliament, as barons, Scottish men cannot have in England, so long as the lawes stand distinct...neither did naturalizing give any man a place in parliament, (except he were chosen,) or give him any lands or goods except he could purchase them.\(^22\)

\(^{21}\) Moore, "The Conference", p. 139.
\(^{22}\) Moore, "the Conference", 142.
With this assurance that English political and patronage positions would remain securely in the hands of Englishmen for the foreseeable future, the judges, in Moore's account, attempted to depoliticise the question of naturalisation, or at least to ease entrenched objections from Englishmen, perhaps including the judges themselves, who worried that naturalisation of the Scots would create precisely the kind of competition that Sir Edwin Sandys had anticipated.

Having, or so they hoped, reassured members of both houses that their jobs were safe, the judges took up the issue of the great seal, showing "that the seal was alterable by the king at his pleasure, and he might make one seale for both kingdoms; for seales, coin, and leagues, are of absolute prerogative to the king without Parliament, not restrayned to any assent of the people." The matter of the great seal may seem like an odd point to follow on from the legal justification of naturalisation. As the examination of the case of Sutton's Hospital will demonstrate, however, seals played an important role in consideration of the body politic. Yet here, the judges suggested that the right of altering the seal, or even creating a single seal for both kingdoms, was a prerogative controlled by the king alone, without the interference of parliament or populace. Yet there are limits to this monarchical control of the great seal: remedial writs addressed under the great seal of England were,

limited their precincte to be within the places of jurisdiction of the courts that must give their redresse of the wrong, and therefor writts are not to goe into Ireland, nor the Isles, nor Wales, nor the counties palatine, because the king's courts there have not power to hould plea of lands or things there. But the great seale hath a power

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23 Moore, "the Conference", loc. cit.
preceptorie to the person, which power extendeth to any place where the person may be found.²⁴

The seal was the physical marker that the king's authority underpinned, among other things, writs in court. Thus, in this passage it played a complex role mediating between the personal authority of the king, the law and its jurisdiction, and the king's subjects. Though the king could alter the seal solely on his own authority, its power attached to remedial writs of law did not extend past the jurisdiction of his laws. This meant that the great seal of England would have no remedial power in disputes over goods or real property in Scotland because it had no authority over Scottish lands or things, but it would have authority over writs governing the persons, or bodies, of people subject to the authority of English law. So, those with goods or lands in England who failed to answer a summons with the great seal of England affixed, even if the summons reached them in Scotland, faced the forfeiture of their English property.

Given the seeming complexity of such logic, it is worth pausing to consider the extent to which allegiance and jurisdiction were matters of actual property and cases as well as the more recondite, and even sometimes – at least in the hands of Sir Edward Coke – mystical, legal theories that governed them. The seal was a visible and tangible emblem of the king's authority over his subjects, and the lands where his law held sway. It served as a partial embodiment of the notion that the laws were the sinews and ligaments of the body politic; without such assurance those who held the delegated authority of the crown could not be sure of where the royal writs that they received actually originated. Indeed, counterfeiting the great

²⁴ Moore, “the Conference”, loc. cit.

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seal had been consistently construed as treasonous since the fourteenth century.\textsuperscript{25} Thus, the emergence of the great seal as a matter of considerable importance in the context of the judges' opinions about allegiance, jurisdiction, and naturalisation is ultimately unsurprising.

A final note of caution is necessary. In general Moore's notes did not distinguish among the judges in ascribing arguments and opinions. I have, of necessity, followed his habit of referring to the judges who presented their findings to parliament collectively, but as his own notes indicate, Justice Thomas Walmsley of the Common Pleas (1547-1612) "differed in the point", demonstrating the danger of taking this apparent consensus and face value. Given Walmsley's noted penchant for legal conservatism, and the fact that he dissented from the majority's agreement in the actual proceedings of \textit{Calvin's case}, it is perhaps unsurprising that he should have disagreed with his colleague.\textsuperscript{26} Despite the appearance of consensus among the judges as a collective, there were considerable differences among even those judges who supported the automatic naturalisation of the \textit{post nati} as to the exact legal precepts that made that naturalisation possible. There was, however, considerable effort to emphasise the agreement among the judges. Such smoothing of judicial opinion occurred not merely within Moore's manuscript notes (unpublished until their inclusion in \textit{Somers Tracts}) but also, perhaps unsurprisingly, in James's own speech to parliament in the aftermath of the conference touching naturalisation.

There was some delay between the conference and James's speech of 31 March 1607, while union supporters and opponents took advantage of the speaker's illness to marshal their arguments. By the time James came to address the battle lines between the two factions had been redrawn, and union opponents were insisting that only a complete, incorporating union of Scotland into English law and custom would permit the naturalisation of the Scots. Since I have discussed the opening rhetoric of the speech in detail in the previous chapter, here I will focus on the specifics of James's understanding of the reasoning of the judges who defended the naturalisation of the post nati at the parliamentary conference and went on to decide Calvin's case in 1608. Indeed, James's reading of the legal interpretation, as a member of an untrained – and hugely influential – observer of the decision is key. It is an integral element in any explanation of how the issue of the post nati was prepared for public -- that is non-legal -- consumption and of how non-lawyers made use of the decision in their turn. Thus on 31 March 1607, James robustly defended his decision to proclaim the Scottish post nati English subjects:

But for the Post nati your owne Lawyers and Judges at my first comming to this Crowne, informed me, there was a difference betweene the Ante and the Post nati of each Kingdome, which caused mee to publish a Proclamation, that the Post nati were Naturalized (Ipso facto) by my Accession to this Crowne. I doe not denie but iudges may err as men, and therefore I doe not presse you here to sweare to all their reasons...But remember also it is as possible and likely your owne Lawyers may err as the Judges: Therefore as I wish you to proceede herein so farre as may tend to the weale of both Nations; So would I have you on the other part to beware to disgrace either my Proclamations or the Judges, who
when he Parliament is done, have power to trie your lands and lives, for so you may disgrace both your King and your Lawes.27

James's rhetorical strategy here was brilliant: recalcitrant MPs were free to object to his proclamation of de facto naturalisation for the post nati so long as they understood that in doing so they also ignored the findings and undercut the authority of English judges. The rather unsubtle stick invoked when James reminded the Commons that the judges they disparaged had power to subject them to trials as soon as parliament was dissolved also became a kind of carrot since he argued that "the doeing of any acte that may procure lesse reverence to the Judges, cannot but breede a looseness in the Gouernment, and a disgrace to the whole nation."28 According to James, acceding to his right to proclaim the naturalisation of the post nati as a fait accompli would not only protect MPs lives and lands, it would also prevent any "looseness" from creeping into their government.

James's rhetorical gauntlet here depended on his conviction that he and the nation's judges were of one accord on the issue of naturalisation. Like Moore, James preferred the plural noun rather than references to any particular lawyer or judge, presumably finding consensus more persuasive than the arguments of any particular legal theorist, no matter how learned or articulate. Unfortunately for James, MPs who opposed union with Scotland were unmoved by his argument. In the immediate aftermath of his speech, there was little reaction; the House of Commons did not return to the problem of the union with Scotland mid-April 1607;29 it was at this point that Sir Edwyn Sandys spoke most powerfully (and at greatest length) on the subject of the "perfect union". Though Sandys never

27 James VI and I, Political Writings. 358.
28 James VI and I, Political Writings, loc. cit.
29 CJ I, p. 364.
opposed union in so many words, his endorsement of an incredibly complex “perfect union” and his rejection of any lesser statutory comingling of England and Scotland. When the Commons proved intractable, despite James’s cogent arguments, he clearly knew he could turn to the judges to confirm that consensus in *Calvin’s case* (1608).

The print matter that emerged from this court case will form the subject of the next chapter. I will argue that while James did indeed get his consensus of judges -- at least as far as the two printed judges opinions, aimed at a non-legal audience went, this consensus ultimately depended more on the malleability of the language of allegiance and the imagery of the body politic than it did with any judicial willingness to conform to James’s own reading of English law. Nevertheless, the iterations of this consensus were to have potent aftereffects. Accordingly, judicial opinions about *Calvin’s case* and their ramifications in Anglo-American legal and political history form the subjects of the remainder of this study.

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6. *Calvin's Case in the Courts*

Despite James's best efforts, to say nothing of their conference with the Lords, Sandys and his allies carried the day. The House of Commons declined consent to statutory confirmation that the *post nati* shared the rights and capacities of English subjects. So, the king did indeed seek to accomplish his goal of naturalisation for the *post nati* through the judges themselves. Accordingly, in October of 1607, Robert Cecil set out to initiate a test case to establish the ability of a Scot born after 1603 to hold land in England and, just as importantly, to seek redress in English courts when his rights as a landholder were infringed upon. Indeed, the bare bones of the course that the case would take were already apparent before the writs to bring it into court had even been issued. A draft description of the case that Cecil corrected described how the case would be brought and pled on demurrer so that the child "who you know being neither denizen nor naturalised particularly cannot take lands, except it bee by the construction of his 'post birth.'" Where James had been unable to secure statutory confirmation of this "post birth", Cecil would help him to secure acknowledgment under common law.

The Scot chosen for role of plaintiff in this test case was James Colville, the young grandson of the first Earl of Culross. The English mistakenly referred to young Colville as Robert Colvin or Colvyn (his father was Robert, in part explaining the confusion), and so the case was recorded in English courts as *Calvin's case*. Despite the mistake, the name has stuck, especially among modern legal theorists and legal philosophers (as opposed to legal historians), who have, understandably, followed the eighteenth-century lead of Blackstone's

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Commentaries and of Cobbett's State Trials. Aside from anything else, the case's name represents an interesting slip among English officials hoping to persuade their fellow Englishmen that a "deluge" of Scots would not appear, or at least would not prove as religiously or socially disruptive as some feared.

It is also paradigmatic of a larger fact surrounding Calvin's case: the actual terms and circumstances of the decision have been infinitely less important in the contexts of legal philosophy and political history than how the decision was read by non-lawyers as well as lawyers down through subsequent generations. The point raised by Keechang Kim, and discussed in the previous chapter, that lawyers cite precedent not to offer future generations historians a guide to how they approached case law, but to win cases, is borne out in this forgetting of the specifics of Calvin's case.

Yet insofar as Kim's insight refers to Coke's report on Calvin's case in particular, it is not entirely satisfying precisely because Coke was not arguing any case – nor for that matter was Ellesmere. Within the legal realm in which they operated, their decision in favour of Calvin, in which only two justices dissented was secure. Yet both men published their decisions: Coke's account appeared in the seventh volume of his reports, in English, unlike the rest of the cases, which he reported in Law French. The published version of Ellesmere's speech in the exchequer appeared shortly after Coke's seventh report in a remarkably readable

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3 For concerns about the "deluge" of Scots, see CJ I, pp 182-3 and pp. 184-5.

4 Keechang Kim, Aliens in Medieval Law, p. 188.
English octavo text. In any case, both men evidently anticipated a broad readership consonant with the national significance of the case on which they had just ruled. The writings of Chancellor Ellesmere and Sir Edward Coke on Calvin's case, are not an indication of any kind of legal consensus about the nature of the body politic, the concept of ligeance, or even the fate of the post nati. Rather, they are valuable as rival attempts by each of these jurists to persuade those outside the community of common lawyers most capable of identifying the cracks in their readings that those readings and their judicial activity were legitimate. Moreover, the increasingly common practice of mining the writings of previous generations of lawyers as well as the Year Books, which contained annually compiled accounts of significant judicial decisions from 1268 through 1535, made it almost impossible for either man to be unaware that his own writings might be put to similar use.

Precisely because of this prescient sense of how their writings on the issue of the post nati might appeal to subsequent generations of non-lawyers and lawyers alike, the writings of Sir Edward Coke and Chancellor Ellesmere are invaluable for a study of the interplay of differing versions of the ideas of the body politic and allegiance. Accordingly, it is their writings that will be the focus of the rest of this chapter. I argue in this chapter is that Coke and Ellesmere produced published accounts of Calvin's case and the issue of the post nati with a clear sense of their broader appeal and significance, as well as their immediate stakes. Moreover, I will demonstrate that both men exploited the malleability of early-modern body-politic rhetoric to advance their own aims even as James secured the remaining possible victory for his naturalisation project.
A sense of the case's significance in apparent in Coke's explanation of why he began the seventh part of his *Reportes* in 1608, immediately after his production of the sixth part of the *Reportes* (first published in 1607). In his prefatory letter to the reader Coke remarked that as soon as he had finished with the sixth volume of the reports, “the greatest case that ever was argued in the Hall of Westminster began to come in question, and afterwards was argued by all the judges of England.”\(^5\) Originally, he explained, he had had not had any intention of publishing his private report of the case because it was such an issue was unlikely to emerge again within the context of common law, and thus there was little need for younger lawyers to master the jurisprudence behind the case. Instead the case was, as Coke wrote, “of his owne nature so like the Phoenix, and so singular and rare in accident, as the union of two famous and auncient kindomes in ligeance and obedience under one great and mightie Monarch.”\(^6\) Yet Coke found that he “was by commandment to beginne againe...for the publike” as soon as he had finished his personal report on the matter of Calvin's case. Coke's insistence that “commandment” had moved him to publish and that, indeed, doing so cost him no small amount of effort was hardy atypical matter for an early-modern preface to a print work\(^7\). Yet it also bears out the contention of the legal historian Richard J. Ross that senses of memory and custodianship played a crucial role in early-modern lawyers' understanding of their professional role and led to considerable debate about the merits of print publication for law reports.\(^8\)

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7 Coke, *La sept part des Reports*, loc. cit.
Coke's preface noted that his labour – and the difference between a report intended for public consumption and a report intended for personal use – were inevitable. As he concluded:

that succinct method and collection that will serve for the privat memorial or repertory, especially of him that knew and heard al, will nothing become a publique Report for the present & al posteritie, or be sufficient to instruct those readers, who of themselves know nothing, but must be instructed by the report onely in the right rule & reason of the case in question.⁹

"Those readers, who of themselves know nothing," was a broad category: Coke invoked not only interested, and learned, parties who had not themselves been present in the Exchequer Chamber in Trinity Term of 1608 when the claims James Colville, alias Robert Calvin, and the rest of the post nati had been argued before the court. He also invoked, and understood, the possibility of readers who actually knew nothing, at least in terms of the vagaries and technicalities of the law.

Though it fell to the courts to resolve the legal status of the post nati by precedent when parliament proved unable, or unwilling, to do so by statute, interest in the decision extended far beyond the fourteen judges in the exchequer chamber and even beyond their colleagues in the other benches and the Inns of Court. Lawyers, after all, were hardly the only people likely to take an interest in a case as portentous and as unusual as the sight of a phoenix.

Indeed, Coke seemed to bask in his role as interpreter for ignorant readers of what, according to the judges, Calvin's case augured for the post nati in England. He published his report of Calvin's case, unlike the rest of the cases in the

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Sept part des reports in English, rather than law French. Since the prefatory epistles to the reader which began each of Coke's reports appeared both in Latin and in English, providing the first and the most substantial case report in the Sept part in English rather than law French, contributed to an already existing sense that different audiences might find different parts of Coke's texts most useful.

Coke had already experimented with English-language law reporting when he published a report on Cawdrey's case, which confirmed the authority of the Court of High Commission to deprive the puritan Robert Cawdrey for allegedly preaching against the Book of Common Prayer, in side-by-side English and Latin columns at the beginning of the fifth volume of his reports. A variant of the 1605 edition of the fifth volume appeared, however, without the inclusion of Cawdrey's case in any language, and Coke made no mention of the case in the prefatory letter to the reader. This is not to say that Coke did not intend to publish Cawdrey's case in English, and, by extension, presumably make it available to a wider audience. Nevertheless, it seems clear that Coke was less interested in promoting his English language report on Cawdrey's case than he was on Calvin's case. This was perhaps a matter of timing: Coke published his report of Cawdrey's case some fourteen years after it had been decided, whereas he rushed his report on Calvin's case into print.

Not to be outdone by his rival from the Common Pleas, Thomas Egerton, Lord Ellesmere published The speech of the Lord Chancellor of England, in the

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11 For a description of the variant copies, see “English Short Title Catalogue, Citation No. S107232”, British Library, http://estc.bl.uk/S107232. For the preface to the fifth part of the reports, see Coke, Quinta Pars, f. sig. AiiR-f. sig. AviR.
Eschequer Chamber, touching the post-nati (1609). In some respects, Ellesmere's explanation of why he decided to publish his own account of the case of the post nati resembled that of Coke. Ellesmere noted that "looking into the nature of the Question then in hand, and examining the circumstances, I found the case to bee so rare, and the matter of great importance and consequence, as being a speciall and principall part of the blessed and happy Union of great Britaine." Yet Ellesmere was also more specific than Coke in explaining how the events within the exchequer chamber moved him to publish: he noted that not all of the fourteen judges concurred in the opinion of the majority, though there were “so few, of them that differed, that in Greeke it would not make a plurall number” (that is, that there were only two). Even two dissenters from the majority, however, were enough to move Ellesmere. He gave his opinion last among the judges, who argued Calvin's case among themselves, after they had heard from counsel for the plaintiff and defendants. Their disagreement, Ellesmere explained, shaped his speech.

Events after the case itself had been concluded also pushed Ellesmere to publish. He fretted that, "the decree and judgement being thus passed, diverse unperfect reports, and severall patches and pieces of my Speech have bin put in writing and dispersed to many hands, and some offred to the Presse.” He was not the only one:

it pleased his sacred Majestie to take some view of it [Ellesmere's plan to publish a correct and authoritative account of his speech

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13 Ellesmere, Speech Touching the Post-nati, f. sig. A4r.
himself], & taking occasion thereby, to remember the dilligence of
the L. chiefe Justice of the common place, for the summary report
he had published of the Judges Arguments, he gave mee in charge
to cause this to be likewise put in Print, to prevent the Printing of
such mistaken and unperfect reports of it, as were alreadie scattered
abroad.'

In his remarkable study of Ellesmere's life and writings, the legal historian Louis
A. Knafla has noted that even outside of this rationale, Ellesmere's printed text
differs significantly from the manuscript notes of the case he left. Indeed,
Ellesmere privately recorded some doubts about the dual capacity argument
advanced by Coke and Bacon, likening a two-bodied monarch to an amphisbena,
"'a serpent having a head at each end, both striving to be the master head'. Yet
these objections preserved in Ellesmere's manuscript reports did not appear in the
print edition of the Chancellor's speech, which, at least by his own account, he
wrote at James's behest to ensure that he retained control over public perception of
his own arguments in Calvin's case (and that those arguments were acceptable to
the monarch).

Here, then, Coke and Ellesmere anticipated the concerns of modern-day
legal historians, who have rightly emphasised the insufficiency of printed reports
to provide a complete and accurate version of the worldview of early-modern
English lawyers or even a comprehensive account of how particular rulings were
reached – and what legal rules were, in the minds of the reporters themselves –
established. These insights have, of necessity, forced historians confronting the
arguments of F. W. Maitland and Ernst Kantorowicz, made entirely from the

14 Ellesmere, *Speech Touching the Post-nati* f. sig. A5^v and A6^v.
15 Chancellor Ellesmere's private notes (Ellesmere MS 1215 2^s) quoted in Knafla, *Law and Politics

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printed reports, to do so with a newly sceptical eye. Yet an approach prioritizing printed reports of Calvin's case, such as this one, remains valuable, though the nature of the insights that printed reports offer has changed with the approach itself. They do not provide a particularly reliable account of what went on in the Exchequer chamber when fourteen judges convened to decide the most important case of the decade, nor do they offer a transparent version of what even their authors made of the arguments laid before them. What the printed reports do unarguably offer are the judges' public stances on a case of seminal importance and vital interest to readers with little interest in or knowledge of the day-to-day working of the English courts. As their respective prefatory remarks indicate, Coke and Ellesmere were entirely aware of the wider political and policy significance of their resolution regarding the *post nati*, and they tailored their printed reports accordingly. To historians therefore, the printed reports of Calvin's case offer invaluable insights not into how Coke and Ellesmere worked but into how they wanted their work understood. Accordingly, I will next take up the question of how Coke and Ellesmere used their published writings on Calvin's case and the *post nati* to explain the relationship between the law, and the courts, and allegiance.

**The Subject and the Body in Calvin's case**

Having thus made overtures to readers outside of community of the Inns of Court, Coke and Ellesmere both took up the issue of the case itself. Their examinations of the case were in broad agreement about its terms. The defendants (John and Richard Smith in Coke's version and John Bingley and Richard Griffin

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in Ellesmere's), presumably carefully coached, pled a demurrer when charged with unlawfully disseising "Robert Calvin's" lands. Rather than contesting the fact that they had disseised the plaintiff of his lands, they argued that since he was Scottish born, he did not have standing to seek redress in English courts, a privilege reserved for English subjects and denizens. In the context of wider fate of the post nati, the disseisin was beside the point. It was this point of special pleading that tested the place of the Scottish post nati in English law. Because Edward Coke's printed report appeared before Ellesmere's printed version of his own speech did, I will start with a consideration of Coke's report before moving on to Ellesmere.

Coke on Calvin's Case: Treason and Allegiance

Thanks to its ongoing influence on citizenship law in the UK and particularly America, and its importance in literary scholarship since the publication of Kantorowicz's King’s Two Bodies, Coke's seventh report probably contains the best-known version of Calvin's case. In the context of attempts to emphasise Coke's resistance to royal authority, such as Catherine Drinker Bowen's 1956 popular biography of Coke, The Lion and the Throne, Coke's enthusiastic willingness to find in James's favour was problematic. Yet, as the intellectual historian Robert Zaller has rightly noted, Coke's opinion "was in fact aimed at confining rather than extending royal power". Coke cautiously advanced his case for confinement through frequent deployment of metaphors of the body, which

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16 Catherine Drinker Bowen, The Lion and the Throne (Boston: Brown, Little and Co, 1956), pp. 258-9. Remarkably, Drinker Bowen devoted her two-page account of Calvin's case entirely to Ellesmere's speech, which she read as an attack on Coke's preference for the authority of the common law over the authority of the monarch.
interacted in more complicated ways then has generally been allowed. So, it is to those metaphors that I now turn.

Most obviously, Coke invoked a two-body theory which envisioned James's natural and politic capacities as endowing him with an invisible and immortal politic body as well as a natural, human body. Coke provided a relatively straightforward account of this dual capacity:

> It is true, that the king hath two capacities in him: one a naturall body, being discended of the blood royall of the Realme; and this bodie is the creation of almightie God, and is subject to death, infirmitie, and such like: the other is a politique body or capacitie, so called, because it is framed by the policie of man (and in 21.E.4.39.b [a case in the year books, heard in the twenty-first regnal year of the reign of Edward IV] is called a mysticall body:) and in this capacitie the king is esteemed to be immortall, invisible, not subject to death, infirmitie, infancie, nonage [etc].

Coke was perfectly, and surprisingly, willing to accede to the proposition that James, in addition to having a politic and a natural body, had multiple politic capacities – one for England and one for Scotland, implying that the king's body politic was the product of specific, national instances of “the policie of man” and not a more general human legal interpretation of the nature of kingship. Immediately, if only implicitly, the king's body politic became a matter of local consent, or at least local willingness to adhere to the legal fiction of a body politic. Fortunately for James, the notion that the king's body politic was fashioned by men on a realm-by-realm basis had limited effect on even Coke's understanding of allegiance. As Coke immediately observed, “it was resolved that that [allegiance]

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18 Coke, *La Sept part des reports*, f. 10r.
was due to the naturall person of the king (which is ever accompanied with the politique capacitie, and he politique capacitie as it were appropriated to the naturall capacitie) and is not due to the politique capacitie onely, that is to the crowne or kingdome, distinct from his naturall capacitie."\(^{19}\) In other words, all of James's subjects owed allegiance to his single natural body, irrespective of their nationalities.

In her nuanced yet concise study of treason's conceptual role in the intellectual formation of a British state, Lisa Steffen persuasively argues that in reaching this conclusion in favour of the body natural as the seat of allegiance Coke ultimately depended more heavily on natural law than has widely been acknowledged. Arguing from an impressively broadly based comparison of Calvin's case with continental legal scholarship, Polly J. Price makes a similar appeal to natural law in Coke's report.\(^{20}\) As both scholars, note, though Coke refers to three other kinds of allegiance (local allegiance like that of foreign merchants under the king's protection; acquired allegiance like that of denizens; and legal allegiance, associated with the oath of fealty sworn at the leete), he prioritised the allegiance which began at birth and linked the body politic with the body natural. It is worth noting that Steffen takes 1608, the year in which Calvin's case was decided as the starting point for her study of treason. Given C. H. McIlwain's oft-overlooked insight (in a footnote to his study of the American revolution) that "the whole history of treason is a commentary upon the central principle of Calvin's

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Case [sic] that allegiance is personal and not national", Steffen's starting point seems entirely appropriate. Coke's report was particularly preoccupied with using the legal doctrine surrounding treason to justify his reading of allegiance as owed to the body natural. As Coke argued "in all inditements of Treason, when any do intend or compass mortem et destructionem domini Regis [the death and destruction of the lord king] (which must needs be understood of his natural body, for his politque body is immortall, and not subject to death) the inditement concludes contra ligeantiae suae debitum [against the duty of his allegiance], ergo the ligeance is due to the natural body.”

To make this argument, Coke focused on a relatively narrow segment of treasonous activity, compassing and actively attempting to kill the king. Of necessity, he ignored other forms of treason, such as counterfeiting the great seal or English coinage and killing the king's officers and judges while they performed their offices. By offering such a narrowly-focused reading of the treason statute, Coke made short work of the infamous reasoning of the Despensers (referred to as Spencers in Coke's report), who in their treason trial had “invented this damnable and damned opinion, That homage and oath of ligeance was more by reason of the kings Crowne (that is his politque capacitie) then by the reason of the person of the king.” Coke insisted that the Despensers had falsely invoked a legally-invalid distinction and that they owed Edward II their allegiance irrespective of whether they felt he deserved his crown, a doctrine sure to please James VI and I. Yet he

22 Coke, La sept part des reports, f. 107.  
23 Ibid, f. 119.
also emphasised the monarch's physical vulnerability. The reference to the Despensers also had additional potential significance, though it is unlikely that Coke, who generally preferred bluntness to insinuation, intended it: before his conviction for treason and execution, the younger Hugh Despenser had been a royal favourite – Edward II's chamberlain and possible lover – who controlled access to the monarch. Given James's own tendency to depend on an entourage of favourites with duties associated with the royal household and bedchamber, it seems entirely possible that Coke's readers might have interpreted his reference to Despenser as a much broader reference to the vulnerability of the king's body natural than Coke intended. In any case, Coke's focus on the vulnerabilities of the body natural was, for James, a decidedly mixed blessing.

Nevertheless, Coke's appeal to the body natural also had more positive ramifications, as far as James was concerned; the chief justice of the common pleas offered a ringing justification of James's birthright to the English throne in the context of allegiance to the body natural, listing his fourth, fifth, and sixth reasons for allegiance's link to the natural body as follows:

4. A bodie politique (being invisible) can as a body politique neither make nor take homage...5. In fide, in faith or ligeance nothing ought to be fained, but ought to be ex fide non ficta [from faith, not feigning]. 6. The king holdeth the kingdome of England by birthright inherent, by descent from the blood royall, whereupon succession doth attend.

26 Coke, *La sept part des reports*, f. 10'.
As a corollary to the fact of James's right to the throne by descent as the eldest male in the blood, Coke stated categorically that by "Queene Elizabeths death the crowne and kingdome of England discended to his Majesty, and hee was fully and absolutely thereby king, without anie essentiall ceremonie or act to be done ex post facto: for coronation is but a royal ornament and solemnization of the royall descent, but no part of the title." Reminding his readers that the Jesuit seminarians Watson and Clark had unsuccessfully argued against this legal interpretation, Coke rather heavy-handedly reminded them of his role as Attorney General in prosecuting those implicated in the Bye Plot, including the two seminarians and Sir Walter Raleigh. Despite, or perhaps because of, the vulnerability of the king's natural body and the certainty of his right to the throne and the politic capacity by right of descent, James could rest assured, Coke suggested, of the protection of the common law and its judges. Yet even that assurance of the law's protection came with a rhetorical price.

Coke and the other kind of Body Politic: The rhetorical embodiment of the Law

While Coke focused, not surprisingly, on explicating the legal doctrine of a natural and a politic capacity in his law reporting, he was not unaware of other versions of the metaphor of the body politic, particularly the more conceptually accessible model of the nation as a body with the king as its head. Indeed, he invoked this imagery himself, even before making his case for dual capacities, when he reminded readers that "as the ligature or strings do knit together the joynts

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27 Coke La sept part des Reports, loc cit.
of all the parts of the bodie, so doth ligeance joyne together the soveraigne and all his subjects, *quasi uno ligamine* [as if by one ligament].”²⁸ By replacing the more traditional formulation that identified law as the sinew or ligament binding the king together with his subjects, Coke seemed to elevate the claims of a natural law-based model of the king as the head of the commonwealth even stronger -- no common law or statute was necessary to knit king and subjects together.

In point of fact, however, Coke had already deployed an even more surprising series of metaphors of the body where the common law was concerned. Remarking that he agreed with the rest of the judges who had judged that the *post nati* were not aliens under English common law, Coke added:

> yet doe I find a meere stranger in this case [e.g. an unprecedented plea], such a one as the eye of the law (our booke, and booke cases) never saw, as the eares of the law (our Reporters) never heard of, nor the mouth of the law (for *Judex est lex loquens* [the judge is the law speaking]) the Judges our forefather of the law never tasted: I say such a one as the stomach of the law, our exquisit and perfect Records of pleadings, entries, & judgments (that make equall and true distribution of all cases in question) never digested. In a word, this little plea is a great stranger in the lawes of England.

Here, Coke invoked the image of a metaphorically embodied law of England, with no king at its head. Indeed, the law was, in this formulation, a self-sufficient body with acute senses and excellent digestion. The legal historian Peter Stein, reviewing the critical legal theorist Peter Goodrich's book *Languages of Law* has suggested Goodrich overplays early-modern lawyers use metaphors of Eucharist and thereby overlooks metaphors of incarnation when he examines the way sixteenth-century common lawyers, including Coke, saw law through a lens of

²⁸ *Ibid*, f. 4⁷. 190
religion. Yet this passage, with its focus on an embodied law in which judges represent one organ (the tongue) that both emits and consumes precedent, tasting and speaking, suggests that both concepts are at work. Eating and speaking were the functions upon which commemoration of the Last Supper depended, irrespective of the varying attitudes that emerged debates about whether their effects were literal or metaphorical. Indeed, it was the very fact that those debates were ongoing that made the metaphors of speech and food particularly acute.

Coke's assertion that "Judex est lex loquens" must have been particularly galling for James since it was a rhyming rejection of the king's own assertion, which I discussed above, in chapter four, that the king was the law speaking (rex est lex loquens). Whereas Coke would go on to describe the monarch's natural body as highly vulnerable and seemingly constantly beset by attempted treason, the law's rhetorical body was in perfect health and could see, hear, taste, and ultimately digest even unfamiliar pleas, like that of the defendants, with ease. Indeed, by reproducing the writ and plea associated with the case at the beginning of his own report, Coke enacted the law's successful, metaphorical digestion of Calvin's case. The natural body of the monarch could receive allegiance, but it was subject to the indignities of nonage, infancy, infirmity, and death. The metaphorical body of the law, on the other hand, was always hungry.

Ellesmere on the Crown and the Judges

Where Coke reproduced the writ on "Calvin's" behalf and the defendants' reply in Latin, Ellesmere took pains to set out the demurrer, and claims, of the defendants in English in the most straightforward terms, noting that,

the Defendants plead, that the Plaintiffe is an Alien, and that in the third yeere of his Majesties raigne of England, and in the nine and thirtieth yere of his Majesties raigne in Scotland, hee was borne in the Realme of Scotland, within the ligeance of his said Majestie, of his Realme of Scotland, and out of the ligeance of our soveraigne Lord the King of his Realme of England. And the defendants say further, That at the time of the birth of the Complainant, and long before, and ever sitthence, the saied Kingdome of Scotland was, and still is, ruled and governed by the proper Lawes and Statutes of the said Kingdome of Scotland, and not by the Lawes and Statutes of the Realme of England.\(^{30}\)

Ellesmere proceeded immediately to an assurance that he rejected the defendants' demurrer categorically, before considering his reasons. He began by summarising the work of the king, judges, and commissioners on the matter of union so far, noting that the Commissioners from both realms charged with creating the Instrument, the series of recommendations for effecting union politically discussed above, had agreed with James's proclamation. Ellesmere further reminded his speech's auditors and his readers that "diverse principall Judges of the Realme were present at all times when the point was debated", before concluding, with considerable satisfaction, "and herein I note the wise and judicious forme of that resolution [that the post nati were subjects of both realms], which was not to propound to the Parliament the making of a new Lawe, but a declaration of the

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\(^{30}\) Ellesmere, *Speech Touching the Post-nati*, pp. 5-6.
common Lawes of both Realmes in this question." Here, Ellesmere, following his monarch's tack closely -- at least in print -- linked royal proclamation, judicial opinion, and pre-existing common law. As we shall see, this linkage was typical in Ellesmere's published speech because publishing on the *post nati* offered a once-in-a-career chance to demonstrate judicial power and logic, and their value to the crown and the realm, and Ellesmere was determined to milk this power to the fullest.

Sure enough, Ellesmere roundly defended the binding status and legal stature of royal proclamations. Ellesmere insisted that,

> of the strength of Proclamations, being made by the King, by the advise of his Counsell and Judges, I will not discourse; yet I will admonish those that bee learned and studious in the Lawes, and by their profession are to give counsell, and to direct themselves, and others, to take heede that they doe not contemne, or lightly regards such Proclamations.  

Nevertheless, Ellesmere proceeded to spend the next two pages doing exactly that, focusing on moments in English common law when proclamations, provisions and ordinances of the king had exerted binding legal force. Accommodatingly, Ellesmere provided both the Law French and Latin text that he quoted from the *Natura Brevium*, the hugely influential 1534 treatise by the Tudor lawyer Anthony Fitzherbert, and translations. He was less forthcoming, however, in his discussion of a decision that appeared in the printed versions of the year books of Edward III, merely stating that he would "wish the Students to reade the same in the printed

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31 Ibid, p. 10.
33 Sir Anthony Fitzherbert, *La Novel Natura Brevium* ([Londini: in aedibus Thomae Bertheleti, 1534]).
Bookes, where they shall see both the effect, and the reason, and the cause thereof; They are worth their reading, and may informe and direct them what judgment to make of proclamations." The case Ellesmere cited here was an odd choice. Robert Thorpe, then Chief Justice of the Common Pleas had decided it in the court of parliament in 1365. It concerned a suit which Edward III himself had brought against the Bishop of Chichester, arguing that he had moved a case out of the jurisdiction of the king's courts and into the jurisdiction of the courts of Rome (in violation of the then recently enacted rules regarding praemunire). In the context of the decision, Thorpe opined that because parliament represented the body of the entire realm, its enactments became law immediately before they were promulgated by proclamation. It was a significant moment in the process of establishing a definition of statutes and the function of parliament within law, but it did little to enhance or secure the significance of proclamations, or other kingly decrees. Indeed, though it is sadly outside the scope of this thesis, further examination of the question is certainly warranted.

In any case, Ellesmere moved from this final, somewhat ambiguous defence of royal decrees to an objection of the MPs which he had evidently found even more damning: the assertion that because the judges were not bound by their oaths of office when they offered their opinions from anywhere but their respective benches, the opinions they had offered in the course of the February 1607

34 Ellesmere, Speech Touching the Post-nati, pp.15-6.
naturalisation conference carried little weight. To this objection Ellesmere offered four rejoinders: first, even without oaths, the "reverence and woorthinesse" of the judges should be trusted to implicitly; second, that in fact, oaths of office bound the judges in the court of parliament as well as in their own courts; third, that the proposed caveat might just as easily serve to undermine judges' very necessary authority when they rode the Assize circuit and rendered judgment far from their own courts in Westminster; and finally, that it behoved his contemporaries to regard their judges with the same reverence that their ancestors had theirs.

Ellesmere, unsurprisingly, devoted the most attention to that fourth caveat, noting that:

(I thank God, and the King, I have neither cause to feare any for displeasure, nor to flatter any for favour: wherefore I will neither be afraid, nor abashed to speake what I thinke:) I say therefore, that as our Judges not succeed the former Judges, in Time and Plaec; so they succeede them, and are not inferior to them in Wisedome, Learning, Integritie, and all other judicious and religious Vertues.37

Here was a sharp reaction to the impression, discussed by the intellectual historian Robert Zaller, that the Calvin's case decision had been rigged.38 Instead, by tying his insistence that he was free from any kind of coercion to his robust account of the role of judicial opinions in shaping English political history, Ellesmere implied that any threat or constraint came not from the king but rather from MPs themselves who had had the temerity to doubt the judges' authority off the bench. Ellesmere followed up this assertion that his own generation of judges lived up to their predecessors with a list of historical judicial interventions in parliamentary

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37 Ellesmere, Speech Touching the Post-nati, p. 18.
history, though he made a point of forbearing to discuss or even "remember" the era of Richard II "where power and might of some potent persons oppressed justice, and faithfull Judges for expounding the Law soundly, and truely." Here, Ellesmere went farther than James would, suggesting that even the realm's rulers ignored its judges at their peril.

It is important to remember that Ellesmere's twenty-page encomium on the historical benefits of and respect for royal decree and judicial opinion came before he even began to speak of the legal, or political, circumstances of the post nati themselves. It bore little obvious relevance to those issues. Even Ellesmere found it necessary to justify his "extravagant Discourse touching Proclamations, and Judge's opinions delivered in Parliament" on the grounds that he thought it necessary "both in respect of the time wherein wee live, and the Mater which we have in hand" before inviting those who disagreed to consider it "either a Passe-time, or Waste-time, as pleaseth you." This linkage between the times and the circumstances of Calvin's case emphasises Ellesmere's approach: the significance of this case meant that both King and Commons were bound to be eager audiences for his Speech, just as they were for Coke's report. Coke had used Calvin's case to advance a doctrine that could constrain the king's power, though it had yet to garner widespread acceptance in the legal community. Ellesmere used his audience's vested interest in the matter of the case to ensure that they first heard his articulate claims for the links between, and benefits of, royal and judicial authority, whether they found such matter a waste of time or not.

39 Ellesmere, Speech Touching the Post-nati, pp. 18-9.
40 Ellesmere, Speech Touching the Post-nati, pp. 23-4.
Ellesmere on the Case Itself

Having thus robustly articulated his own claims for king and judge alike, Ellesmere finally turned to the case of “Robert Calvin” himself, praising Sir Francis Bacon, the solicitor general and counsel for the plaintiff, for reminding the courts that it was a real case and had not been feigned or surmised. Similarly, Ellesmere roundly praised the skill of the counsel for the defendants, noting their skill with the law as well as their investment in the outcome of the case. Indeed, he particularly mentioned that the defence council had been chosen from among those most who had argued most persuasively against naturalisation for the post nati in parliament.\(^1\) Once again, Ellesmere's desire to establish the integrity of the judges emerged as a signal part of his approach. He also took the opportunity to remind his monarch that in his Exchequer Chamber even his most capable opponents had been routed by the collective skill and wisdom of the judges. Moreover, in noting that few of the parliamentary opponents of naturalisation actually argued for the defence in the Exchequer, Ellesmere suggested that all of the wisdom and eloquence of the rest “was put into the mouth of those few to serve as Organs and Instruments to deliver it unto us”.\(^2\) The metaphor of a mouth delivering a legal consensus on the law was reminiscent of Coke's elaborate invocation of law-as-body in his own Calvin's case report. Yet whereas for Coke, there was something almost mythical about the idea of judges embodying the mouth of the law even as digests and records of cases embodied its guts, for Ellesmere, the collective legal opinion uttered from few mouths was learned but, crucially, it was also wrong. Subtly, Ellesmere undercut not so much the efficacy of metaphorical references to

\(^1\) Ibid, pp. 25-6.
\(^2\) Ellesmere, *Speech Touching the Post-nati*, loc. cit.
embodiment and corporeality but rather the association between rhetorical embodiment and natural bodies, especially as it emphasised consensus, and being correct.

Indeed, Ellesmere emphasised a different kind of incorporation when he yet again asserted the impartiality of the judges, tying it to James's own inevitable even-handedness between England and Scotland. The chancellor wrote that "the king (whome under God they [the judges] serve) being Pater patriae [father of the fatherland] and soveraigne head of both these great united Kingdomes, is to them both like as the head of a naturall body is to all the Members of the same, and is not, nor can not be partiall more one than to another." More strongly than he had yet, Ellesmere linked the judges with the king's capacity and prerogative as the head of the nation. Given Ellesmere's preoccupation with the respect of former generations for their judges and the frequent recurrence of references to treason cases in Coke's report, it is worth noting that it had been treasonous to kill one of the king's judges while they were performing their duties since the first English treason statute of 1352. The treason statutes made killing a judge a violation of the allegiance a subject owed the sovereign. Yet as Coke had argued, subjects owed allegiance to the body natural – that is from birth according to natural law – rather than to the body politic, which encompassed the prerogatives awarded to the king under man-made law. By simultaneously invoking the king's metaphorical role as the head of a natural body that treats its members equally and connecting the judges' ethics to their sovereign's, Ellesmere established the king's prerogative to appoint judges while moving away from the rhetoric of politic and natural

44 See Steffen, Defining a British State, p. 10, for her excellent summary of Coke's account of the statute.
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capacity favoured by Coke. For Ellesmere, embodying the realm offered scope for associating judicial and royal authority. Dwelling on the idea that the king was subject to the law because of his politic or natural body or capacity would have been counterproductive.

Yet Ellesmere's tack was not entirely different from Coke's. He too wanted to establish common law's sufficiency for resolving the issue of the post nati, but he argued explicitly that such a stance demanded an explanation of what the common law was and was not, noting that "we have in this age so many Questionists; and Quo modo [by what means], and Quare [why] are so common in most mens mouthes, that they leave neither Religion, nor Lawe, nor King nor Counsell, nor Policie, nor Government out of question."45 Unfortunately, the curiosity of the "questionists" was not benevolent. They were out to undermine the government itself by casting doubt on the firmness of the legal foundations that underpin government in England. Fortunately, Ellesmere announced that he would satisfy them: "I will therefore declare mine opinion in his point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by auncient Writers, and good authorities voide of all exception."46 What followed is instructive to modern historians as well as to those doubters Ellesmere hoped to silence. With reference to the civilians as well as to the works attributed to famous medieval common lawyers Ralph de Glanville and Henry de Bracton, Ellesmere offered what was essentially a catechism of common law, answering the objections of the "questionists" and offering concrete historical examples of places where old statute and common law had become obsolete and

45 Ellesmere, Speech Touching the Post-nati, pp. 31-2.
46 Ibid loc. cit.
required replacement with new judicial maxims. Mindful of his royal reader, he offered an extensive quotation from the Scottish civilian Adam Blackwood's stinging reply (1581) to George Buchanan's *De Jure Regni apud Scotos* (1579) to demonstrate that civil law, as lifted directly from the Romans, had not had automatic binding status in France or Spain.47

Interestingly, Ellesmere continued to tie English common and civil law together in arguing for the necessity of expert interpretation to ensure the stability of law:

> it may be said, That all the Lawes of all nations are uncerten: For in the Civile Lawe, which is taken to be the most universall and generall Lawe in the world, they hould the same rule and order [dependence on the discretion of the judges] in all cases which be out of the direct words of the Lawe.48

Here, the linkage between civil law and common law emphasised the political compatibility of England and Scotland, since, as long as judicial opinion received the respect it deserved, “all the Lawes of all nations” would have the same rule to secure their certainty and stability. Linking civil and common law on the grounds that both ultimately deferred to judicial opinion where a point in law was uncertain also indicated the on-going importance of judges to the new schema.

Later in his text, Ellesmere returned to the matter of the legal compatibility between England and Scotland more explicitly in order to respond to the charge that differences between the oaths taken by Englishmen and Scotsmen to their

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48 Ellesmere, *Speech Touching the Post-nati*. p. 55. Leet courts met locally, at least annually to handle minor criminal matters; because all men who might fall within the jury pool were obliged to attend, leet court sessions were also where subjects swore an oath of allegiance to the monarch. 200
monarch at their respective leet courts led to two different allegiances.\footnote{Ibid, pp.76-7.} Here, Ellesmere approvingly cited Coke's distinction between the *legalis ligeantia* (allegiance by oath, which Coke termed "legal allegiance") and *alta ligeantia* (allegiance by birth). Indeed, Ellesmere went further and insisted that this legal allegiance "maketh nothing to this naturall Allegeance and subjection of birth; it is not *Alta ligeantia* by birth-right; it is but *Legalis ligeantia* by Policie"\footnote{Ibid, p. 77.}. Though Ellesmere here made no mention of the elaborate invocation of the king's two capacities as embodied realities (the body natural and the body politic) he nonetheless made distinctions between that allegiance which was inevitable, "natural" law by virtue of simple physical fact (having been born in the king's allegiance) and that allegiance which was a matter of policy, that is of deliberate and legally binding human action. He shared the sense that treason was tied to the more visceral, "natural" allegiance owed from birth: even women and children under age twelve, Ellesmere pointed out, who were deemed incapable of swearing the oath at the leet could still commit treason and felony.\footnote{Ellesmere, *Speech Touching the Post-nati*, pp. 77-8.} Allegiance, whether by birth or oath, therefore occupied a complex nexus between legal capacity and actual physical personhood: birth, age, and sex were physical realities for Jacobean theorists attempting to make sense of allegiance. It was necessary that the same attributes that must be discarded to ensure that the monarch retained a politic capacity should similarly play no role in determining who owed allegiance, even though that allegiance was owed irrespective of the politic capacity. Thus just as grants of land or leases made in the name of infant kings were valid despite those
monarch’s infancy, infant subjects, like young James Colville (or “Robert Calvin”) owed their allegiance to the king long before they could articulate any oath affirming it.

This was a complicated and unlovely legal doctrine, and at first it hardly seems surprising that Ellesmere warned of a "dangerous distinction between the King and the Crowne, and between the King and the kingdome." Yet the distinction Ellesmere referred to was not so much the articulation of differing politic and natural capacities that characterised Coke's report of the case; rather it was, to all intents and purposes, an incipient resistance theory. Thus Ellesmere attributed the danger to a crew of traitors, papists and sectaries (including Knox and Buchanan) who "maintaineth that kinges have their authority by positive Lawe of Nations, and have no more power than the People hath, of whome they take their temporal jurisdiction."52 Because of the necessity of establishing that allegiance was owed from birth, this allegiance had to be tied to the natural capacity of the king and the natural bodies of subjects alike, or as Ellesmere argued:

This bond of Allegeance whereof we dispute, is *Vinculum fidei* [a chain of faith]; it bindeth the soule and conscience of every subject, severally and respectively, to bee faithfull and obedient to the King: And as a Soule or Conscience cannot bee framed by Policie; so Faith and Allegance cannot bee framed by Policie, nor put into a politike body. An oathe must be sworne by a naturall bodie; homage and fealtie must bee done by naturall bodie, a politike bodie cannot doe it.53

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Because allegiance was a matter of conscience and soul it must be tied to the natural bodies of subjects and kings. Kings could, after all, no more receive homage as corporations than non-royal corporations could swear fealty.

Yet Ellesmere insistently sought to differentiate between that degree of dual capacity in the king and a more fundamental distinction between the king and his office. The very fact that such differentiation was necessary, however, and the fact that in differentiating between the two ideas Ellesmere perforce included both of them in his treatise left the *Speech Touching the Post-nati* vulnerable to subsequent readings that conflated them exactly as Ellesmere had feared. In my reading of Robert Austin, I will argue that such readings did in fact occur precisely because language about royal bodies and royal capacities was so malleable. The interpretation that Chancellor Ellesmere publicly propagated, much like Lord Edward Coke's, was thus as valuable to resistance theorists as well as royalists.

This moment of apparent unity between Coke and Ellesmere was not to last. With the issue of *Calvin's case* and the fate of the *post nati* resolved, Ellesmere remained profoundly suspicious of gestures toward publicising and popularising parliamentary proceedings and cemented his reputation as a loyal and reliable servitor of the crown.\(^\text{54}\) Given this concern, Ellesmere's willingness to publish such an extended account of Calvin's case may seem odd. Ultimately, though, his concern with the emergence of "popular spirits" helps to account for his decision to publish: a widely accessible account of judicial authority, royal

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prerogative, and the mutual obligations between king and subject must be carefully constructed.

Generally, however, Ellesmere remained sceptical of printed legal matter, and Coke’s law publishing in particular. Thus, in 1616, he wrote scathingly to the privy council that although “Wherein his Epistle to his 7 booke he would make men believe that in all his Reports he had avoyded obscurity and Noveltie”, an unsuspecting reader who attempted to read Coke’s case reporting “shall runne into a wood or thickett out of which he shall not easily wind himself”. Further, Ellesmere insisted that Coke had, in fact, employed novelty in Bonham’s case, to such an extent that “he doth strike in sunder the Barrs of Government of the Colledge of phisicions.”55 Thus, it seems likely that to some degree the disingenuousness of the epistle, or preface, that impelled Ellesmere to print his own account of the post nati. Yet the very fact that Coke was, to Ellesmere’s mind, so professionally untrustworthy, necessitated the appearance of some consensus: otherwise, where the two judges differed, it might be Ellesmere rather than Coke who was accused of novelty. Ellesmere’s effort to suggest consensus with his archrival on Scottish naturalisation was thus his only foray into print, though one of his works was published posthumously – and misattributed to Francis Bacon.56

Coke, on the other hand, continued to write and publish prodigiously even as he clashed with Ellesmere and James. In 1613, against his will, Coke was promoted from the Common Pleas to the King’s Bench. Ostensibly this was a plum promotion, but it came at considerable cost – the King’s Bench offered its

55 The report to the Privy Council from which these quotes are taken is reproduced in Louis A. Knafla, Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere, pp. 297-318 passim, and p. 318 for the quotes.
justices far smaller fees. Coke finally fell from grace during his time on the King’s Bench, and in 1616, James ordered him to revise his reports so as to eliminate any legal doctrines that ran counter to royal authority. Coke made superficial changes but left his published legal writings largely untouched.\(^5\) His relationship with James remained rocky, but up to Coke’s imprisonment in the tower in 1622, he could occasionally be counted on to accede to James’s political demands. Irrespective of their subsequent clashes, Coke and Ellesmere and James had, in 1608, found common ground in the metaphor of the body politic: with minimal mutual goodwill, it could paper over the cracks in their ideological unity.

**Conclusion**

Over the course of my arguments to this point, I have demonstrated the presence and interaction of differing models of the political and legal metaphor. We might expect a technical reading, linking the body with capacity, to hold sway in the context of *Calvin’s case* itself, which gave England’s judges an unparalleled opportunity to demonstrate to sovereign and parliament alike the efficacy of the tools of their trade, the teachings of the common law, to resolve complex and pressing political issues. It was Edward Coke’s elaboration of his understanding of allegiance, after all, that inspired F. W. Maitland to refer to the king as “corporation sole” and Ernst Kantorowicz to pen *The King’s Two Bodies*. Yet even in the printed accounts of Calvin’s case, which were sources explicitly and obviously meant to justify the judges’ decision to their sceptical contemporaries and preserve their legal reputations for subsequent generations of scholars, there

was a surprising amount of slippage. A politic capacity, easily recognizable to Edmund Plowden, rubbed metaphorical shoulders with a body made up of the whole island of Britain, with James at its head. Moreover, the ease with which this pervasive language of embodiment and capacity could be co-opted into justifications of resisting royal authority was already implicit in the very texts that at last secured for James the stable and legitimate status he had so desired for the post nati. Ultimately then, no matter how powerful the rhetorical appeals to the king as the head of the kingdom's body, or the possessor of an inviolate politic body and capacity, when James depended on his judges to substantiate the status of his royal proclamations, he placed himself ipso facto at the mercy of the law. When two of the judges defended their decision in print to a wider community of readers, this weak point was exposed outside of the Exchequer Chamber. It was a position that was to have tremendous consequences, for the course of English law and the fate of the realm as well as the Stuart line itself.
7. Dangerous Precedents: The Legal and Political Aftereffects of the Body Politic in Calvin's Case

Chancellor Ellesmere did not publish any of treatises except the Speech of the Lord Chancellor Touching the Post Nati. Sir Edward Coke, however, published four subsequent volumes of law reporting in his lifetime (his sons published two additional volumes, and the four volumes of his Institutes after his death). For Coke, there were a considerable variety of other interpretations of the law that might benefit from the fixity of print. The most influential case of Coke’s post-Calvin’s case reporting was probably Bonham’s case, which Coke judged in 1610. Coke’s published finding, that the statute under which Doctor Thomas Bonham had been gaol was invalid under extant common law, formed the basis for the emergence of the doctrine judicial review. More immediately, it exacerbated the tensions between Coke and his king, as well as some of his fellow judges. In the context of Coke’s publishing career, as Bonham’s case demonstrates, Calvin’s case was remarkable less because of Coke’s awareness of the possibilities of print publication and more because of the opportunity it provided to claim consensus with Ellesmere and James himself under the umbrella-term “body politic”.

It is the intellectual and legal afterlife of this apparent agreement around the body politic that forms the subject of this chapter. The rapid-fire printing of English-language reporting meant that the consensus around Calvin’s case was staged: Coke and Ellesmere, both currying favour and opportunity, performed their

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agreement, and by extension the legitimacy of Calvin's case in print. Yet the body politic remained a convenient legal fiction apart from its presentation to a wide audience. In turn, this meant that even as Calvin's case began to excite the enthusiasm and imagination of readers far removed from the courts, the doctrine of an imaginary body politic that could be any corporation, sole or aggregate, continued to develop. This chapter is thus concerned with how the language of the body politic was problematic, even as it became axiomatic.

The case of Sutton's Hospital was one of the cases that appeared in Coke's Tenth Reports, in Law French. Though it met with less controversy than either Calvin's case or Bonham's case, the case of Sutton's Hospital was as replete with references to the "body politic" and the "politic capacity" as Calvin's case. Yet Sutton's Hospital did not ostensibly hinge on issues of royal capacity, allegiance or mutual obligation between subject and sovereign. The body politic belonged to the incorporated hospital itself. Accordingly, the case, though ultimately unremarkable as a legal precedent, is instructive as a reminder that the conceptual problems with assigning legal rights and responsibilities to an entity with only a fictive body were not unique to the king. Nor were they resolved by Calvin's case.

With this in mind, I open this chapter with an intensive analysis of Coke's report on Sutton's Hospital, focusing particularly his habit of drawing on non-legal imagery and source material to substantiate the politic body and capacity of the hospital corporation. From this interaction between technical and non-technical

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3 Sir Edward Coke, La Dixme Part des Reports de S. Edw. Coke Chivalier, Chief Justice Dengleterre des pieles desten tenus devant le Roy mesme assignee, & del Councell privie d'Estate: des diuers Resolutions & jugements donez sur solemnes arguments & avec grand deliberation & conference des tresereuherend luges & Sages de la Ley, de cases en Ley queux ne fueront vnques resulus ou aduges par devant: Et les raisons & causes des dits Resolutions & jugements ([London]: Printed for the Societie of Stationers, 1614), ff. 1R-35R.

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legal material in *Sutton's Hospital*, I turn to *Allegiance not Impeached* Robert Austin's radical 1644 rereading of Coke's report of *Calvin's case*. Austin was a clergymen of Puritan inclinations, Archbishop George Abbot's chaplain; he was not a lawyer. *Allegiance not Impeached*, his elaborate justification of parliament's right to take up arms against the king, was neither influential nor well-regarded. Nevertheless, it indicates the ways in which legal opinions about embodiment and allegiance, drawn from *Calvin's case*, were available for political argument in the mid-seventeenth century. How Austin used *Calvin's case* is instructive. Austin provides a way into a wider examination of how the political contexts and contemporary uses of *Calvin's case* shaped subsequent generations of readings, among lawyers and laymen alike, focusing on discussions of the king's status as a corporation in William Blackstone's *Commentaries*, the texts of *Calvin's case* that appeared in the *State Trials*, and the role that Coke's reports played in establishing judicial practice and legislative philosophies in the New England colonies and the Virginia territory. The creation of an imaginary body to legitimate and legalise a disembodied entity was inevitably and inherently a political act. Even so, bodies politic were at their most political when questions of allegiance and sovereign authority were at stake. The idea that corporations need legal personhood, however fictive, was permanently altered by its brush with allegiance. The effect of the judicial logic of *Calvin's case*, first felt in 1609, remained present through legal history.

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Corporations and the case of Sutton's Hospital

To lawyers, as well as laymen, the best-known, and certainly the pithiest, explanation of the problem with giving non-human entities legal standing was expressed by Edward, Baron Thurlow (1731-1806), at one time Chancellor of the Exchequer, who pointed out that “Corporations have neither bodies to be punished, nor souls to be damned; they therefore do as they like.” This statement, often misquoted, has provided a source for countless legal scholars of subsequent generations seeking sharp titles and epigrams for studies of corporation law and corporate responsibility, but it would be of little interest in the current context were it not a reformulation of observations included in the tenth volume of Coke's Reports, in a discussion of the case of Sutton's Hospital. In Coke's work too, the most quotable segment of the text has often been taken for as the case's salient point, obviating the need to consider the context.

For his part, Coke regarded the case of Sutton's Hospital as significant enough to begin the tenth volume of his reports, published in 1614, noting in his prefatory letter to readers that "it doth deserve to have precedencie for two causes, first for that it was an Eschequer Chamber case, wher, by the verdict of the grand jury of al the Judges of England, it was for the Hospital found Billa vera [supported by the evidence, thus a “true bill”]; 2. For that the foundation of this hospital is opus sine exemplo [an unexampled undertaking].” There may have

6 John C. Coffey, Jr., "No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment” Michigan Law Review, Vol. 79, No. 3 (Jan. 1981), pp. 386-459 is typical, using the remarks in both the title and epigram and acknowledging the difficulty of tracing them back, in their original form to Thurlow, much less a particular case.
7 Sir Edward Coke, La Dixme Part des Reports de S'. Edw. Coke Chivalier, Chief Justice Dengleterre des píèes deste tenus devant le Roy mesme assignee, & del Councell privé d'Estate: 210
been a note of self-congratulation in Coke's subsequent remark that "this worke of charitie hath exceeded any foundation that euer was in the Christian world, nay the eye of Time it selfe did never see the like." As the reader was to discover, Coke himself, in his role as Chief Justice of the King's Bench was named to the governing board of Sutton's Hospital by the latter's will and the subsequent parliamentary acts of incorporation.

The “Hospital” of Sutton's Hospital became the London Charterhouse. Thomas Sutton (1532-1611) was the son of Richard Sutton, a sheriff's clerk in Lincoln. Like his father, Thomas Sutton became a bureaucrat, working for the Earls of Warwick and Leicester until his 1570 appointment as the Master of Ordinance. Eventually, Sutton parlayed his considerable financial acumen and the repeal of the Edwardian statutes against lending at interest into an immense fortune. Before Coke was one of Sutton's hospital governors, Sutton was one of Coke's creditors. Sutton, who in Hugh Trevor-Roper's estimation "had no interest in his family" decided to use his immense wealth to endow a charitable foundation, a hospital, which would provide for the raising and educating of deserving poor boys, as well as the maintenance of elderly and infirm poor men. In 1608, at the tail end of the first Stuart parliament that had proved so troublesome to James VI and I, Sutton managed to get a bill passed incorporating his as yet unbuilt hospital, and stipulating that after his death, it was to be run by a self-perpetuating board of

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8 Coke, *La Dix"* part des Reportes, loc. cit.
governors, the first generation of whom Sutton had already appointed. By the
terms of his will, Sutton left nearly the entirety of his property to the hospital
corporation. His nephew Simon Baxter, dismayed with his relatively small
inheritance of £300, attempted to enter the Hospital's lands by force. When this
failed, he brought a writ of trespass against Richard Sutton and John Lawe, the
Hospital's onsite governors, asserting that their possession was an act of unlawful
trespass. On the advice of Sir Francis Bacon, James VI and I decided to use the
case to ensure the legality of the Hospital's foundation and resolve broader issues
of charitable gifts. Accordingly, it was moved to the Exchequer Bench to be
heard by chief justices from all of the courts, several of whom, like Coke, were
themselves members of the Hospital's governing board.

Accordingly, in Michaelmas Term in 1612, the case of Sutton's Hospital
came to court. Coke's report on the case is instructive, and extensive: it
immediately follows the text of the Writ of Trespass brought by Simon Baxter with
the full text of the act confirming the foundation of Sutton's hospital. After
enumerating a list of the governors of the hospital and another of the extensive
properties that Sutton intended for the Hospital's use, the act turned to its
centrepiece, the incorporation of the governors:

And that the sayd governors and their successors by the same name
shall and may have power, abilitie, and capacitie, to demise, lease,
& grant their possessions and hereditaments...And to take, acquire,
and purchase, And to sue and be sued, And to doe, performe, and
execute all and everie other lawfull act and thing, good, and
necessarie and profitable for the said incorporation, in as full and

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10 Hugh Trevor-Roper, “Sutton Thomas (1532-1611)”, ODNB; see also Coke, La Dix"me Part des
Reports, f. 238
11 Hugh Trevor-Roper, “Sutton, Thomas (1532-1611)” ODNB.
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ample manner and form to all intents, constructions, and purposes, as any other incorporations or bodie politique or corporat, fully & perfectly founded & incorporated may doe. And that the same governors and their successors for the time being may have and use a common Seale for the making, granting, and demising of such their demises and leases, and for the doing of all and everie other thing touching, or in any wise concerning the said incorporation.12

A couple of key elements stand out in this careful articulation of the appurtenances of an incorporated body of governors. The description beginning with "power, abilitie, and capacitie" indicated the role of capacity in distinguishing kinds of legal personhood. The essential nature of any "bodie politique or corporat" was its capacities to "demise" and purchase. "Demise" here referred to the legal right to transfer property to another, usually by leasing it, rather than a demise as in a death, or even, in the regal formulation, the transfer of power from one monarch to the next on the basis of the first monarch's death or abdication. Yet the fact that the two concepts depended on the same term must have made a degree of conflation inescapable: the notion of the legally necessary transfer of property from one man to another was confused with the physical and political processes that gave rise to those transfers.

The bill's insistence on a "common Seale" for the governors was a simple necessity of their ability to conduct business – the attachment of a seal guaranteed the authenticity of a contract, lease, or deed. Yet it also emphasized the way in which a corporation like Sutton's hospital, with a charter modelled on borough corporations, as well as older, perpetual charitable endowments, mirrored larger versions of the "body politique." Certainly, with Sutton seconding the Keeper of

12 Coke, La Dixme Part des Reports, f.4R.
the Great Seal to his hospital's body of governors for as long as anyone should hold the office, the resemblance was difficult to miss. In reproducing the texts of Sutton's petition and the parliamentary bill so extensively then, Coke indicated his own sense of the importance of the judicial opinion that followed his quoted text.

In this opinion, Coke offered an extended meditation on the nature of the corporation. In his report, he offered an account of no less than ten objections that the plaintiff's counsel offered against the legality of Sutton's large bequest to the newly-chartered corporation of the hospital. The scope of this chapter makes it impossible to consider all of these objections or the entirety of Coke's report on the case, so is the third and sixth objections that is relevant here. The third objection was that James could not, by letters patent or charters make a gift of revenues or property that were *in alieno solo* (in some one else's soil). According to Coke's report, the sixth objection was that:

> Until there is a Hospital and poor men in it, there can be no governors of them, because governors ought not to be idle, or as cyphers in algorithms, because governors and government, which exist simultaneously, are not absolute; and as well in his will as in other instruments he [Sutton] had many times called it his intended hospital.

In other words, Baxter's lawyers questioned whether it was legal for the governors named in Sutton's petition to James, and the subsequent royal charter, to assume governing responsibility for the corporation when its physical plant, which would after all form the mainstay of their responsibilities, did not yet exist. Here, the language of "cyphers in algorithms" stressed the potential similarity between

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13 Coke, *La Dix*me Part des Reports, f. 23v, original in Law French; except where otherwise stated, translations from Law French are my own.
armchair governors and place-holding terms in mathematical expressions and
emphasised the case's preoccupation with the theoretical ramifications of corporate
charters and wills. Moreover, Coke's rhetoric here linked idleness with the
mutable, disembodied nature of the cypher.

This sixth objection led to the most famous formulation of the anxieties
around corporate embodiment in early-modern England:

And as to the sixth objection that until a Hospital is founded, no
incorporation can exist, because then there would be idle and
mathematical governors, it was answered that there was a Hospital
in capacity, and a hospital in execution, also a hospital in
possibility, a hospital in action, a hospital in matter, and a hospital
in name. And as to the creation of a corporation, hospitals in
capacity, potential, or name suffice; as one can by letters patent be
governor of an army before that there may be an army [citation
omitted]. And this accords with philosophy and reason. Aristotle in
Book 3 of the De Generatione says, that flesh engenders flesh
[quod caro gignit carnem] and this is seen in capacity but not in
actuality and so a bird, as soon as it has hatched is [called] a fowl,
[volatilis], from flying, [volando] because it has the capacity to fly
although it cannot fly. So an infant, as soon as it is born, is called
rational, [rationalis] because it has the capacity [potestate], even
though it doesn't yet and peradventure may never have actual
reason...And it is great reason that a hospital, & etc. in expectancy,
or intention, or nomination are sufficient to support a corporation as
long as the corporation is only in the abstract & rests only in
intention and consideration of the law; because a corporation
aggregated of many is invisible, immortal and rests only on
deane and chapter cannot have heir or successor [citation omitted]
they cannot commit treason, nor be outlawed, nor excommunicated
because they do not have souls, nor can they appear in person, but only by an attorney [here "attorney" refers to any delegated representative who could appear in court, as well as referring more specifically to legally trained advocates]: 33.8. H. titled Fealtie Booke, a corporation aggregated of many cannot swear fealty, because the invisible body cannot exist in person, nor can it swear, Plowden's Commentaries & Lord Barkley's Case [citation omitted]. It is not subject to imbecilities or death of the natural body and diverse other cases.

In granting corporations some kinds of human agency (the capacity to sue and be sue) but not others (swearing fealty and committing treason), this reading of the case of Sutton's Hospital also inevitably tied specific human activities before the law to the possession of visible, tangible, and even non-fictive bodies. Yet as Saru Matambanadzo has recently and cogently argued, exposing the legal fiction that underpinned the act of chartering a body politic also exposed the limits and scope of the legal imagination. Even where the entities law confronted were least tangible and least embodied, granting them any kind of legal status depended on reimagining them as bodies, however imperfect such bodies might be before the law.

The Report's recourse to Aristotle's De Generatione required analogising between birds, who had the future but not the actual capacity for flight from birth and infants, who might or might not have the future capacity for reason, presumably, specifically legal reason. It thus implicitly linked the development of legal reason with the growth of the physical body. Because the body politic,

15 Coke, La Dixième Part des Reports, f.32r-v.
however, was incapable of death and was indeed perpetual, it was outside the
process of this kind of development, and it could not reproduce other bodies
politic: bodies politic that could not die had neither need of heirs nor the capacity
to engender offspring.

When it became necessary to find an analogy linking the body politic with
the body natural to justify James naming Sutton's property in the charter of
incorporation for Sutton's hospital, Coke fell back on a surprising choice: baptism.
Despite his assertions in the same opinion that corporations, as bodies politic rather
than natural, had no souls, Coke responded to the third objection (that naming
Sutton's property in the hospital corporation's charter was beyond James's power)
by likening the name of a corporation a "proper name" or a "baptismal name". He
continued that "in this case Sutton, as godfather, gives the name and with the same
name, the king baptizes the corporation; by this it appears that the objection that
the king cannot give a name to the house that is the inheritance of another has no
value."18

Coke's suggestion about baptism was undoubtedly an oblique reference to
James's position as the head of the Church of England, but it also acknowledged
the awkward position of the body politic. It did not have a soul precisely because it
required a pseudo-baptism in law, rather than a real baptism. Yet corporations
themselves came into existence only when legitimised, or rather baptised, by the
king, who himself possessed a body politic, or, as Edmund Plowden might have
argued, was possessed by a body politic. Just as the limitations of the corporation,
then, depended on the fictional nature of its body, its positive capacities under law

18 Coke, *La Dixieme Part des Reports*, f. 28v.
were dependent on belief in that fiction. Accordingly, just as the monarchical body politic was necessarily embodied in James's natural body, the hospital corporation required a bare minimum of embodiment; this was what made the possibility of "mathematical" or "cypher" governors so problematic. Yet even where there was a single, natural body, that of the king, underpinning a body politic, the complexity of the nexus of body politic and body natural required careful legal scrutiny. Human allegiance, as Coke demonstrated in Calvin's case, belonged to the king’s natural body, which was vulnerable to treason and possessed of a soul. Nevertheless, one of the advantages to James’s possession of a body politic, at least for James’s subjects, was the ability it conferred on the king to engender other bodies politic, at least in the eyes of the law. An imaginary body which could create the Charterhouse Hospital, soulless or not, was an asset to be celebrated.

The Extra-Legal Afterlife of the Body Politic

Early seventeenth-century conceptions of the body politic of course outlasted Coke's own use of them. Coke himself acquired considerable notoriety when he became associated with the 1628 Petition of Right. His notoriety was perhaps enhanced when Charles I sealed off his rooms in the Inner Temple and seized his papers in 1633. On 12 May 1641, the Long Parliament voted to return Coke’s papers to his grandson Roger Coke so that they could be prepared for publication.19

Meanwhile, rising political tensions inspired a new sense of urgency in calls for widely-accessible printed law. As Elizabeth Eisenstein has noted, John Lilburne called for the widespread publication of English law in English so that

19 See Allen D. Boyer, “Coke, Sir Edward (1552-1634)”. 218
“every Free-man may reade it as well as the lawyers.”

Calvin’s case had been reported in English to attempt to forestall the kind of distrust of lawyers by laymen that Lilburne’s plea indicated. Indeed, Robert Austin, a non-lawyer had already attempted to claim the logic of Calvin’s case to support the parliamentarian cause. In 1644, he worked from the printed accounts of Calvin’s case to argue that members of parliament could support the mustering of an army in defence of realm and crown against Charles I. Austin was a Cambridge-educated clergyman, without legal training. He was the chaplain of Archbishop George Abbott and subsequently the rector of the parish of Adlington, Kent. Nevertheless, he familiarised himself with the accounts which Coke and Ellesmere wrote of Calvin’s case. Austin’s reading illustrated the dangers of lay interpretation of the law: one reader remarked in the margin of the title page of the Folger Library Copy that Austin “by his false interpretations wrongs Monarchy, the King, & all the private men he makes use of, such a wrong deserves a heavy punishment.”

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20 Elizabeth Eisenstein, The Printing Press as an Agent of Change: Communication and cultural transformations in early-modern Europe, Volumes I and II (Cambridge: Cambridge University Press, 1980), p. 362. For the source of the quote, see John Lilburne, England’s Birthright Justified against all arbitrary usurpation, whether regall or parliamentary, or under what vizor soever. With divers queries, observations and grievances of the people, declaring this Parliament’s present proceedings to be directly contrary to those fundamentall principles, whereby their actions at first were justifiable against the King, in their present illegall dealings with those that have been their best friends, advancers and preservers: and in other things of high concernment to the freedom of all the free-born people of England; by a well-wisher to the just cause for which Lieutenant Col. John Lilburne is unjustly in-prisoned in New-gate. ([London: Larner’s Press at Goodman’s Fields], 1645), p. 8.


Certainly, Austin’s reading of Calvin’s case, like his invocation of the body politic, was atypical. It has understandably attracted very little critical or scholarly attention. It was neither accurate nor particularly influential. Yet in Allegiance not Impeached, Austin illustrated the way in which lay readers could construct highly contentious readings of legal texts with no help whatsoever from lawyers themselves. Austin’s use of Calvin’s case was strikingly different from more obviously significant citations of the law case or, indeed, the metaphor of political embodiment more generally.

Thus the parliamentary secretary and political theorist Henry Parker, a writer both more prolific and more influential than Robert Austin, considering the relationship between parliament and king in his Observations upon some of His Majesties late answers and expresses (1642), famously insisted that the law to which Charles I referred as the source of his hereditary right was neither divine or natural, but rather “nothing else amongst Christians but the Pactions and agreements of such and such politque corporations”.

As Michael Mendle has noted in his study of Henry Parker’s role in civil war propagandizing, “the reduction of human law to ‘pactions’ of particular corporations brutally demystified the relation of law to king and polity.” Though Parker disdained the notion of an indissoluble bond between the king as head and the state as his body politic, he nonetheless remained engaged by the iconography of the body politic. He argued that the head of a body politic, unlike the head of the body natural, “receives more subsistence from the body than it gives, and being subservient to

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24 Henry Parker, Observations upon some of His Majesties late answers and expresses [London: s.n., 1642], p. 1.
that, it has no being when that is dissolved, and that may be preserved after its dissolution".²⁶ Here, Parker, trained in common law at Lincoln’s Inn and eager to defend parliament’s right to defy Charles I, stressed the differences between the body politic and the body natural. A body politic, or “politique corporation”, could withstand the loss of its head far more comfortably than could a human body.

Parker’s observations immediately generated a flurry of rebuttals from royalists and imitations from fellow parliamentarians.²⁷ In considering this back and forth in the “war of words” between king and parliament, the literary critic Nigel Smith has suggested that “far too much has been claimed for the iconic nature of royalist literature, without appreciating the extent to which parliamentary apology stretched the shape of royalist discourse in very un-iconic ways.”²⁸ Yet in this case, while Parker had certainly stretched the royalist iconography of king-as-head beyond the point of justifying royal sovereignty, one of his royalist respondents, Sir John Spelman took a still less iconographic, and far more legalistic, line. Like Parker, Spelman been trained for law, following in the footsteps of his father, the legal antiquarian Sir Henry Spelman, at Gray’s Inn. While Spelman directly refuted Parker’s claims that the body politic could survive without its kingly head,²⁹ invoking Sir John Fortescue and the De Laudibus Legum Anglie as he did so, he also made a point of citing case law, including Calvin’s case, in order to argue that no parliamentary statute could supersede the mutual

²⁶ Parker, Observations, p. 19.
²⁷ For the Observation’s influence, see Mendle, Henry Parker, pp. 90-3.
obligations of protection and allegiance that bound monarch and subjects.\textsuperscript{30} Thus, Spelman both employed a broadly intuitive account of the body politic and cited *Calvin's case*, a technical and legalistic resolution on allegiance.

Thus, vexed questions about how the state as a body politic was and was not like a natural body provided considerable ammunition to both sides of the pamphlet wars of the early 1640s. Recent scholarship has devoted considerable attention to the problem of how the political imagination integrated various conceptions of the body politic during the period.\textsuperscript{31} In the context of these pamphlet wars, Austin's *Allegiance not Impeached* was less a broadside missile than a misfire: indeed, it is puzzling that while parliament could depend on the intellect of men like Parker, and the king, in turn, could look to figures like Sir John Spelman and Sir Dudley Digges, Austin attempted to take up the issue of allegiance at all. Despite their ideological and political differences, Parker, Spelman, and Digges all shared training at common law. More, each man wielded considerable political influence during his lifetime. Austin, by contrast, had served as a bishop's chaplain and subsequently as a country parson. Since he had neither the expertise to use his evidence to best advantage, nor the influence to put his argument into political practice, it is unsurprising that he left little mark on the ideological debates of the period. Nevertheless, the fact that Robert Austin took it...

\begin{footnotesize}
\textsuperscript{30} Spelman, *A View*, p. 7.
\end{footnotesize}
upon himself to interpret legal precedent to defend parliamentary authority and the fact that newly available textual evidence made such an approach possible renders the Allegiance not Impeached worthy of some scrutiny. What makes Austin so interesting is not that he advanced a dominant, or even a correct, reading of Calvin’s case as a precedent on allegiance; rather, Austin’s interest derives from his insistence on offering an interpretation of the case from so far beyond the pale of professional legal reading.

Notwithstanding the idiosyncrasy of his approach to Calvin’s case, Austin explained the stakes for a correct understanding of the case early in the text. Because the judges ruled that allegiance was owed to the person of the sovereign rather than the crown, "many ground and raise a scruple, how they can take up defensive armes, sith by the Oath of their Allegiance they are bound to bee true and faithfull to the person of the King." Fortunately, for such doubters, Austin assured them that, "from whence they raise a scruple, thence doe I raise an argument to confirme me in the case at hand." Indeed, Austin explained that upon [the principles in Calvin’s case] I build my insuing Discourse, as upon a supposed sure foundation, because the then Lord Chancellour, and twelve chiefe Judges, did argue from those very grounds in this case of Calvin: and it is remarkable what Judge Coke observeth here: Never in any case (sayes he) within mans memory did so many argue, and they did it in his judgment, as elaborately, substantially and judiciously as hee ever read or heard

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32 Robert Austin, Allegiance not impeached viz. by the Parliaments taking up of arms, though against the Kings personall commands, for the just defence of the Kings person, crown and dignity, the laws of the land, liberties of the subject : yea they are bound by the oath of their allegiance and trust reposed in them to doe it : proved partly from the words of the oath it self : and partly, from the principles of nature and of law, alledged for such by the Lord Chancellor Elsmore and twelve other judges in the case of Calvin, a Scot by birth, as appears in the seventh part of Justice Cooks reports, in Calvins case, which case is briefly set down in the Epistle to the reader (Printed at London: by Richard Cates, for John Bellamy, 1644), f. sig. A2²3.
of any; Whether I build aright upon these grounds of theirs, I leave to thine impartial judgement.  

Austin was familiar with the printed tract materials relating to Calvin's case. More than that, he was confident that he could interpret and expand upon the principles the judges elucidated, making the case a political, and even a personal precedent. Men could reimagine their oaths of office, he suggested, with a judicious reading of *Calvin's case* and a clear conscience. Finally, Austin invited his readers to judge for themselves whether he had effectively used the outcome of the case.

Edward Coke, whom Austin invoked as an authority for the significance of Calvin's case, had conceived of the Common Law as an accretion of the “wisdom” of the judges, but also of their “artificial reason”. This reason was the product, for Coke, of the careful study and consensus of a community of lawyers. Yet Coke, in writing and publishing his *Institutes* and particularly his *Calvin's case* report in English, had significantly widened access to that reasoning, rendering it not only useful but also practicable to people far outside the charmed circle of the Inns of Court.

As a clergyman, Robert Austin positioned his layman's use of “artificial reason” in terms of a divinely-inflected chronology of the world. He tied his disdain for “Schoole termes and words of Art” to an insistence that his artless style was only meant to be harsh where it attacked “those who are and have been the chiefe Authours of all our troubles, or their fierce abetters, who are the chiefe causes of the shedding so much Christian blood, which cries aloud for vengeance

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34 For Coke's conception of artificial reason, see Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age*, 83-4
35 Austin, *Allegiance not Impeached*, f. sig. A2^v^-A3^r.
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unto God". Though Austin's rejection of "words of Art" was perhaps ironic given his invocation of Coke and Ellesmere, he was ultimately claiming that the lawyer's logic could be summarised and reinterpreted without legal language and that it was available for deployment in a wider context of religious and ideological, rather than merely political or legal, conflict. Accordingly, he assured his readers that God would in fact avenge the blood spilt by his intellectual adversaries, citing the prophecies of Malachi and arguing that the prophet's words should be interpreted as referring not only to the coming of Christ but also to any subsequent efforts at reform under Christian sovereigns until the Apocalypse. In this respect at least, the efforts of the judges in Calvin's case were a spectacular success: Austin, a non-lawyer accepted their published reading as authoritative.

Austin was quick to stress this authoritative status: in the first chapter of his work after the prefatory address to the reader, he listed the names of the judges in Calvin's case, explaining that "their very names mee thinks should beare that sway and weight with us, as to poyse the ballance of our judgement something in this case." Indeed the judges' names were left to speak for themselves – Austin made no mention of what the judges' qualifications or other works were. Nor did he bother to elucidate the facts of the case. In part this may have been a matter of simple expediency; allegiance and its reciprocity fell within his purview, but the details and specifics of Robert Calvin's (or Colville's) status as a Scottish and/or English subject had little relevance for his case.

36 Austin, Allegiance not Impeached, f. sig. A3R.
37 Ibid., f. sig, A3R-V.
Interestingly, though Austin cited Ellesmere rather than Coke in his title, following the order of legal precedent, which set the Chancellor of the Exchequer ahead of the Chief Justice of the Common Pleas, the principles of allegiance which he explicated were taken from Coke's *Septieme part des reportes* rather than Ellesmere's *Speech*. As I demonstrated in the previous chapter, though Ellesmere and Coke agreed, publicly, on essential principles, they differed significantly in how they conceived of judicial authority, especially in relation to the crown. Accordingly, Austin's references to Coke rather than to Ellesmere prioritised a vision of judicial authority tied to the rule of law rather than to the crown or the king's will.

Closely following Coke's legal reasoning, Austin invoked Coke's description of four categories of allegiance: natural allegiance, owed from birth; acquired allegiance, owed by naturalised subjects; local allegiance, owed by aliens under the monarch's protection; and legal allegiance, owed in accordance with the law. Austin identified the leet oath with legal allegiance, surprisingly paraphrasing the oath taken at the leet courts at length. In doing so, he emphasised the physical to a remarkable degree:

> You shall sweare that from this day forward, you shall bee true and faithfull unto our Soveraign Lord King CHARLES, and his Heires, and truth and faith shall beare of life and member [that is, unto the letting out of the last drop of our dearest bloud] and terrene honour, and you shall neither know nor heare of any ill or mage intended unto him that you shall not defend, So helpe you God.\(^{39}\)

Austin's insertion of this text – into a description of, rather than a quotation from the Caroline Oath of Allegiance – strongly emphasised the fact that though the leet

\(^{39}\) Austin, *Allegiance not Impeached*, f. sig. B2\(^8\). The italics and insertion are both original.
oath to Charles I demanded an extreme bodily commitment from Charles’s
subjects, linking "legal allegiance" with the natural bodies of those subjects
swearing it. Austin contrasted this viscerally physical oath with the one sworn to
James VI and I, of which he noted (in the marginalia) only that the king’s "Person,
Crown and Dignity" were mentioned. By implication, the oath sworn to Charles I
conflated legal allegiance and an obligation on subjects' parts to surrender their
very lifeblood to their monarch.

When Austin turned at last from oaths of allegiance to the next point in his
summary of Coke's report, whether allegiance is owed to the king's natural body or
his body politic. Coke himself had taken pains in his printed report (discussed in
the previous chapter) to tie allegiance to the natural body. For his part, Austin took
a slightly different tack that Coke in framing the question, asking:

whether [allegiance is due] to the King in his naturall capacity, as
he is a man descended of the bloud royall of the Realme, and so is
subject to death, and infirmity and such like, or in his politick
capacity, as hee is the head of the body politick, in which capacity
the King is esteemed to bee immortall, invisible, not subject to
death, infirmity, infancy, nonage; that is; the first capacity hee hath
from God, the second from the policy of man.41

Austin was obviously attentive to Coke's report here, citing his list of things that
could not happen to a body politic. Yet Austin altered, subtly but substantially,
Coke's legalistic, Plowden's Commentaries-inspired account of the body politic.
For Coke, as we have seen, the king possessed a body politic because he was a
corporation, a status he shared with abbots, archbishops, and, as the case of

40 Austin, Allegiance not Impeached, f. sig. B2^R.
41 Ibid. f. sig. B2^RV.
Sutton's Hospital demonstrated, even hospitals. Austin's reading retained the legal characteristics of the body politic but read the body politic exclusively as a metaphor for the nation. The king was no longer a corporation sole but rather the head of a metaphorical body. A generation after the two most prominent judges in England had published their opinions of Calvin's case, the case retained its relevance outside the courts, but the presence of multiple strains of body politic rhetoric made it possible for writers like Austin to bundle together legal thought and political rhetoric, ignoring the disparities between these strains.

Citing the specific arguments with which Coke's report underpinned its argument for allegiance adhering to the body politic, Austin turned from summarising the judges' opinions to building on them in Chapter Two of his pamphlet. He elucidated a four-pronged approach to the duty of allegiance: acknowledgment that subjects owed a duty to the king; investigation of what law bound them to that duty; manifestation of that duty to the king's "Person, Crown, and Dignity"; and manifestation of that duty to the king's commands because "whosoever shall resist his commands, resists his power."\(^4^2\) Austin's attention to elucidating, and even attenuating, various strands of allegiance ultimately belied his fairly simple conclusion: "The Law by which this whole duty is due, and to bee performed, and according to which it is to bee esteemed either kept or violated, even the whole duty of our Allegiance: it is the Law of God and of nature, and of this Realme."\(^4^3\) Given how contested the relationship between common law, statute law, and natural law had been in English legal theory (and continues to be in modern legal scholarship), Austin's casual assumption that a law, could

\(^4^2\) Austin, Allegiance not Impeached, f. sig. B3\(^R\)\(^V\).
\(^4^3\) Ibid, f. sig. B3\(^V\).
adequately contain nature, God, and the statutes and judges of the realm as its sources seems strikingly disingenuous. Yet Austin’s claim was, arguably, more complex than its most obvious potential for controversy would suggest: if the conflation of natural, divine, and national law was normative rather than descriptive, Austin could frame the bounds of both law and allegiance in new terms.

If the law of God and the law of nature were equivalent to one another and the law of the realm, then where the law of the realm seemed to contradict divine or natural law, it ceased to be the law of the realm. Later in his treatise, Austin qualified this phrasing, acknowledging that “God sometimes commands what nature does not; and man sometimes what God does not, I meane, more is expressed by one, then does at first appeare expressed by the other, though all their commands are but the dictates of true reason.” This qualification envisioned the laws of men, God, and nature as a trio of widening concentric spheres, all of which were, in turn, subsumed under the heading of “true reason.” Even here, Austin’s phrasing demands close attention: his claim was that man’s law expresses more “then does at first appeare” in God’s law or nature’s law despite the fact that ultimately reason is the source of all three kinds of law. The sense that it was the appearance of kinds of law that differed pushed even this caveat back towards the normative unity among kinds of law that Austin’s initial statement suggested.

The argument leading to this initial conclusion is no less surprising than the conclusion itself. Robert Austin noted that ultimately, not only was the law (natural, divine and national) the source and font of the reciprocal relationship

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44 Austin, Allegiance not Impeached, l. sig. B4v.
between king and subject, it was the rubric "according to which [the duty of allegiance] is to bee esteemed either kept or violated." In other words, Austin's remarkably broad, conflated category of the law was the measure of what duty the Stuart monarchs, could expect from their subjects. As we have seen, such a rationale would not have impressed James himself. The author of the True Law had sought evidence from the Old Testament to argue that divine law mandated obedience to even the worst kings. Yet Austin's very inclination to write about, and reinterpret, Calvin's case set his logic in Allegiance not Impeached at odds with Edward Coke's legacy and his emphasis upon "artificial reason," which was the product of lawyers' extensive training. This emphasis, of course, alienated Coke from his monarch: his insistence during the course of Fuller's case (1607) that being king of England did not qualify James to interpret the law of England as well as his judges marked one of the low points of their relationship. 46

By reading natural, divine and national law as all essentially equivalent to true reason, and distancing himself from either James VI and I's claims for a model of allegiance that subjects owed irrespective of any reciprocal royal duty, or Coke's reciprocal allegiance adjudicated by the judges' artificial reason, Robert Austin could read the maxim that the safety of the commonwealth was the highest law (salus populi, suprema lex) as governing all types of law, and by extension, allegiance. This rhetorical move, in turn, allowed Austin to turn from considering law generally to considering the individual elements of the phrase salus populi suprema lex.

Not entirely surprisingly, Austin foregrounded his analysis of the term populi, drawing on the works of Augustine, Aquinas, Becman, Coke, John Calvin,

46 Boyer, "Coke, Sir Edward, (1552-1634)" ODNB.
and Johann Gödde, professor of law and rector at the University of Marburg, to track the ways in which the word *populus* had been construed to include or exclude various classes of people. From this point, he returned to the consideration of the body politic. As he explained, because the king, as head of the body politic, and the people, as its members, were distinct entities but must have a homogenous substance, "it will follow, that as the head hath its naturall and politick capacity by itself, so the people must have theirs by themselves also." Austin's claim that the head and body ought to be homogenous in some respects pushed the link between the human and the political body into new and untoward territory. Indeed, in conflating the rhetorical body politic, in which head and members must have some homogenous traits as parts of the same body, and the legal body politic, which conferred politic capacity, Austin made room for an entirely novel rereading of the terms of *Calvin's case*.

Point by point, Austin considered the aspects of a body politic stressed by Plowden and Coke and insisted that they had analogues for the people, arguing that:

First as in the king there is a naturall capacity, which is his person, and a politick, which is his Crown and Dignity and such other flowers of the Crown, as belong unto it; So in the people there shall be considerable both their naturall capacity and also their politick respect, or capacity, (call it what you please) which are their liberties and privileges, or such rights as belong to them. The medical, and even sacramental, resonances of the argument that the king as body and the people as members must be of the same substance should not distract us from the point that legally-speaking, Austin was in some respects right. The
politic capacity of politic bodies, those created by human policy as legal entities, was meant to emulate the capacities already present in some part of the people: the abilities to buy and sell, sue and be sued. Those who were excluded from these legal capacities (married women, children and wards, and others) unsurprisingly went unmentioned in Austin's account of the width and breadth of the concept populus. Accordingly, though his reasoning would not have appealed to any lawyers who had themselves read Plowden and Coke, Austin was ultimately claiming "liberties and privileges", by a mechanism of a people's politic capacity, which the law already afforded.

Austin continued his reading further still to argue that:

Secondly, as in the King the naturall capacity is ever accompanyed with the politick, (as you have heard) and the politick capacity is as it were appropriated to the naturall: So shall it bee also here: the naturall capacity of the people shall bee ever accompanyed with the politick, (considered in its liberties and privileges) and there must never be severed.47

In this second assertion readers familiar with the legal justification of corporate embodiment in the body politic could find more to quibble with. Austin here, though he accurately echoed Coke's argument that the politic capacity attached the body natural, argued from this point that the members (people) of a metaphorical body politic had an analogous politic capacity attaching to their natural bodies. With this claim, Austin missed the fundamental legal significance of a politic capacity: it let monarchs (and bishops, hospital corporations, and joint-stock companies) exercise legal privileges already available to human subjects and primarily related to property. As Coke's lengthy explanation and justification of the

47 Austin, Allegiance not Impeached, f. sig. C1^v-C2^r.
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process of incorporation in *Sutton's Hospital* indicated, the legal fiction of the body politic was a convenience for the courts rather than a secure basis liberties and privileges. Yet Austin also understood how the capacity associated with bodies politic differed from the capacity of human beings -- its immortality. It was this aspect of the politic capacity that formed the third prong of his account, an insistence that like the crown, the liberties and privileges of the people were undying.48

It was at this point that Austin finally turned to consideration of the place of the law in his radical schema of the body politic, noting that:

And here now in these three instances, I have made (as you see) no mention of the Laws, because I conceive them not proper to either politick capacity, but common unto both: the Laws being the common principle, out of which both show, and in which they both subsist, and with which they make one body politick, as you shall heare hereafter. Wherefore in these Instances, the Laws are not to bee thought excluded, but rather included according to their different relations to King and people.49

Here again, there is little in the broad strokes of Austin's claim that the politic capacity was constrained by the law rather than generating it. Nevertheless, Austin turned conventional legal analysis on their heads once more: his choice of the verb "subsist" was not accidental, evoking as it the creedal and Eucharistic language of "one substance", which bound Christ, the head, to his church, the body. Peter Goodrich has remarked upon the presence of Eucharistic symbolism in early modern legal writing in the past,50 but Austin's use of the language of "substance"

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48 Austin, *Allegiance not Impeached*, f. sig. C2R.
49 Ibid, loc. cit.
was both more deliberate and more specific. In insisting that the politic capacity "subsisted" in English law, Austin could subtly realign it. Instead of associating "politic" with policy, human agency, and the law of the realm, Austin emphasised the organic and theological metaphors that justified the mutuality of the body politic between sovereign and subjects. His earlier hierarchical conflation of natural, divine, and state law offers some clue to the ultimate advantages of such a reimagining of the politic capacity. If the politic capacity is not actually politic, except insofar as it confers rights and privileges on the people and an admittedly metonymous crown on the sovereign, then it falls within the more central circles of divine and natural law, beyond the reach of human legislation and particularly royal tyranny.

Austin's account, prioritising the theological bases and ramifications of a metaphorically double-bodied king and polity, ultimately might have been a better fit for Ernst Kantorowicz's King's Two Bodies, than Edmund Plowden or Edward Coke. Their conception of the king's two bodies, and two capacities, stemming as it did from a broader conception of fictive, legal personhood for corporate entities bore fit awkwardly at best into Kantorowicz's conception of an evolving medieval and early modern political theology. It was not in Willion v. Barkley, Duchy of Lancaster nor even Calvin's Case that the link between the texts Kantorowicz cited and the argument he gleaned from them first emerged. Instead the conflation that Kantorowicz echoed, ironically, only occurred in rhetoric of the 1640s aimed at separating the monarch and his sovereign authority. Legal language, naturally enough, only became thoroughly absorbed in the kind of theological discourse described in The King's Two Bodies when it
became available to non-lawyers. Calvin's case was published in English, and Sutton's Hospital was not. Under such circumstances, it was hardly surprising that in the politically turbulent 1640s, non-lawyers like Austin used the terminology of the body politic exclusively in political contexts; the body politic as corporation remained the domain of the lawyers.

The Fixed Text of the Law in the Eighteenth Century

For lawyers and non-lawyers alike, however, Sutton's Hospital was to have a fortuitous benefit. Its terms allowed the creation of the Charterhouse Hospital and the Charterhouse School, which, in 1730 admitted as a pupil a widow's son named William Blackstone. Despite being orphaned entirely during his time at the Charterhouse, by all accounts Blackstone thrived intellectually, and he matriculated to Pembroke College, Oxford in 1738. He studied civil law in Oxford, while simultaneously undertaking to read common law in the Middle Temple in London. Maintaining connections to each of these institutions was an excellent career move for Blackstone. He himself had studied civil law at Oxford in part because there was no scope to pursue common law in the English universities. He narrowly missed appointment to the Regius Professorship in Civil law in 1753, but in 1758, by the terms of the will of Charles Viner, the administration at Oxford established a new Vinerian Chair in Common Law and elected Blackstone as its first occupant.\(^{51}\)

Developing a course in common law suited to a university setting provided ample scope for Blackstone's not inconsiderable intellectual talents. The project also influenced the form of his *Commentaries on the Laws of England*, first published in four volumes over the course of the 1760s. In the text of his first lecture, which became the front matter of the *Commentaries*, Blackstone averred that "as therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned." To facilitate young scholars in this aim, Blackstone organised his *Commentaries* topically, assuring his readers of ease of access.

Blackstone's desire to make the law more generally accessible bore fruit, and his *Commentaries* became the basic textbook universal to later eighteenth- and nineteenth-century lawyers on both sides of the Atlantic.\(^{53}\)

Given the breadth of the *Commentaries* influence, it is unsurprising that Blackstone's text became an important source for lawyers and all those who agreed that it was incumbent on them to know some law when they thought through the metaphor of embodiment. Interestingly, Blackstone dwelt most on the notion of a body politic not in his discussion of royal prerogatives and obligations, nor while considering subjects and aliens, although as Polly Price has argued, it was probably through Blackstone that American lawyers and judges came to depend of *Calvin's case* to construe issues of allegiance and citizenship.\(^{54}\) Rather, Blackstone


\(^{53}\) One popular, though probably apocryphal, story suggests that it was the accidental purchase of a copy of the *Commentaries* from a passing homesteader that inspired Abraham Lincoln to take up the study of law. See Alban Jaspar Conant, "My Acquaintance with Abraham Lincoln," *Liber Scriptorum: The First Book of the Author's Club* (New York: The Author's Club, 1893), p. 172.

came to his fullest analysis of the nature of the body politic when he discussed corporations noting that the establishment of a new corporation always required the explicit consent of the king, but that implied consent to incorporation was sufficient for some corporations sole, including,

the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can show us) to have been corporations, *virtute officii* [by virtue of their office]: and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time.\(^5^5\)

For Blackstone, then, what made corporations essential was that their convenient perpetuity. Nevertheless, that perpetuity permanently altered how a king, bishop, or even churchwarden was conceived under law: dual personhood was an integral part of their legal portrait.

Where the early seventeenth-century panel of judges discussing union had been preoccupied with the seal as the integral tangible sign of a corporation's status as an invisible body under law, Blackstone seized upon names. Indeed he noted that “the name of incorporation, says Sir Edward Coke, is a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as godfather; and by that same name, the king baptizes the incorporation.”\(^5^6\) Here Blackstone referred readers to Coke's report on the *case of Sutton's Hospital*, but he also invoked statute and charter from the across English legal history in order to demonstrate that royal consent was the necessary

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\(^{55}\) Blackstone, *Commentaries*, p. 460.

\(^{56}\) Ibid, pp. 462-3.
ingredient for the establishment of a corporation. Attaching the power to form corporations so strongly to royal prerogative emphasised, subtly, the link between that prerogative and the king's own immutable status as an undying and perpetual corporation.

For Blackstone, both the capacities and the limits of corporations are simply the results of their disembodied nature (he pointedly excepts corporations sole from these capacities and limits): they must always be represented in court by attorneys, since they cannot appear for themselves; they cannot become the victims of assault or battery, because it is impossible to do physical damage to an imaginary body; they cannot commit treason, nor can their blood be corrupted upon conviction; they cannot take oaths, be arrested, or be outlawed. Imaginary bodies are thus inherently limited by their invisibility and intangibility, and there is very little that is ostensibly mystical about their existence in Blackstone's formulation. Where perpetuity in law was a desired end, the king could grant a corporate charter, and bestow a corporate name. Despite his largely utilitarian views of corporations, Blackstone fell back on Coke's baptism metaphor. Even for him, the easiest analogy for incorporation was religious ritual. The king as corporation, and all those corporations the king created, still required ritualistic, tangible links to their imaginary bodies. Bodies politic were not quite like bodies natural, and imaginary bodies, like their royal creator, did not face the full spectrum of capacities enjoyed by, and imposed on, natural bodies (especially where those natural bodies were sound, male, and of age). The question of how exactly to understand, and grant, these partial capacities, held by imaginary bodies,
remains one of the most pressing, not just in legal history, but in Anglo-American law.

The flexibility of the corporate form reflected the nebulous shape of the corporate metaphor, in politics as well as law. As the appendix that follows demonstrates, in England and particularly in America, rearticulations of corporate persons’ rights were carefully correlated with considerations of the non-personhood of slaves. Making the king-as-state, and thus the state itself, an imaginary person was critical, not only for political discourse, but also for how law determined what it meant to be a person, whether that person a real or imaginary body. The continual slippage between valences and uses of the language of “body politic” thus had major consequences far beyond cases dealing with what the English monarch’s corporate status.
APPENDIX

The Empire of Personhood: Fictions of Personhood in a Transatlantic Context

As the Case of Sutton’s hospital illustrates, even Lord Edward Coke and William Blackstone continued to wrestle with the problem of artificial, corporate entities. Despite Coke’s reiterated insistence that the corporation governing the Charterhouse Hospital, like the king’s body politic, had no soul, the most apt metaphor he could find for legal incorporation was baptism. Jurists and legal theorists in the four centuries since Coke handed down his rulings have continued to be baffled by how to talk about imagined bodies with real legal rights and responsibilities. Accordingly, in this final chapter, I will track the continuing influence of late-sixteenth and early-seventeenth century writings about the body politic developed in Coke’s publications (as state and as corporation) through subsequent points of intersection between metaphorical, partial, and real personhood in Anglo-American law.

This examination will elucidate the stakes of a serious engagement with the body politic metaphor for legal history. As S. E. Thome and G. Edward White have noted in very different works,1 an incomplete set of Coke’s writings came to North America on the Mayflower, and nineteenth- and even twentieth- and twenty first-century American jurists have tended to prioritise seventeenth- and eighteenth-century English legal texts even more highly than the English themselves. Accordingly, after I briefly consider how the rhetoric of the body politic emerged in eighteenth-century

English legal texts that were explicitly intended for non-professional audiences, I will outline the continuing importance of these texts in the emergence and evolution of a nineteenth-century American jurisprudence at the nexus of personhood, capacity, and citizenship. The impact of received seventeenth-century conceptions of the body politic, especially those elucidated in reports of *Calvin’s case*, was two-fold: first, the relationship between allegiance and territorial jurisdiction remained as important in the eighteenth and nineteenth centuries as it had been in 1608; second, because the capacities so publicly tied to the body politic were exactly those denied to people whom the law excluded from personhood. So, in this chapter, I take up case law that hinged on issues of how the physical characteristics of persons, and the nature of invented persons with imagined bodies, were connected to the rights and capacities which law allowed to them. From these cases I argue that ideas drawn through Coke and Blackstone from early modern law about imaginary, politic bodies, has been an integral part of the development of a jurisprudence linking personhood and capacity, and thus a modern conception of civil rights under law.

**Spirit, Contract and the Construction of Free Personhood in English Case Law**

A discussion of personhood in Anglo-American legal history must commence with the issue of chattel slavery since, as the legal historian Don E. Fehrenbacher has noted in his remarkable history of *Dred Scott v Sanford* (1857), "slaves were in some respects persons and in other respects property."² The American Supreme Court, with Roger B. Taney at its head, ruled that Dred Scott and his wife Harriet remained the chattel property of John F. A. Sanford (as in *Calvin’s case*, the official court report of

Dred Scott recorded the name of one of its principles incorrectly). By 1857, Taney and his fellow justices had a considerable wealth of case law to draw upon from England. Like future commentators, Taney prioritised two cases, Somerset v. Stewart (1772) and The Case of the Slave Grace (1827). Though they produced very different opinions, the two cases depended on similar questions: whether their plaintiffs had become free English subjects under law when they travelled to England on the grounds that within England itself (though not its colonies) the air was "too pure" for slavery to exist. In Somerset, Charles Stewart, a customs agent who had worked in several port cities on the American coastline (starting in Massachusetts Bay and winding up in Virginia), had brought his slave James Somerset to England itself as a personal attendant. While in England, Somerset had fled from Stewart and found work in the city of London. James Stewart, angered by this incidence of perfidy made arrangements to recapture Somerset and sell him on to John Knowles, a slave trader bound for Jamaica. There thanks to the rigours of sugar cultivation and problems of disease, enslavement was, even more so than in Britain's other colonies, was, to all intents and purposes a death sentence. In desperation, Somerset appealed to the English abolitionists who had been aiding him since his escape, and they filed a writ of habeas corpus in the common bench in order to compel Knowles to produce James Somerset in court and show cause for his capture and imprisonment. The case came before Lord Mansfield, a moderate abolitionist and the chief justice of the King's Bench. The barrister and aspiring legal historian Francis Hargrave argued for James Somerset and made his reputation on the case. Later, he considerably expanded on his

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3 Indeed, most historians agree that sugar planters, disturbed by the possibility of slave rebellions deliberately ensured that sugar cultivation and refining were as physically difficult as possible, even at the cost of greater efficiency. See Richard B. Sheridan, Sugar and Slavery: an Economic History of the British West Indies (Barbados: Caribbean University Press, 1974). 242
oral argument to offer a broader explanation of his reasoning, though *Somersett* was the only major case he undertook which dealt with abolitionism.\(^4\) Because my interest in this survey of post-seventeenth-century cases, is how the Taney court read *Somersett* in deciding *Dred Scott*, I am prioritising the account of the case from the *State Trials* (1816), which included Hargrave's longer notes on the case as well as Mansfield's decision, and which the Taney court relied upon to the exclusion of other reports in their opinions in *Dred Scott*.

The *Somersett* decision's importance lay in its construction of the relationship between place and personal status under the law, as Hargrave's summation of the facts of the case quickly made clear: "Mr. Steuart purchases a negro slave in Virginia, where by the law of the place negroes are slaves, and saleable as other property. He comes into England, and brings the negro with him. Here the negro leaves Mr. Steuart's service without his consent."\(^5\) In Virginia, in Hargrave's account, James Somersett's race is explicitly linked with local law's insistence that he was chattel property rather than person. Yet as soon as Charles Steuart and James Somersett arrived in England, Hargrave replaced the language of slavery with the concepts of service and consent. A contract, binding Somersett to remain in Steuart's service is implicit in Hargrave's phrasing, which neatly elided the fact that James Somersett had not had any part in consenting to his enslavement in Virginia, where he had been the

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\(^4\) *Somersett v Steuart* was recorded in multiple print reports with sharply differing accounts of Hargrave's argument: the English Reporter (official) version offers a transcript of Hargrave's argument as spoken before the court while the version of Hargrave's argument in the *State Trials* was a substantially longer written account of his logic, provided after the fact by Hargrave himself. Interestingly, the two accounts differ as to the question of whether the parties' names were spelled Somersett and Stewart (the English Reporter) or Somersett and Steuart (the State Trials). In the interests of avoiding confusion and conforming with historical legal usage, I have chosen to adopt the spellings of the State Trials in all cases.

object, not the agent, of the sale. In fact, James Somersett, whether as a consenting English subject or the enslaved object of Steuart's Virginian property rights, disappeared from Hargrave's account altogether. Even in England, in the account of his own lawyer, James Somersett largely disappeared from the narrative of his own experiences and actions in England. In order for Hargrave to elucidate grounds on which the King's Bench could safely ignore Charles Steuart's claim that under Virginia law he owned James Somersett, the lawyer offered dire predictions about the consequences that would befall England if Lord Mansfield were to allow Virginia law to stand. Hargrave argued that:

It is a general rule that the *lex loci* [the "law of place" which would hold that the dispute should be judged under Virginia law since Virginia was the site of the original sale of James Somersett to Charles Steuart] shall not prevail, if great inconveniences will ensue from giving effect to it...Or law prohibits the commencement of domestic slavery in England; because it disapproves of slavery and considers its operations as dangerous and destructive to the whole community. But would not this prohibition be wholly ineffectual, if slavery could be introduced from a foreign country?

In this logic, refusing to allow John Knowles to transport James Somersett out of London into Jamaica protected a vulnerable England from the perils of domestic slavery at the heart of the Empire. Before making this argument about the irrelevance of Virginia law to England, at least where slavery was concerned, Hargrave, following John Locke, had argued the impossibility of justifying slavery by conquest, criminal conviction, or contract, pointing out that according to Locke, "the misfortune of [the reasoning of Rutherforth justifying slavery by contract] is, that though the contract cannot justly convey an arbitrary power over the slave's life, yet it generally

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6 The case's running title in *State Trials*, Vol. XX is not “Somersett” but “The Negro Case”.

7 *Somersett, State Trials*, vol. XX (1816), 60.
leaves him without a security against the exercise of that or any other power."⁸ One
could not, according to Locke, and Hargrave, be a consenting, contracting person, and
also a slave.

So, the threat to English law and the English state that Hargrave described was
inextricably bound up with the inviolable relationship between subject status and the
capacity to make contracts. The insufficiency of contract as a justification for
enslavement implied a reciprocal incapacity among the enslaved. Prevailing English
political opinion and legal thought placed enslavement beyond the power of contract
to regulate, so the law codes of the colonies insisted those enslaved there had no
capacity to contract at all. Ultimately, the legal risk attached to allowing Charles
Steuart's right to compel James Somersett to be sold in Jamaica was confirming that
even in England itself, people could exist without power to contract, and by extension,
as non-persons under law. Non-human corporate entities which the law had endowed
with the capacity to make contracts and seek their enforcement in the courts,
including those whose charters encompassed the power to kidnap and trade in slaves
like James Somersett, could continue, even under Hargrave's argument, to hold those
capacities in service of English interests. English law could tolerate, encourage, and
even generate, non-human actors with the legal capacities of persons. In Hargrave's
formulation, though, even where the authority of Virginia law and the principle of lex
loci were at stake, English law could not withstand the possibility of a human being
arbitrarily stripped of his right to contract, and of his personhood before the law. It
was for this reason that Hargrave largely avoided speaking of James Somersett, the

⁸ Somersett, State Trials, vol. XX(1816), 30.
named plaintiff of the case, as a person under English law: paradoxically, his non-personhood was the most effective rhetorical weapon for ensuring his freedom.

Lord Mansfield's decision, which occupies three pages worth of the *State Trials* (as compared to the forty-three of Francis Hargrave's argument), has nevertheless attracted considerable attention. It after all formed the official body of *Somerset* as case law. Most commentators have noted that Mansfield was reluctant to rule at all in the case. Initially, he postponed the judgment of the King's bench, wistfully noting that “in five of six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give our opinion.” Mansfield declined to adopt or endorse Francis Hargrave's logic, though expressed “particular happiness in seeing [that] young men, just called to the bar, have been able so much to profit by their reading.” Despite his enthusiasm for Hargrave's acumen, Mansfield ultimately construed the case in very simple terms indeed. To his mind, the case hinged on one question: whether or not Charles Steuart and John Knowles could legally refuse to surrender James Somersett to the English court after a writ of *habeus corpus* had been issued compelling them to produce him. On this question Mansfield opined, remarkably concisely, that:

> The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from

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9 *Somerset, State Trials* vol. XX, 79.
10 Ibid, loc cit.
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memory. It is so odious, that nothing can be suffered to support it, but positive law.¹¹

On these grounds, because the laws of England itself did not endorse chattel slavery, Mansfield concluded, “the black must be discharged”. Thus James Somersett was simultaneously freed from bondage to Charles Steuart and stripped of his personhood by the court that ordered his freedom. Even as the court affirmed his legal personhood, it reduced him to the status of rhetorical cypher.

Despite this erasure of James Somersett as an individual, Somersett did establish precedent for the principle that where legal personhood and slavery were concerned the presence or absence of local positive law trumped the need for comity between differing legal systems. Yet this precedent was quickly challenged, if not outright overturned, in the 1827 case of the Slave Grace v. Allan.¹² The wife of John Allan, an Antiguan planter, had brought her slave Grace with her to England in 1822, and brought her back to Antigua in 1823. George Wyke, the collector of customs for Antigua happened to be returning from England on the same ship. In 1825, apparently at Wyke's behest, customs officials removed Grace from the Allans' home, alleging that she had been illegally imported into Antigua when she came on shore in 1823. The Allans went to the colonial courts, where John Allan successfully asserted his right in property to Grace. In turn, the crown initiated an appeal to the Admiralty Courts, where, in 1827, Lord Stowell upheld the verdict of the vice-admiralty court in Antigua, in an opinion as voluble as Mansfield's had been terse. In particular, Stowell dwelt on the crown's allegation that “she [Grace] was a free subject of his Majesty and

¹¹ Ibid, 82.
¹² Like Somersett, the Slave Grace was reported in multiple sources, in this case, Haggard's reports of Admiralty Cases and the State Trials. Again, following Taney, I have preferred Haggard, which Taney cites.
under that character unlawfully imported as a slave and was so treated." Stowell opined that the burden of proof in this case rested upon the appellants to prove that Grace had been free. Stowell found that she was not, arguing that "if she depends upon such a freedom, conveyed by a mere residence in England, she complains of violation of right which she possessed no longer than whilst she resided in England, but which totally expired when that residence ceased; and she was imported into Antigua." It is important at this point to note that in the period between the Mansfield's 1772 ruling in *Somersett* and Stowell's 1827 ruling in *the Slave Grace*, the Slave Trade act of 1807 had abolished the sale of slaves, though it did not abolish slavery itself nor did it manumit children of enslaved mothers. Stowell accordingly deployed the act to argue that merely by virtue of seeking a legal remedy through a claim that she had been improperly imported into Antigua, the courts and Grace demonstrated why she could have been free. Stowell rhetorically inquired: "Could it possibly occur to any person in such a situation to submit to the degrading remedy which is here sought for -- that is, not to assert his right to a freedom of which he is already in possession?" He continued even more decisively in the same vein:

> There is no statute whatever that imposes upon a free person the vindication of his freedom by submitting to a procedure so humiliating to a freeman as to sue for it, at the mercy of the Crown, under a process which places him at the disposal of the officer of the Crown and subject to all such situations as the slave-abolition would warrant.

It is valuable to fully consider the assumptions implicit in this argument. Unlike Francis Hargrave, focused his arguments on the interrelatedness of concepts of

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slavery, personhood and contract, Stowell reasoning hinged on free subjects' access to the courts. Stowell's account gives this aspect of legal personhood a fundamental, almost psychological significance. The status of legal subjecthood was closely, tautologically linked with the subject's awareness that such a status includes access to the courts. For Stowell, then, the free subject's status is demonstrated not by the right to sue, hold property, or contract, but rather by a "spirit of freedom -- that spirit which would enable its possessor to resent the outrage with which he was threatened, and, without these degredations, to restore him to himself unaided by such a proceeding as could only be instituted against a person already in a state of slavery."¹⁷

Legal personhood as Stowell constructed it was thus not so much constructed or conferred as it was demanded – when it was demanded by an ideal, explicitly masculine freeman of proper spirit. Stowell's disdain for the protection of the crown also indicated a dim view of the crown courts as a source of equitable remedies: right depended, in this formulation, on the individual wronged party's having the wherewithall to insist upon it. Ultimately, the ramifications of this disdain go farther still: if subjects were conspicuous for their refusal to depend on the crown to act in their behalf, then free personhood and capacity depended not on a reciprocal relationship of mutual obligation between sovereign authority and individual subject, but rather on an instinctual assertion of right. Personhood in the courts of England, was therefore, for Stowell, a product of a personhood of the psyche. No great logical leap is necessary to move from this attitude to the astonishing and infamous opinion of Chief Justice Roger B. Taney in *Dred Scott*.

Dred Scott and the Nadir of Human Personhood under the Law

Scott v. Sandford (henceforth, Dred Scott) remains the most infamous case ever decided by an American Supreme Court. The relatively short duration of its effect is obviated by the gratuitously sweeping terms of its holding. It remains the defining case of the Roger B. Taney's tenure as Chief Justice, and in its immediate aftermath, it was so controversial that it inspired one of the dissenting Justices, Benjamin Curtis, to resign in disgust. It was also a case with dramatic ramifications for future constructions of personhood under American law; as the American legal historian George Rutherglen has noted, "the thirteenth amendment removed the ground on which Dred Scott rested, but it did not remove its narrow interpretation of federal citizenship." This narrow interpretation guided Reconstruction-era Republican jurists and legislators in shaping a new set of civil rights: the rights most essential to all citizens, irrespective of race, were precisely those which Taney had sought to deny free blacks in Dred Scott. So how Taney understood the fraught issue of the relationship between personhood, federal allegiance and federal citizenship had a profound impact on subsequent generations of American lawmakers, though it was not the impact he had envisioned. As his insistence on construing federal citizenship in racial terms indicates, Taney argued that participation in the American body politic depended largely on what kind of body one possessed.

18 Dred Scott became definitively irrelevant with the passage of the reconstruction amendments, the last of which was enacted in 1870, giving it a maximum effect of thirteen years. Compare this with the equally infamous "separate but equal" doctrine which came into force with the decision of Plessy v. Ferguson (1896), which was only overturned in the Brown decision of 1954, giving its effect a duration of fifty-eight years.
19 Fehrenbacher, Dred Scott, pp. 318-9.
21 See Rutherglen, Civil Rights in the Shadow of Slavery, pp. 28-39, passim.
The syllabus and head notes of the official report of *Dred Scott* indicate the breadth of the issues it attempted to settle: quite apart from its ruling on the issue of Dred and Harriet Scott's citizenship, *Dred Scott* also invalidated the Missouri Compromise, to insist that slavery was legal in all of the federally controlled territories. This was only the second time that a Supreme Court had ruled an act of Congress unconstitutional (the first had been *Marbury v. Madison*, the landmark 1803 that established the form of judicial review in America). Nevertheless, the element of *Dred Scott* that has understandably most preoccupied twentieth- and twenty-first-century scholars is its opinion in the matter of Dred Scott's citizenship. As Taney understood the question of whether Dred Scott had a right to sue John A. Sanford, who claimed to own him, it pointed to a nexus of economics, race, and personhood. He wrote:

The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in
which the word "citizen" is used in the Constitution of the United States. 22

Here, in absolutely unambiguous terms was Taney's initial linking of race and citizenship. Interestingly, Taney carefully distinguished between free blacks and Indians, on the grounds that because the American government had entered into treaties with the governments of various Indian tribes, even though,

the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race, and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage [sic]... they may, without doubt, like the subjects on any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States. 23

Such a naturalized citizen, Taney concluded, would certainly be entitled to all the privileges and immunities afforded by the Constitution to American citizens. 24

Interestingly, given his claims that free blacks were unfit for citizenship on racial grounds, Taney construed his understanding of hypothetical American Indian naturalisation on the basis of a sense that American Indians were the subjects of discrete foreign powers. He made no reference to perceived racial or cultural differences in explaining his considered opinion that American Indians could become naturalised citizens. Accordingly, their possible naturalisation was based on their already being citizens of another, albeit subordinate, state, and their relationships as citizens to a sovereign power, even one ultimately itself in the power of the United States, could be analagised to their roles as naturalised American citizens.

22 Scott v. Sanford, 60 U.S. 393 (1856), 403.
23 Scott v. Sanford, 60 U. S. 393, 404 (1856).
24 Scott v. Sanford, 60 U.S. 393, loc. cit. (1856).
Having disposed of status of “Indians not taxed”, Taney turned to the case of free blacks. Here, Taney wrote that “people of the United states” and “citizens” were synonymous terms that both described, “the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government though their representatives.” In the context of a republican government, as Taney indicated, citizens were both subject and sovereign by turns. Thus, they were simultaneously a body politic in the sense of the broader political and philosophical metaphor and the constituent members of a legal body politic, though obviously the citizenry, unlike the king, were by definition not a corporation sole.

For Taney, this "political body" excluded free blacks. Interpreting the constitution, he opined that:

they [free blacks] are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and whether emancipated or not, yet remain subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Where judicial efforts to exclude people from the status of legal citizenship were at their most strenuous then, admission to the metaphorical body politic depended on external physical characteristics. Taney here referred to article I, section 2 of the US Constitution, which established that during the decennial census, taxes and Congressional representatives would be apportioned on the basis of counts by “adding

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26 Scott v. Sanford, 60 U.S. 393, 404 (1856).
27 Scott v. Sanford 60 U.S. 393, 404-5 (1856).
the whole number of free persons”, including those serving indentures, and “three fifths of all other persons”, that is, slaves. Yet because the Constitution itself referred only obliquely to slavery, Taney could refer to the status of free blacks “at that time” only obliquely, rather than citing specific passages of the Constitution. Extrapolating this claim for regarding free blacks as “a subordinate and inferior class of beings,” from the framers' fastidious decision to decline to refer to slavery even as they tacitly endorsed its ongoing existence, was in any case a massive overstatement. Indeed, as Don Fehrenbacher, the preeminent modern analyst of *Dred Scott*, has argued, Taney consistently and consciously glossed over distinctions between free and enslaved persons at the federal level, while citing state laws wildly inconsistently and only where they advanced his argument. Since *Dred Scott* was unusual in that each of the six concurring justices wrote separate concurrences, and the two dissenters each wrote a dissent, it was evident that the justices were by no means in ideological agreement, and that even the concurring justices realised that the court's opinion would generate controversy. While the six concurring justices joined the Court's opinion that Dred Scott was not a citizen of the state of Missouri, none of them echoed or explicitly endorsed Taney's insistence that Dred Scott's race prevented him from ever becoming a citizen on Constitutional grounds. Indeed, Benjamin Curtis, the dissenting justice who resigned in protest in *Dred Scott*'s aftermath specifically disavowed Taney's claims.

Though he wrote the majority opinion of the Court, Taney stands out to this day for his insistence on reading fitness for citizenship not as a statutory or common

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29 For the theory that the framers reticence represented not only a compromise between advocates and opponents of slavery but also an attempt to envision slavery "bifocally -- that is plainly visible at their feet, but disappearing from view when they lifted their eyes," see Fehrenbacher, *Dred Scott*, 19-27.
31 *Scott v. Sanford* 60 US 393 (1856), 570-5 (Curtis J, dissenting)
law construct but rather as a place where law bowed to historic public attitudes (at least as Taney characterised them) about racial categories. Much of the legacy of his Dred Scott opinion then rests in Taney's insistence on inscribing his own understanding of biological and physical difference on the legal qualifications for citizenship and even for personhood. As legal historians from Jacobus tenBroeke to George Rutherglen have argued, it was precisely in opposition to the Dred Scott opinion, and the increasingly repressive slave codes, that post-bellum Republicans framed the language of the Civil Rights Act of 1866 and the three reconstruction amendments of 1865, 1868 and 1870 respectively. While it took less than a decade and a half for the findings in Dred Scott to become irrelevant, the case's logic had a more lasting impact: Taney's conclusion that physical characteristics were essential in determining a person's fitness to claim legal standing as a part of a legal, metaphorical body politic would prove hugely influential. Indeed, the lingering remnants of his finding that emancipation did not automatically confer or guarantee citizenship spurred the enactment of the fourteenth amendment. This has ensured that “bodies” metaphorical and real, and citizenship remain closely interconnected ideas in American law.

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33 Rutherglen, pp. 27-9.
The Fourteenth Amendment and the Citizen Body

In the aftermath of the American Civil War (1861-5), a Congress dominated by radical Republicans enacted the “reconstruction amendments”, that is, the thirteenth, fourteenth and fifteenth amendments. Among the three it has been the fourteenth amendment which has received the most attention: while the thirteenth outlawed slavery in America, and the fifteenth confirmed the right of all adult male citizens to vote, the fourteenth amendment established that every person born on American soil was a citizen of the United States, with all the “privileges or immunities” citizenship implied, borrowing the language of the Comity Clause of 1789 Constitutional text. In addition, the fourteenth amendment repudiated the Confederacy’s debts, eliminated the infamous three-fifths compromise for purposes of apportioning taxes and Congressional Representatives, and barred certain members of the Confederate government and military command from holding elective office. Perhaps most significant, however, was the final section of the fourteenth amendment, which confirmed that “the Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” While similar provisions formed the final section of the texts of both the thirteenth and the fifteenth amendments, the relative elasticity of possible interpretations of the language of the fourteenth amendment eventually came to justify far more sweeping legislation designed to prevent the infringing of the "privileges or immunities" by other governments at the federal, state and local level, and even by other non-state entities, such as corporate employers.

34 US CONST., art. IV, § 2, cl. 1.
35 US CONST. amend. XIV, § 5.
36 For the best-known argument that courts have been misreading the fourteenth amendment when they construed it to incorporate the Bill of Rights on state and local governments, and even some civil rights on non-governmental entities, see Raoul Berger, Government by Judiciary: the Transformation of the Fourteenth Amendment (Cambridge, MA: Harvard University Press, 1977); for a strong rebuttal of 256
The sweep of this final element of the amendment meant that Congress could cite the fourteenth amendment rather than the Commerce Clause when it enacted broad legislation intended to prevent discrimination in areas like employment, housing, and access to public amenities on a national scale. In the landmark 1940 case of *Cantwell v. Connecticut*, the Supreme court's ruling, which depended heavily on the fourteenth amendment, had the effect of "incorporating" the First Amendment, and by extension, the rest of the Bill of Rights so that they bind state and local, as well as federal legislation.

This debate over whether incorporation is justified under the terms and history of the fourteenth amendment has continued raged on despite the fact that the *Cantwell* decision has been settled jurisprudence for over fifty years. So, it aptly demonstrates the continuing and overweening preoccupation among American legal historians and judges with legal history and judicial hermeneutics. Though the American legal system has come under criticism from historians of English law for cherry-picking English precedents and case law, the culture of reverence for Coke and Blackstone was perhaps inevitable given the way in which American law prioritises the principle of *stare decisis* and the Supreme Court's power of judicial review. Yet the continuing preoccupation with the question of incorporation among mainstream, contemporary American jurists and legal scholars has tended to paper over other debates around the nature of who, and what, constitutes a person and a citizen according to the logic

Berger’s claims, see Michael J. Perry, *We the People: The Fourteenth Amendment and Supreme Court* (Oxford: Oxford University Press, 1999).

37 See, for example, Keechang Kim, *Aliens in Medieval Law*, who closes his work on medieval and early modern law governing aliens and citizens with a meditation on the perils of a seemingly historicist but methodologically inadequate American reading of English legal tradition, pp. 212-227.

38 Though *Cantwell v. Connecticut* created precedent for reading the Bill of Rights as binding on the States, incorporation has still been accomplished piecemeal. As late as 2010, the Supreme Court was still considering whether the right to bear arms was protected at the state and municipal levels (see *McDonald v. Chicago*, 561 U. S. 742 (2010)).
of the fourteenth amendment. Yet even as the fourteenth amendment created room for
debate about whether “privileges and immunities” protected federally-guaranteed
rights at the local level, it also opened a debate about who exactly were included in
the phrase “all persons born or naturalized”. Lawyers and historians, after all could
turn to the first volume of Blackstone’s Commentaries, subtitled On the Rights of
Persons, to find a chapter concerning corporate persons, replete with evidence from
Coke’s reports. For a system that linked capacity to physical and legal
qualifications, which rights were under discussion, and what sorts of persons, and
bodies, could claim them were inextricably linked problems.

American lawyers and politically-minded non-lawyers working in the 1870s,
however, immediately grasped the scope and ramifications of the Fourteenth
Amendment, which inspired major cases all pressing the courts to further elaborate on
the problems of which “privileges or immunities” specifically inhered in the
Amendment’s guarantee that “all persons born or naturalized in the United States, and
subject to the jurisdiction thereof, are citizens of the United States and the State
wherein they reside.” Initially, the court under the leadership of Chief Justice
Salmon P. Chase, the court took steps to limit the effect of the fourteenth amendment
over the states, insisting that although it did offer equal access to the privileges and
immunities associated with federal law and national citizenship, it afforded no
guarantees of equal access to the protections of state law.

The Chase court articulated this opinion while deciding the Slaughterhouse
cases (1873), which concerned new rules regulating butchering in and around New
Orleans, where offal had been creating a public health risk. Because it was necessary

39 Blackstone, Commentaries, pp. 455-473.
40 US CONST., Amend. XIV, § 1.
41 The Slaughterhouse Cases, 83. U. S. 36 (1873).
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to regulate butchering practices across several parishes, the state legislature of Louisiana took up the issue of slaughtering in and around the city of New Orleans in 1869. It incorporated the Crescent City Live-Stock Landing and Slaughter-House Company, and awarded it a monopoly charter for slaughterhouse operations, provided that it charged a fixed fee to butchers who wished to slaughter their animals on its premises and granted all butchers who met the fee access to its premises. In three cases heard simultaneously, individual butchers and the Butchers' Benevolent Association of New Orleans, all brought suit against the newly-incorporated centralised slaughterhouse, arguing that its monopoly created a system of "involuntary servitude" and denied them equal access to the "privileges or immunities" guaranteed by the fourteenth amendment by denying them the right to practise their trade. In this context, to the dismay of subsequent generations of legal scholars, but, ironically, at least in part with an eye toward the interests of black butchers, who received a legal guarantee of access to slaughtering premises for the first time, the Supreme Court found with the new corporation and with the state, narrowly construing the "privileges or immunities" clause as having no effect on Louisiana's power to issue a monopoly charter.42

For the purposes of this study, the Slaughterhouse cases are as interesting for what they remained silent about as they are for what they discussed. In his majority opinion, Justice Samuel F. Miller offered a lengthy justification of the ratification of the fourteenth amendment, insisting that "that history [of how the reconstruction amendments were enacted] relates to the general purpose which pervades them all"

42 For a broad spectrum of scholarly opinion on the Slaughterhouse cases, see Elizabeth A. Reilley, ed. Infinite Hope and Finite Disappointment: the Story of the First Interpreters of the Fourteenth Amendment (Akron, OH: University of Akron Press, 2011).
and carefully explicating the process by which over the course of reconstruction, the framers of the thirteenth amendment had come to realise that in order to ensure that the former slave states did not perpetuate the practical social and economic effects of chattel slavery as serfdom or wage slavery, it was necessary to safeguard the privileges, immunities and franchise of newly emancipated persons of colour by ratifying the fourteenth and fifteenth amendments.\textsuperscript{43} Moreover, Miller consciously positioned the \textit{Slaughterhouse cases} in opposition to \textit{Dred Scott}, noting that the fourteenth amendment had established birthright national citizenship, irrespective and race, and the possibility for national citizenship as distinct from citizenship in a particular state.\textsuperscript{44} From this conclusion he could rule that the Louisiana statute governing butchering did non violate the privileges or immunities of the butchers who brought suit. Yet though Miller frequently considered corporations and persons in the same breath, he evidently saw no reason to consider whether the persons whose rights as citizens of the United States were guaranteed under the fourteenth amendment included corporations.

Instead, Miller could safely depend on the familiar privileges that attached to corporations as a standard result of incorporation, to bring suit, hold property, and exist under law in perpetuity.\textsuperscript{45} Indeed, Justice Stephen Field, dissenting, noted that, it had never been held in any case which had come before under its observation, either in the State or Federal courts, that a corporation was a citizen within the meaning of the clause in question, entitling the citizens of each State to the privileges and immunities of citizens in the

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\textsuperscript{43} \textit{Slaughterhouse Cases}, 83 U.S. 36, 69-72 (1872)
\textsuperscript{44} \textit{Slaughterhouse Cases}, 83 U.S. 36, 74-5 (1872)
\textsuperscript{45} \textit{Blackstone, Commentaries}, pp. 455-6.
\end{flushright}
several States [the Comity clause, which prevented states from
discriminating against the citizens of other states].^M
Moreover, though the justices differed among themselves over the question of what
exactly constituted a privilege or an immunity, and which privileges and immunities
fell to the federal as opposed to the state government to protect, neither Miller, nor
Field, nor either of the other judges was eager to consider what exactly were the
privileges and immunities that attached to citizenship. Indeed, despite modern
consensus that the Slaughterhouse cases gutted the "privileges or immunities" clause
of the fourteenth amendment, further cases would continue to test the question of
what kind of citizens could claim which particular privileges or immunities.

Minor v. Happersett: Gendered Personhood Under the Law

One such case, which followed relatively rapidly after the Slaughterhouse
cases, was Minor v. Happersett (1875). Virginia Minor, a prominent member of the
movement for women's suffrage, contended that the franchise constituted one of the
privileges associated with citizenship and that to deny her attempts to register to vote
thus violated the terms of this newest part of the Constitution. Chief Justice Morrison
Waite, writing the unanimous opinion, suggested that Minor and her lawyers were
wrong to invoke the Fourteenth Amendment, however, noting that "sex has never
been made one of the elements of citizenship in the United States. In this respect men
have never had an advantage over women. The same laws of citizenship apply to both.
The fourteenth amendment did not affect the citizenship of women any more than it

46 Slaughterhouse cases, 83 U. S. 36, 99 (1872) (Field J, dissenting). For the Comity Clause, see U.S.
CONST, Art. IV, § 2, clause 1.
What is interesting about this formulation is the way that it simultaneously invoked and ignored the potential connections in American law between physical markers and legal capacities since the Fourteenth Amendment had conferred citizenship on both men and women of colour born in the states and territories of the United States.

Though Waite insisted that voting is neither a privilege nor an immunity as defined by the fourteenth amendment arguing that if it were, the Fifteenth Amendment, confirming the right of adult male citizens to vote would have been unnecessary, he was remarkably reluctant to identify exactly what voting was.\textsuperscript{48} Thus though Waite demonstrated extensively that suffrage and citizenship had never before been co-extensive, he resisted the corollary insight that this fact created multiple categories of citizen and person. Indeed, somewhat ironically, in order to trace the origins of explicit acknowledgment of women's citizenship under American federal law, Waite pointed to rulings and legislation that favoured granting the widows and orphans of male immigrants who had died before they could be naturalized.\textsuperscript{49} To all intents and purposes then, Waite found evidence for women's statutory parity with men (at least for purposes of citizenship) by pointing to their status in common law as {	extit{femmes couvertes}}, with their legal status "covered" by their husbands, even after those husbands' deaths. Women might be persons for the purposes of establishing citizenship, but even in the aftermath of the fourteenth and fifteenth amendments, but their personhood did not extend to the franchise.

The Rise of Explicit Corporate Citizenship and its early-modern origins:

Headnotes and Footnotes in *Southern Pacific R. Co.* and *Wong Kim Ark*

As even the highly abridged set of cases discussed here indicates, *Minor v. Happersett* formed part of a particularly rich period of jurisprudence regarding personhood, with the courts revisiting antebellum precedent in light of the reconstruction amendments. Indeed, many of the Chase and Waite courts’ most significant contributions to American precedents emerged from early disputes about how to understand personhood in the post-Reconstruction period. In order to reach these conclusions, the court looked not only to the Reconstruction amendments themselves but also, as we have seen, from Morrison’s own opinion in *Minor v. Happersett* to common law borrowed from England. In another case, *Santa Clara County v. Southern Pacific Railroad Company* (1886), Waite appears to have offered an even more startling conclusion, one which resembles the Coke’s logic in his report of *Sutton’s Hospital* to a remarkable degree. *Southern Pacific Railroad Company* hinged on whether or not back taxes, which the local officials alleged that the railroad corporation owed, had been improperly assessed. Unusually, the reporter responsible for the case, J. C. Bancroft Davis, who had himself long been a director of the New York and Newburgh Railway Corporation, quoted Waite, apparently verbatim, in the headnotes of the case law. While written briefs from the lawyers representing the city of Santa Clara had found fault with the corporation’s lawyer’s claims for its corporate personhood, according to Bancroft Davis’s headnotes, Waite foreclosed the possibility of expanding on the issue during oral argument stating that:

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*Coke, La Dix*°* Part des Reportes*, ff. 23°-35°.
The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of the opinion that it does.51

Indeed, Bancroft Davis's headnotes are considerably more concerned with the issue of corporate personality than Justice Harlan's unanimously joined opinion was. Indeed, as the political scientist C. Peter Magrath discovered in the course of writing Morrison Waite's biography, the Chief Justice appeared to be indifferent as to whether Bancroft Davis should include the point at all when the latter wrote him to double check the quote's accuracy.52

Despite the legally secondary status of headnotes, Waite's remarks proved highly influential after the fact. Not only did subsequent case law affirm the status of corporations as persons according to the fourteenth amendment,53 Charles and Mary Beard, two major early-twentieth century historians of American politics and society, also adopted as evidence for one of the strangest interpretations of reconstruction legislative history ever advanced. Following the trail of Santa Clara v. Southern Pacific R. Co., the Beards discovered the oral arguments of Roscoe Conkling in a previous case brought by another county against the Southern Pacific Railroad Company (San Mateo County v Southern Pacific R. Co., in which the court granted a motion to dismiss, leaving the underlying legal issues open for resolution a year later

51 Santa Clara County v. Southern Pacific R. Co. 118 U.S. 394 (1886). In the American tradition of Supreme Court reporting, the court reporter creates headnotes summarizing the substantive points in law which are established in the court's opinion. The headnotes themselves do not form a part of the court's opinion for official purposes nor do they constitute official case law.

52 Correspondence of Waite and Bancroft Davis, quoted in C. Peter Magrath, Morrison Waite: The Triumph of Character (New York: Macmillan, 1963), p. 117.

53 Pembina Consolidated Silver Mining Co. v. Pennsylvania 125 U.S. 181 (1888), which held that private corporations were persons under the fourteenth amendment but not citizens under the comity clause.

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in *Santa Clara v. Southern Pacific R. Co.* Conkling, a former Republican senator from New York had been a member of the Congressional committee responsible for drafting the fourteenth amendment. Thus he was able to assert, with considerable force, though not necessarily with considerable candour, that the "persons" language of the fourteenth amendment had been specifically written to bring corporations within the scope of federal protections of privileges and immunities. The Beards, however, accepted Conkling's claims at face value and suggested that in his oral argument in *San Mateo v. Southern Pacific R. Co.*, Conkling had "unfolded for the first time the deep purpose of the committee." Thus, working from the legacy of *Santa Clara v. Southern Pacific R. Co.*, the Beards could advance a "conspiracy theory" of the fourteenth amendment which challenged Justice Miller's opinion that the legislative history of the fourteenth amendment made it plain that its primary force was the protection of the civil rights of free persons of colour.

In post-Reconstruction America, then, as in Jacobean England, the ramifications of and interest in debates about the nature of personhood and the significance of the metaphor, and legal fiction, of the corporation as body or person, extended far beyond the realm of law. In the 1880s as in the 1600s, legal thought about corporate personhood emerged out of much wider debate about the nature of the nexus between bodies as real entities and bodies as legal fictions and political metaphors. One of the legal legacies of slavery was the "double character" of slaves under law: for purposes of criminal liability, slaves were people; in civil matters,

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54 See *San Mateo County v. Southern Pacific R. Co.* 116 U. S. 128 (1885)
56 For this point, see Howad Jay Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment", *Yale Law Journal*, 47 (1938): pp. 371-5. Graham's articles to date remain the best examination of and riposte to the Beards' remarkable theory.
slaves were the objects of the property rights of others. As the confluence of the end of a period of legal decisions regulating slavery and the beginning of a period of explicit judicial endorsement of corporate personhood demonstrate, however, the human being whose personhood is denied and the imaginary body on whom personhood is conferred have always been two sides of the same coin in the legal imagination.

Moreover, as I have demonstrated above, the intellectual landscape of American law had been overwhelmingly shaped by precisely those opinions meant to appeal to an audience of wide background and long duration: the works of English legal scholars who, like Lord Edward Coke, and William Blackstone had aspired to, and attained, canonical status. Thus in the case of United States v. Wong Kim Ark (1898),\(^57\) which tested the principle of birthright citizenship against the Chinese Exclusion Act of 1882 nearly three hundred years after a panel of judges settled Calvin's case and an ocean away, Coke and Ellesmere retained their legal authority. In 1895, Wong Kim Ark, who had been born to Chinese parents in San Francisco in 1872, applied for permission to land in San Francisco on his return from a temporary stay in China where he had been working and visiting family. The collector of customs at the port of San Francisco denied him permission, citing the Chinese Exclusion Act of 1882, which set quotas limiting Chinese immigration to the United States, and detained him. Wong Kim Ark brought suit on the grounds that having been born in the United States, he was a citizen of the United States, and not a Chinese immigrant. In his majority opinion, Justice Horace Gray argued that:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance...of the King. The principle

\(^{57}\) U.S. v. Wong Kim Ark, 169 U.S. 649 (1898).

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embraced all persons bon within the King's allegiance and subject to his protection. Such allegiance and protection were mutual – as expressed in the maxim *protectio trahit subjectionem, et subjectio protectionem* [protection draws allegiance, or "subjecthood" after it, and allegiance protection] – and were not restricted to natural-born subject and naturalized subjects, or to those who had taken an oath of allegiance, but were predictable of aliens in amity so long as they were within the kingdom. Children, born in England, of such aliens were therefore natural-born subjects...This fundamental principle, with these qualifications or explanations of it was clearly, though quaintly, stated in the leading case, known as Calvin's Case or the Case of the Postnati, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the Judges of England, and reported by Lord Coke and Lord Ellesmere.  

Gray twice reiterated this citation over the course of the case. Ostensibly, his opinion for the majority dealt exclusively with Calvin's case as a source of legal reasoning on what constitutes natural-birth citizenship, but in dealing with the mutual obligation of allegiance and protection, it inevitably evoked the body politic. Coke and Ellesmere for their part, might have held that the obligation and mutual responsibility inhered in the king's natural person, but Horace Gray had no king, and thus no king's body to which he could ascribe Wong Kim Ark's protection or assign his allegiance. In order for *Calvin's case* to stand as precedent, therefore, the bonds and body implicit in allegiance were both necessarily metaphorical. The precedent thus underwent a fairly major alteration before it reemerged in the service of American legal opinion. Nevertheless, it offered, and offers compelling evidence of the hold that bodies, both

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real and imaginary, continue to exert on Anglo-American law, through the eighteenth and nineteenth centuries and beyond.

**Conclusion**

Wong Kim Ark was able to come home to California, and Sir Edward Coke’s expectation that *Calvin’s case*, if accessibly reported, might continue to inspire interest was proved remarkably correct. Indeed, even the present-day effort of conspiracy theorists to suggest that Barack Obama is ineligible for the presidency have involved recourse to Coke on *Calvin’s case*, a law report which predated his election by four hundred years. Despite, President Obama’s reelection in 2012, people who deny his eligibility to hold office continue to cite and study *Calvin’s case*. The enduring popularity of Calvin’s case is, in part, a result of Coke’s continued reputation as a prodigious law reporter, which was considerably aided by the appeal that his relatively accessible, portable reports exerted outside the legal training grounds of the Inns of Court. The post-interregnum sense of Coke’s writings as a bedrock of common law accounted for the extent to which his law reporting in *Calvin’s case*, and, to a lesser extent the *case of Sutton’s Hospital*, became and remained so influential in thinking about bodies politic under common law. Yet as Blackstone reminded his readers, credit for the invention of corporations was due to the Romans. Coke’s popularity in and of itself, could not account for the pervasive presence of bodies politic in legal and political imagination. The appeal of the body politic rested, and still rests, on the flexibility of the metaphor and the legal fiction it

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59 Steven Tonchen, a self-trained proponent of the theory that President Obama is ineligible for his office, maintains the most regularly updated compilation of arguments against the President’s status as a “natural born citizen.” Tonchen’s continuing interest in *Calvin’s case* demonstrates the case’s continuing, and wide, appeal. See Stephen Tonchen "Presidential Eligibility Tutorial," last modified February 28, 2014, http://people.mags.net/tonchen/birthers.htm. 268
engenders. A legal body, incapable of death, and both bound to and independent of its human owners and officers, offers innumerable advantages. The capacities of such corporate bodies, invented by human policy, to buy and sell, and to sue and be sued, have profoundly affected legal doctrines governing everything from allegiance and citizenship to taxation and criminal liability. More significantly still, measuring the legal capacities of imaginary bodies against those of real persons has affected subjecthood and citizenship from the time of *Calvin's case* on. Corporations cannot die, but nor can they cast ballots or serve on juries. Of course, the capacity to vote or to perform jury service has often been denied to groups of citizens and subjects possessed of natural bodies. This slippage around alternatingly diminishing and increasing capacities, of bodies natural and bodies politic, is crucial. It indicates that the bright line separating the imaginary bodies of corporations and the real bodies of human persons frequently becomes blurrier than many corporate law scholars would like to admit.

In order to fully understand the contexts in which legal of allegiance, citizenship, and subject status emerged, it is necessary to consider not just the pragmatic origins of legal developments in these areas but also the role of fictions and metaphors of embodiment in how they were articulated. Despite the strenuous disinclination of most corporate lawyers to seriously examine the fictive personhood and imaginary bodies of their subjects, it has always been precisely this aspect that has made them intellectually accessible as states writ small. In a period when courts are rethinking everything from corporate criminal liability to whether a private corporation can hold religious convictions, the king as corporation is no longer a “curious freak” of English history. Rather, the corporation sole with the sole authority
to “baptise” other corporations is the progenitor of an entire, and pervasively influential, legal tribe.
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