

## PART I

### 1. THE ENGLISH STORY OF SOVEREIGNTY

In the United States, jurists have loosely ascribed the origins of the body sovereign to juristic expressions around the King of England. That is, they understand that sovereign immunity is tied into the King in some special way that warrants further understanding; they turn to Blackstone and cite several passages relating to the preeminence of the King;<sup>1</sup> or to the infallibility of the King;<sup>2</sup> or to the prerogative of the King;<sup>3</sup> or to the requirement of the King's consent before he may be sued;<sup>4</sup> or that all

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<sup>1</sup> See e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999) citing WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND \*242 (“And, First, the law scribes to the king the attribute of sovereignty, or pre-eminence”). Blackstone continues his thought “he is said to have imperial dignity; and in charters before the conquest in frequently stiled [sic] *basilius* and *imperator* the titles respectively assumed by the emperors of the East and the West. His realm is declared to be an empire and his crown *imperial* by many acts of parliament... which at the same time declare the King to be the supreme head of the realm, in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man.” 2 *id.* at \*242 Thus, though skipped by Justice Kennedy, this is the basis for the prior statement, and its conclusion: “Hence it is that no suit or action can be brought against the King, even in Civil matters, because no court can have jurisdiction over him. 2 *id.* at 242 cited in *Alden*, 527 U.S. at 715. Hereinafter, Blackstone’s Commentaries will be referred to as COMMENTARIES.

<sup>2</sup> See e.g., *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (though rejecting the notion of executive perfection, noted its historical relevance towards uncovering sovereign immunity); see also 2 COMMENTARIES, *supra* note 7 at \*238-39 (“Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful...”). Blackstone continues telling us that “The king ... is not only incapable of doing wrong, but ever of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.” *Id.*

<sup>3</sup> See e.g., *Myers v. U.S.*, 272 U.S. 52, 64 (1926) (J. McReynolds, Concurring) (“Blackstone affirms that the supreme executive power is vested by our laws in a single person, the king or queen, and that there are certain branches of royal prerogative, which invest thus our sovereign lord, thus all perfect and immortal in his Kingly capacity.”); see also 2 COMMENTARIES *supra* note 7 at \*239 (“By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity...

land in England derives ownership from the Crown.<sup>5</sup> And certain that the fiction only reaches as far as the King, they ignore the deeper more probing questions that reach the heart of the fiction: why is the King infallible; why must the King consent before being sued; and more probing, why is there no difference between the King's personal property and his kingly property; and how these attributes inform the King's posture towards the realm.<sup>6</sup> Such analysis requires not only an eye towards the mystical but a sort of

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It must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer"; 2 *id* at \*243 ("and, first, as to private injuries; if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion... 'A subject, says Puffendorf, so long as he continues a subject, hath no way to oblige his prince to give him his due... For the end of such action is not to compel the prince to observe the contract, but to persuade him.")[SIC].

<sup>4</sup> See e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 (1996) (J. Souter, Dissenting); see also 2 COMMENTARIES *supra* note 7 at \*235 ("Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it; but who, says Finch, shall command the king?"); 2 *id.* at \*221 ("the queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll; nor is she liable to any amercement in any court"). [SIC]

<sup>5</sup> See e.g., *Hall*, 440 U.S. at 415 ("The King's immunity rested primarily on the structure of the feudal system"); see also 2 COMMENTARIES *supra* note 7 at \* 281 ("when I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute rights, because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our antient princes."). [SIC]

<sup>6</sup> I primarily have in mind Justice Stevens's opinions in *United States v. Dalm*, wherein he decries sovereign immunity as "majestic voices" with a "haunting charm." *Id.* at 616. Continuing on, Justice Stevens heroically defends *Bull v. United States*, saying the court

reverence towards kingly things – a quality the American courts are not naturally inclined towards. To the extent that American judges have considered the King in realm, they have done so based on antiquarian concepts that all but became irrelevant by the time of American independence; this is Justice Jay’s plight in *Chisolm v. Georgia*. Indeed, American courts have never really understood kingly sovereignty.<sup>7</sup>

We begin with the various opinions of *Chisolm v. Georgia*, the first case to discuss sovereign immunity in the United States. Three of the five justices undertook to ascribe some relation of sovereign immunity to the relationship of the King to the people. Chief Justice Jay, in the shortest of these descriptions juxtaposes the sovereignty of the

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then, “reasoned not in obedience to these siren-like voices but rather under the reliable guidance of a bright star in our jurisprudence: the presumption that for every right there should be a remedy. *Id. citing* Marbury v. Madison, 1 Cranch 137, 162-163 (1803).; or his opinion in *Nevada v. Hall*, where Stevens said sovereign immunity “ought not be celebrated.” “We must of course reject the fiction [sovereign immunity]. It was rejected by the colonists when they declared their independence from the crown... But the notion that immunity from suit is an attribute of sovereignty is reflected in our cases.” *Nevada v. Hall*, 440 U.S. 410, 415 (1978); or again in *Will v. Michigan Department of State Police*, suggesting that the doctrine of Sovereign immunity continues to flourish despite the perishing of its “*raison d’être*.” *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 87 (1988). Indeed, Stevens sees sovereign immunity as an attribute of the institutions shed in our countries founding.

I also have in mind, a series of cases I discuss in more detail below that purposefully associate the Kingship with principles of sovereignty, like *Chisolm v. Georgia* and *U.S. v. Lee*.

<sup>7</sup> There is a way of reconciling Justice Stevens opinions, and the opinions in *Chisolm v. Georgia* and *U.S. v. Lee* despite their incomplete inquiry. That inquiry would ask not what is the true rationale of the sovereign, which would undertake an inquiry similar to the one I undertake in parts II and III; rather it would ask what is the rationale for the sovereign in 1787 when the U.S. Constitution was ratified. That inquiry is oblivious to historical integrity and instead would allow for the distaste towards kingly things that Stevens wants to find. Said slightly differently, perhaps for purposes of the revolution and government forming, Jay’s feudal king is exactly the inflammatory image necessary to underscore American independence. *See infra* text accompanying notes 8-10.

people of the United States to the sovereigns in Europe that “exist on feudal principles.”<sup>8</sup> Jay’s description of the “sovereign of Europe” is characterized in general as a tyrant: he is the object of allegiance; he is above persons in his kingdom; “he is the fountain of honor and authority;” all franchises are granted by his grace alone; etc....<sup>9</sup> The description of sovereign prerogative by Jay explains for him why the King could not be sued by a subject, and why any court judgment was not mandatory upon him but mere advice.<sup>10</sup> Jay’s revolutionary rhetoric reminds the reader that *Chisolm v. Georgia* was decided a mere ten years after the colonists had settled their own contest of sovereignty with the King and suggests a historical context for Jay’s highly critical approach – a contest that led towards the writing of the Constitution that Jay was now attempting to interpret.

Like Jay, Wilson places the primary emphasis of sovereignty on the feudal qualities of the King. But Wilson also reveals another characteristic of sovereignty – that of the law giver.<sup>11</sup> “The principle is that all human law must be prescribed by a superior.”<sup>12</sup> That superiority, Wilson informs us, was started with the Conqueror in 1056 and not only operated to create jurisdiction over others, but to exclude himself from the same jurisdiction. Thus Wilson says that “no suit or action can be brought against the King, even in civil matters; because no court can have jurisdiction over him; for all

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<sup>8</sup> *Chisolm v. Georgia*, 2 U.S. (Dall.) 419, 471 (1793). “If then it be true that the sovereignty of the nation in in the people of the nation, and the residuary sovereignty of each state in the people of each state, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter are so essential to the latter.”

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 458.

<sup>12</sup> *Id.*

jurisdiction implies superiority of power.”<sup>13</sup> Yet for Wilson, in the United States the people are sovereign, and therefore no sovereign immunity attaches to governments in America like it does in England.

Justice Iredell proceeds differently. Conceding that the United States is the successor in law to England, he looks to what types of cases could be heard against the King.<sup>14</sup> Iredell’s description, then, of the common law rights against the sovereign begins with the “Petition of Right,” which since Edward I, was the only right of action against the sovereign of England.<sup>15</sup> Iredell’s opinion is as formalistic as it is long. A brief summary of points shall be sufficient. First, giving great deference to Lord Somers,<sup>16</sup> Iredell found that the Right of Petition against the King did not include a right against the Exchequer in a court of law as the court had no authority over the treasury. Therefore no right of action exists in the American states that might threaten legislative

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<sup>13</sup> *Id.* at 459.

<sup>14</sup> *Id.* at 437 (Iredell) (“If therefore no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this enquiry is perfectly equal) an action of the nature like this before the court could have been maintained against one of the states in the union upon the principles of the common law, which I have shewn to be alone applicable”[SIC]).

<sup>15</sup> *Id.*; but see Louis L. Jaffe, *Suits against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) (suggesting that suits against government officials connected to the king proceeded under basis other than “petitions of right”); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 26-28 (2002) (following the Jaffe argument that other actions lie against the king). Indeed, Louis Jaffe suggests that the Petition of Right has been “over generalized into the broad abstraction of sovereign immunity. *Id.* at 3. Jaffe argues this in an attempt to suggest that other actions against palace and government officials weakened sovereign immunity. However, Jaffe seems to have omitted one certainty in his historical argument from England – there is only one sovereign and only one whom sovereign immunity truly applies.

<sup>16</sup> We shall return to Lord Somers opinion in *Calvin’s Case* in Part II “*The Gemina Persona.*”

purses.<sup>17</sup> Second, the Right of Petition exists as a grace by the regent.<sup>18</sup> Third, the King as corporation has the authority to subject corporations he establishes to his prerogative.<sup>19</sup> Under these basis, and since no law had overturned these principles, Iredell, as the lone dissenter, believed the state of Georgia was protected by sovereign immunity.

Wilson's description of the "sovereign people" seems to explain the differences between the English Sovereign and his immunity and sovereign immunity in North America; of course, the rationale was used to abrogate sovereign immunity not to create it. Interestingly though, the Wilson rationale does support sovereign immunity in *U.S. v. Lee*.<sup>20</sup> The Court in *Lee* concludes that the people are sovereign and that consent of the legislature as representatives of the people is required for a suit to proceed against the government. Like *Chisolm*, the Court in *Lee* looks back to English tradition to understand why the consent of the sovereign is required for suits to proceed.

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<sup>17</sup> *Id.* 437-39. Iredell comes to this conclusion after reviewing the *Bankers case*, reported in 1 FREEMAN'S REPORTS at 330 (1691). It seems that King Charles II accepted loans from several bankers with tallies given from the exchequer. Interest was paid on the loans until 1683, when it fell in arrears. The barons presented the payment case to the barons of the exchequer, who granted payment. The attorney general presented the concise question to the court whether such grants were valid under English law. The court held that the king could alienate the revenues of the crown and that the petition to the barons was the proper remedy. The court's more precise holding was that it had no authority to hear this case, but rather the Lord High Treasurer was the proper authority.

<sup>18</sup> *Id.* at 442 (citing Puffendorf, "a subject say Puffendorf, so long as he continues to be subject hath no way to oblige his prince to give him his due when he refutes it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws. For the end of such action is not to compel the prince to observe the contract, but to persuade him").

<sup>19</sup> *Id.* at 449. Iredell's opinion suggests that because the State of Georgia was not a corporation "under the United States" it could not be subject to the sovereignty of the United States. We will also address the corporate nature in further detail in Part II "*The Gemina Persona*."

<sup>20</sup> *United States v. Lee*, 106 U.S. 196, 204 (1882).

As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court....

“The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right at the will of any citizen and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.”<sup>21</sup>

Thus, for Justice Miller, the practical effect of the King serving himself together with the inconsistency of a suable sovereign with supreme power made sovereign immunity a necessity.

By means of summary, the historical perceptions of kings and sovereign immunity by the United States Supreme Court can be isolated into several distinct aspects. First is the concept of the King as infallible.<sup>22</sup> Second, the King is supreme and

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<sup>21</sup> *Id.* at 206 (citing *Briggs & Another v. Light Boats*, 11 Allen (Mass), 157.).

<sup>22</sup> *See e.g.*, *Feres v. United States*, 340 U.S. 135, 139 (1950) (Jackson, J.) (“The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the king could do no wrong was repudiated in America, a legal doctrine derived from it that the crown is immune from any suit to which it has not consented was invoked on behalf of the republic and applied by our courts as vigorously as it had been on behalf of the crown”); *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) (Burger, J.) (ascribing the king’s infallibility as a basis for sovereign immunity and extending to officers); *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (Stevens, J.) (“The king’s immunity rested on a fiction that the King could do no wrong.”); *Clinton v. Jones*, 520 U.S. 681, 697 n. 24 (1997) (Stevens, J.) (citing *Nevada v. Hall* for infallibility as basis of King’s immunity). *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 429 (1981) (Burger, J. Dissenting) (“The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from “the king can do no wrong”. *United States v Dalm*, 494 U.S. 596, 622 (1990) (Stevens, J. Dissenting) (“Sovereign immunity has its origin in the ancient myth that the “king can do no wrong”); *See also* similar dissenting opinions by Justice Stevens e.g., *Will v. Michigan Department of State Police*, 491 U.S. 58, 87 (1989) (Stevens, J. Dissenting); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 95 (1996) (Stevens J. Dissenting).

cannot be forced to submit to any other jurisdiction except that which he consents to.<sup>23</sup>

Third, the King as law giver is only subject to the laws he consents to as determined by his prerogative.<sup>24</sup> And fourth, subjecting the King to courts would confuse the supreme executive power of the King, and therefore be unwise.<sup>25</sup>

All of these rationales are true. Each describes an aspect of the sovereign King that together supported the body sovereign. But seen by way of our jurisprudence, the picture of the King is a confused array of qualities with no understanding for their basis in tradition, much less their grounding in the realm. The next part looks at the King more completely.

One explanation for the American failure to fully appreciate “kingly things” is the dysfunctional relationship America held with the King in its formative years. Indeed, “in the beginning,” American Constitutionalism has an inconsistent identity as both a constitutional and a revolutionary solution to despotism; pertinently both are mutually exclusive of one another.<sup>26</sup> This is not just semantic. Rather, the consistent use of inconsistencies recognizes that the American state starts with two diametrically opposed ends. We should not then be surprised that our legal formulations that are so closely tied to these beginnings are equally dysfunctional. On the one hand, we claim sovereign

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<sup>23</sup> *Hall*, 440 U.S. at 415 (“Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued; the King’s immunity rested primarily on the structure of the feudal system); *Alden v. Maine*, 527 U.S. 706, 714 (1999) (Kennedy, J.) (“And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence ... Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him”).

<sup>24</sup> *Chisolm v. Georgia*, 2 U.S. (Dall.) 419, 471 (1793).

<sup>25</sup> *United States v. Lee*, 106 U.S. 196, 204 (1882).

<sup>26</sup> See CHARLES I. MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 2* (1924) (noting the inconsistency that “Constitutional” and “Revolutionary” rhetoric was used in the formative era).

immunity is necessary for government operation, and at the same time we cringe from its meaning.<sup>27</sup>

This part is specifically about how beginnings and sovereignty are intertwined. However, its not interested in American beginnings except by association and by certain broad conclusions at the end. Rather, its primary focus is English beginnings. Understanding sovereignty in America requires a keen eye towards our original model of sovereignty and the later developed perceptions of that model. Like King Oedipus, who can't escape his family history, America continues to embrace British things, without concretely understanding why.

Chapter II, shows how incomplete the American image of the monarchy is, focusing on the Kingship's mystical, theological and dynastic underpinnings. Chapter III considers the King's Powers. Chapter IV asks the crucial question that American courts have failed to ask: having taken stock of the King's attributes, how does this "sovereign" relate to his realm. Specifically it presents three images: King as conqueror / landlord; King as father; and King as trustee. In each case the narrative of beginnings is highlighted to show that the question of sovereignty rests as much on the "story we tell" as it does on the nature of his being. Finally, Chapter V considers the American Perceptions of Kingship, and the theories of Sovereignty that develop apart from the King.

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A word of pause. The temptation in reading antiquarian conceptions is to dismiss the findings as notions long passed – particularly as the work draws upon mystic

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<sup>27</sup> Ala Justice Stevens discussed *supra* note 12.

foundations of current constitutional doctrine. The introduction to Ernst H.

Kantorowicz's seminal work on the King's Two Bodies encapsulates those fears:

Mysticism when transposed from the warm twilight of myth and fiction to the cold searchlight of fact and reason, has usually little left to recommend itself. Its language, unless resounding within its own magic or mystic circle will often appear poor and even slightly foolish and its most baffling metaphors and highflown images, when deprived of their iridescent wings, may easily resemble the pathetic and pitiful sight of Baudelaire's Albatross. Political mysticism in particular is exposed to the danger of losing its spell or becoming quite meaningless when taken out of its native surroundings, its time and its space.<sup>28</sup>

But the temptation as great as it may be, is in reality a diversion. We were told by modernists like Locke and Hobbes that the pre-modernists were full of quaint but misguided notions and that the modernists held the true meaning of government. We now live in a confusing and illogical time where those that have moved beyond modernity -- literally the post moderns reject their own forbearers and seek their own truth. The problem of the post-moderns is the failure to locate a narrative in which their norms can be housed. Both the Moderns and Pre-Moderns provided society with all-encompassing narratives that, though fantasiful at times, grounded their theory in concrete and demonstrable ways. To date, the Post-moderns have yet to find a narrative that they can latch onto. Nevertheless, certain strands of post-modern theory occasionally appear in Constitutional discourse. This project's philosophical contribution is to help the post-moderns realize that there are certain givens that we can trust.

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<sup>28</sup> Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* 3 (Princeton 1957).

A.

THE *GEMINA PERSONA*

*Twin Born with Greatness, subject to the breath of every fool  
Whose sense no more can feel but his own wringing  
What infinite heart's ease must Kings neglect that private men enjoy!  
What king of god art thou, that suffer'st more of mortal griefs than do thy  
worshippers.*

William Shakespeare, King Henry V, iv.i.254f

The King of England can be called a corporation. This was the Frederick W. Maitland's famous thesis in his work *Crown as Corporation*.<sup>29</sup> But what does this mean. In Sir F. Polluck's words, which Maitland begins with, it means: "The greatest of artificial persons, politically speaking is the state... In England, we now say that the Crown is corporation: it was certainly not so when the King's peace died with him, and "everyman that could forthwith robbed another."<sup>30</sup> And by artificial persons, Pollock means to tell us that corporations have a "continuous legal existence not necessarily depending on any natural life."<sup>31</sup>

The distinction by Maitland, Pollock and others describes a mystical aspect of the Kingship: that the King is a *gemina persona*, human by nature and divine by grace."<sup>32</sup> This dualism originally cast in a medieval world, and obvious to all with aspirations of

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<sup>29</sup> F.W. Maitland, *The Crown as Corporation*, 17 L.Q.R.131, 131 (1901).

<sup>30</sup> POLLUCK, FIRST BOOK OF JURISPRUDENCE, 113.

<sup>31</sup> *Id.* at 111.

<sup>32</sup> ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY 87 (1957) (hereinafter Kantorowicz).

understanding kingly things (see i.e. Shakespeare's King Richard II)<sup>33</sup> explained how the King could die, and at the same time how the Crown could yet continue.<sup>34</sup> It explained the divine principles of the King conflated with the mortal and imperfect body of a man. To be sure, the King's two bodies is a contradiction, but not an unworkable contradiction. Indeed that contradictory dualism spawned a most important aspect of the sovereign – his

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<sup>33</sup> In an illuminating chapter on the pervasiveness of the King's corporate nature, Kantorowicz draws upon Shakespearean prose as recognizing the King's Duality. Of note are a quote from Henry V discussing the duality of the God-head and man-head nature of the King: "Twin Born with Greatness, subject to the breath of every fool Whose sense no more can feel but his own wringing; What infinite heart's ease must Kings neglect that private men enjoy! What king of god art thou, that suffer'st more of mortal griefs than do thy worshippers." Kantorowicz, *supra* note 37, at 24 citing WILLIAM SHAKESPEARE, HENRY V, iv.i.254f. In other examples, Kantorowicz notes that it is the very twin natured kingship that forms the "substance and essence" of *The tragedy of King Richard II*. See *id.* at 26. Indeed, Kantorowicz carefully suggests to us that the essence of *Richard II* lies in the vasilization and in turn "vasilizing" of the King between man and immortal. Perhaps the most illuminating passage from *Richard II* is pronounced by the Bishop of Carlisle, who says:

*What subject can give sentence on his King?  
And who sits here that is not Richard's subject?  
And shall the figure of God's majesty,  
His Captain, Steward, deputy-elect,  
Anointed, Crowned, Planted many years,  
Be Judged by subject and inferior breath,  
And he himself not present? O Forefend it, God,  
That in a Christian climate souls refined  
Should show so heinous, Black, obscene deed!*

Shakespeare, *The Tragedy of Richard II*, Act. IV, i. 121ff.

<sup>34</sup> A part of mediaeval philosophy that modern readers often times fail to grasp is the consistency with which two contradictions can exist within the same body. So for example, the Virgin Mary can be both the mother and daughter of Christ simultaneously. The duality of roles represents the collision with the temporal with the mystical, and certainly influenced political thought of the middle ages. See Kantorowicz, *supra* note 37, at 101. Indeed, all of Kantorowicz work is aimed at showing a link between the *sacradotum* and the *regnum* as played out in medieval culture. See also Maitland, *supra* note 34, at 132 (drawing clear reference to the influence of medieval theology on mediaeval politics). Similar dueling contrasts abound in medieval political practice: City of God versus City of Man; Spiritual Sword versus Temporal Sword etc...

eternal nature and divine commission. The result is a King with two bodies -- one political and one natural.

Perhaps the most efficacious mode of understanding the role of the King's two bodies in relation to the body sovereign is to first grasp the two most prominent contemporary works on the King's dual nature: F.W. Maitland's *The Crown as Corporation* and Ernst H. Kantorowicz's *The King's Two Bodies*. Both are remarkably different, though each draw on the same premise: that the dual nature of the King tells us something about his attributes as a sovereign. For Maitland, the exercise is one of understanding contradictions as manifested in space and time. For Kantorowicz, the exercise understands the King's two bodies as defining a mysticism of the sovereign. As will become clear in this section, my approach is to understand how the sovereign is limited and at the same time empowered in the body of the King, certainly an ever present tension for American constitutionalists grappling over whether the U.S. Constitution empowers or limits federal authority. The end of this part describes the King's two bodies as manifested in Magna Charta.

**a. F.W. Maitland and “*The Crown as Corporation*”**

Maitland's pivotal work on the nature of the King begins by attributing its corporate nature to a dimension of ecclesial law and policy towards property. Maitland in a prior work suggests that corporation law developed because the church desired to maintain a fee simple in property outside of its clerics.<sup>35</sup> But as Maitland says,

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<sup>35</sup> F.W. Maitland, *The Corporation Sole*, 16 L.Q. REV. 335, (1900). By “Corporation Sole” Maitland refers to a provision in Sir Edward Coke in his chapter on the English Law of Persons identifying a “Corporation Sole.” See SIR EDWARD COKE, 2a COKE'S REPORTS at 250. What Maitland means to tell us about the “Corporation Sole” is that it is a juridical person that is specifically identified by a specific individual. Thus, as Littleton

“unfortunately, the thought occurred to Coke that the King of England ought to be brought into one class with the parson: both were to be artificial persons and both were to be corporations sole.”<sup>36</sup> Thus, Maitland cautiously ventures two remarks about the King’s “parsonified” nature.<sup>37</sup>

The first feature that Maitland wants to illuminate is the relationship between the King as corporation sole, and the King as “head of corporation.” While English lawyers may have perceived first and foremost a “Henry” as a human,<sup>38</sup> metaphor, no matter how fantasiful was not lost. So the perception of the nation as a community, pictured as a body, of which the King was head was an easy picture given the ease of relation of the deified son of God as the head of his ecclesial community.<sup>39</sup>

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would suggest, a parson is a Body politic identifiable by a specific body of the Parson. *See Corporation Sole* at 337. For the most part the corporation soles that Coke understood were ecclesial, but there were two others: the King of England and the Chamberlain of the City of London. Regarding the Chamberlain of London, Maitland only finds one example of the civil officer pursuing claims based on his corporate persona. *See Corporation Sole* at 340 *citing* 8 Edw. IV, f. 18 (Mich. Pl. 29). To this end, we are content to pursue the chamberlain’s dual persona no further.

But as to the King, Maitland’s history supports Kantorowicz’s mystical nature of the Kingship. *See infra* section b, on *The King’s Two Bodies*.

<sup>36</sup> *Crown as Corporation supra* note 34, at 131.

<sup>37</sup> *Id.* at 132. Maitland in *Crown as Corporation* concedes a certain mystical quality, calling the King “Parsonified,” instead of calling the state personified. *Id.* at 132.

<sup>38</sup> *Id.* In a striking comment towards the realism character of the common law, Maitland says that English lawyers were never really adept at the mystical. “They like their persons to be real, and what we have seen of the parochial glebe has shown us that even the church (*ecclesia particularis*) was not for them a person. In all the year books I have seen very little said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry.”

<sup>39</sup> The New Testament abounds with references to the headship and incorporation of the church into the Body of Christ. *See e.g.*, Romans 12:4-5 (just as each of us has one body with many members, and these members do not all have the same function, so in Christ we who are many form one body, and each member belongs to all the others); I Corinthians 11:3 (Now I want you to realize that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God); Ephesians 1:10 (to be put into effect when the times will have reached their fulfillment—to bring all things in heaven

The image of the realm as community, Maitland also sees in Parliament.

The ‘commune of the realm’ differed rather in size and power than in essence from the commune of a county or the commune of a borough. And as the *comitatus or county* took visible form in the *comitatus* or county court, so the realm took visible form in a parliament.”<sup>40</sup>

And so the description of knowledge within the realm is not surprising when one considers that Parliament is an ever-present expression of the realm: “Everyone is bound to know at once what is done in Parliament, for Parliament represents the body of the whole realm.”<sup>41</sup> Thus, the Parliament as the realm, with the Lords and Commons together with the King, was said to be a corporation by common law.<sup>42</sup> As an explanation of King and Parliament as government of the people, the analogy is as good as any other.

But curiously, the corporate body described above also seemed to hold “private rights,” owning personal lands and chattels. Maitland reminds us of Henry VIII’s vivid picture of the body politic with himself as head.

Where by divers sundry old authentik histories and chronicles it is manifestly declared and expressed that this realm of England is an Empire, and so hath been accepted in the world, governed by One supreme Head and King, having the dignity and royal estate of the Imperial Crown of the same, unto whom a Body Politik, Compact of all sorts and degrees of people and by names of spirituality and

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and on earth together under one head, even Christ); Ephesians 4:15 (Instead, speaking the truth in love, we will in all things grow up into him who is the Head, that is, Christ); Colossians 2:10 (and you have been given fullness in Christ, who is the head over every power and authority) amongst others.

<sup>40</sup> Crown as Corporation *supra* note 34, at 133.

<sup>41</sup> *Id. citing* Y.B. 39 Edw. III. F.7.

<sup>42</sup> *Id. citing* Y.B. 14 Hen. VIII. f. 3. (Mich. Pl. 2): “the parliament of the Lords and the king and the commons are a corporation.” Note that Blackstone refers to this same formulation, not as corporation but as “Constitution.” *See infra* notes \_\_\_\_, and text accompanying.

temporality been bounden and owen to bear next to God, a natural and humble obedience.<sup>43</sup>

Thus, from Henry's perspective the "body Spiritual" and the "body politik" culminates in the King. Maitland identifies Henry's break with the Roman Church as the historical background to a new found conflation of spiritual and political composites of the English Crown. Indeed, as Maitland says, under Henry, "were not all Englishmen incorporated in King Henry? Were not his acts and deeds, the acts and deeds of that body politic which was both realm and church?"<sup>44</sup>

The concrete way that spiritual and material conflation manifested itself was towards lands owned by the King in his person. Thus for example in 1562, a dispute regarding the King's capacity to lease certain lands came before the court of the Duchy of Lancaster. During King Henry VIII's reign, he executed a lease for twenty-one years to a certain individual known as W.C. Upon his death Edward VI ascended to the throne at the age of ten. He immediately executed a similar lease as Henry VIII, for twenty-one years to an individual named R.W. During the lease, Edward VI died and Elizabeth I ascended to the throne. Queen Elizabeth inquired to the court whether she must honor the lease or could avoid it because of Edward's infant capacity.

In describing the King's particularly natures, the court said:

So that he [the King] has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated into one person and make one body and not divers, that is the body corporate in the body natural *et e contra* the body natural in the body corporate. So that the body natural by

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<sup>43</sup> *Id. citing* 25 Hen.VIII c.12.

<sup>44</sup> *Id.* at 134.

the conjunction of the body politic to it (which body politic contains the office, government, and majesty royal) is magnified and by the said consolidation hath in it the body politic.<sup>45</sup>

But the contradiction was too much to ignore. The contradiction became apparent as the defendants began their argument:

The King has two capacities, for he has two bodies, the one whereof is a natural body... 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.”<sup>46</sup>

So is the corporate sole of the King the King himself, or the King as head of the realm?<sup>47</sup>

Maitland finds another aspect of the Kingship perhaps more mischievous He says:

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<sup>45</sup> Crown as Corporation, *supra* note 34, at 134 *citing Case of Dutchy Lane at Segent's Inn*, Plowden's Reports 213.

<sup>46</sup> Crown as Corporation, *supra* note 34, at 135.

<sup>47</sup> This is question we shall return to in Part III, where we consider the nature of the body sovereign. For now, the dualistic description of the king shall suffice. Another found in the same report says:

For the king has in him two bodies, *viz*, a body natural and a body politic. His body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy and government, and constituted for the direction of the people and the management of the public-weal, and this body is utterly void of infancy, and old age, and other natural defects and imbecilities which the body natural is subject to, and for this cause, what the king does in his body politic cannot be invalidated or frustrated by any disability in his natural body.

*Plowden 212a.*

we are taught that the King is two ‘persons,’ only to be taught that though he has ‘two bodies,’ and ‘two capacities’ he ‘hath but one person.’ Any real and consistent severance of the two personalities would naturally have led to the ‘damnable and damned opinion,’ productive of ‘execrable and detestable consequences,’ that allegiance is due to the corporation sole and not to the man.”<sup>48</sup>

Thus by tying the King to two bodies, the embodiment of the realm enjoyed the same loyalty as the realm itself.

Practically, the fiction had the effect of tying the King’s personal lands and personal monies into the lands of the Common weal and the Exchequer. This effect had at least one ironic and somewhat humorous episode in the history. Over the course of several years, the King’s fiscal responsibility declined to the point that Parliament was forced to take over the King’s lands and in exchange give him a set remuneration. The legislation made the King’s lands unalienable – both lands held by virtue of being the Crown and those he held as a natural person.<sup>49</sup> So, during the reign of King George III, the regent was forced to go to Parliament to ask permission to hold lands as a man and not as King, “for he had been denied rights that were not denied to ‘any of His Majesty’s subjects.’”<sup>50</sup>

A second thing that Maitland would like to tell us about the King’s two bodies is that the fictive qualities of the King became offensive towards the realm – the very thing the King was supposed to embody.<sup>51</sup> The opinion of the jurists at Sergent’s Inn serves to illuminate a second aspect of the duality ever-present in the King’s body. On the one

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<sup>48</sup> Crown as Corporation *supra* note 34, at 135.

<sup>49</sup> As a side note, at the beginning of each monarch’s reign, he renews the corporation formed to hold the lands of the crown on behalf of Parliament. The corporation is known as the Crown Estate. See <http://www.crownestate.co.uk/>.

<sup>50</sup> Crown, *supra* note 34, at 136 (citing 39 & 40 Geo. III. C. 88).

<sup>51</sup> Crown, *supra* note 34, at 135.

hand, the King was as frail and as vulnerable to stupidity as any human. But on the other, he was infallible, incapable of stupid decisions, and more importantly, always continuing in the natural body of the new King.

A most ingenious argument by at least one litigator before the King's Bench developed from this line of thought. Following the 1715 rebellion, an act of Parliament was passed that vested all estates of those deemed to be traitors in the King, for the "use of the Publik."<sup>52</sup> As Maitland tells us, one of those traitors was Lord Derwentwater. This particular traitor owned lands that he leased to certain tenants, who paid a "fine" on the fee holder's death. Thus, the question the tenants wanted to know is that since their new lord in fee was the King, and the King never dies, are they still bound to pay the particular fine. Perhaps if the obligation required anything other than the payment of money, the tenants argument would have been more successful. But another law was passed by Parliament during the reign of King George II deeming the King's death in such case the same as if he were a private person. As Matiland pointedly perceives, even the public body of the King must be "deemed to die now and then for the benefit of *cestui que trust*."<sup>53</sup>

Perhaps most irreconcilable of all the fictions surrounding the King's two bodies for Maitland is his eternal qualities. On the one hand, Maitland says "we are plunged into talk about King's that do not die..."<sup>54</sup> On the other, though, the temporal demise of the Crown seems to have had a halting effect for the government. Thus, "at the delegator's death, the delegation ceased. All litigation not only came to a stop but had to be begun

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<sup>52</sup> I Geo. I, Stat 2, c.50.

<sup>53</sup> Crown, *supra* note 34, at 137.

<sup>54</sup> *Id.* at 135.

all over again.”<sup>55</sup> Though pervasive throughout English law, Maitland seems to wonder out loud whether the fiction was worth the mental exercises when it caused such chaos when proven untrue. Indeed, “when on the demise of the Crown we see all the wheels of the state stopping or even running backwards, it seems an idle jest to say that the King never dies.”<sup>56</sup>

Ultimately, Maitland finds the fictions that surround the King – that of his duality, his eternal and divine qualities amongst others, renders the Kingship having set astray the corporate nature of the Crown.<sup>57</sup>

**b. Ernst H. Kantorowicz’s “*The King’s Two Bodies*”**

If Maitland wants to say that the King’s two bodies was a foolish folly, Kantorowicz wants to redeem the concept by reading it in the context of the period that the political ideology developed – namely a religiously charged culture where religious symbolism permeated worldly institutions. Indeed, in a time when church and state competed against one another for preeminence in a social sphere, Kantorowicz does not see the King’s two bodies as a mistake of history but rather evidence of a political liturgy that explains the nuanced relationships between states, Kings, laws and subjects.

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<sup>55</sup> *Id.* at 136. Maitland says further: “We might have thought that the introduction of phrases which gave the King an immortal as well as a mortal body would have transformed this part of the law. But no. The consequences of the old principle had to be picked off one after another by statute.” By way of example, Maitland shows us how up through Queen Victoria’s reign, the new monarch had to renew all military commissions. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Crown as Corporation*, *supra* note 34, at 144. After citing a case that refers to the American state as similar to “corporations,” Maitland concludes that “the American state is, to say the least, very like a corporation: it has private rights, power to sue and the like. This seems to me the result to which English law would naturally have come had not that foolish parson led it astray.”

For Kantorowicz, the mystical is the point. As Maitland would ascribe the description of the “Crown as Corporation” to either an ignorant folly or an ingenious borrowing from church law, Kantorowicz would tell us its no accident that the King developed two bodies. He traces the development to thirteenth century church dogma where the “body of Christ” became bifurcated between the true body of Christ and the mystical.

The change may be vaguely connected with the great dispute of the eleventh century about transubstantiation. In response to the doctrines of Berengar of Tours and to the teaching of heretical sectarians, who tended to spiritualize and mystify the sacrament of the altar, the church was compelled to stress most emphatically, not a spiritual or mystical, but a real presence of both the human and the divine Christ in the eucharist. The consecrated bread was now significantly the *corpus verum* (true body) or *corpus naturale* (natural body) or simply *corpus christi* (body of christ)... That is to say, the Pauline term originally designating the Christian church now began to designate the consecrated host; contrariwise, the notion *corpus mysticum*, hitherto used to describe the host, was gradually transferred to the church as the organized body of christian society united in the sacrament of the altar.<sup>58</sup>

The result was the concept of seeing two bodies of Christ: Simon of Tournai wrote that “Two are the bodies of Christ: the human material body which he assumed from the virgin and the spiritual collegiate body, the ecclesiastical college.”<sup>59</sup> Similarly, Kantorowicz points us to Gregory of Bergamo: “One is the body which is the sacrament, another the body of which it is the sacrament....One body of Christ which is he himself,

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<sup>58</sup> Kantorowicz, *supra* note 37, at 196. In this sense, Kantorowicz suggests that the expression “mystical body” which originally had a liturgical or sacramental meaning took on a connotation of sociological content.” *Id.* That is to say, the *sacradotum* and the *seculrum* had sufficiently merged so that their terminologies became interchangeable. Thus, we could speak of the sacred kingship and the Most Holy Roman Emperor in the same way we could refer to the Church of Rome as the “Empire of Christ.”

<sup>59</sup> Kantorowicz, *supra* note 37, at 198 *citing* Lubac, *Corpus Mysticum*, 122.

and another body of which he is the head.<sup>60</sup> In this example, -- “in the Bodies natural and mystic, personal and corporate, individual and collective of Christ,” Kantorowicz claims to have found the precise precedent for “the King’s two bodies.”<sup>61</sup>

As we have said before, Kantorowicz sees the development of the King’s two bodies through theologically-oriented mystical lenses. So it is little surprise that he sees the King’s qualities that derive from his nature in the same way. Specifically, his eternal qualities have as much to do with mystical understandings of “time” as they do with the practical understandings of space.

First, as to time, Kantorowicz tells us that the development of the eternality of the King evolved at approximately the same time as the question of understanding time came to the forefront in philosophical and theological discussions. The crux of this new conflict between the previously accepted Augustine perception that time is created, and the now revived Aristotelian concept that time was infinite (and therefore not created).<sup>62</sup>

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<sup>60</sup> Kantorowicz, *supra* note 37, at 198, citing Gregory of Bergamo, *De Veritate Corporis Christi*, c.18, ed. H.Hurter, *Sanctorum Patrum Opuscula Selecta* (Innsbruck, 1879), Vol. xxxix, 75f. For other theological examples of Christ’s Two Bodies, see Kantorowicz, at 198-99 (citing Guibert of Nogent, *De Pignoribus Sanctorum*, II PL (discussing the “bipartite body of the Lord (*corpus dominicum bipertitum*)); (citing examples of Innocent III’s distinction between the individual body and the collective body); (citing William of Auxere’s differentiation of the body Natural “(*corpus naturale*) with the *corpus mysticum*”).

<sup>61</sup> Kantorowicz, *supra* note 37, at 272.

<sup>62</sup> *Id.* at 274-75. Augustine comes to grips with Time as the creation of God, like himself in Book 11 of the *Confessions*:

at si cuiusquam volatilis sensus vagatur per imagines retro  
temporum et te, deum omnipotentem et omnificentem et  
omnitenentem, caeli et terrae artificem, ab opere tanto,  
antequam id faceres, per innumerabilia saecula cessasse  
miratur, evigilet atque attendat, quia falsa miratur. nam  
unde poterant innumerabilia saecula praeterire quae ipse  
non feceras, cum sis omnium saeculorum auctor et  
conditor? aut quae tempora fuissent quae abs te condita non

To be sure, time was bounded in the church, for without bounded time, there was no creation or end. As Kantorowicz aptly describes, such a view was not the view of the divine being: “for the *aeternitas* of God was timeless; it was static eternity without motion, and without past or future; it was as Augustine called it, “a now ever standing still,”<sup>63</sup> or, as Dante put it, “the point at which all times are present.”<sup>64</sup>

But such ideas that time was eternal instead of created did lead to scholastic thought that led to a vision of an “unlimited continuity that was neither *tempus* nor *aeternitas*.”<sup>65</sup> One such manifestation was the revival of the notion of an eon (*aevum*), a category of endless infinite time, knowing past and future (in contrast to eternity which knows no past or future), but which had a beginning with no end.<sup>66</sup> Three types of time

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essent? aut quomodo praeterirent, si numquam fuissent?  
cum ergo sis operator omnium temporum, si fuit aliquod  
tempus antequam faceres caelum et terram, cur dicitur quod  
ab opere cessabas? id ipsum enim tempus tu feceras, nec  
praeterire potuerunt tempora antequam faceres tempora. si  
autem ante caelum et terram nullum erat tempus, cur  
quaeritur quid tunc faciebas? non enim erat tunc, ubi non  
erat tempus.

St. Augustine, *The Confessions*, 11:13:15.

In contrast, the Aristillian notion of time being uncreated and to a certain extent co-existent with God, Kantorowicz assigns to the work of the Averroists who supported the “eternity of the world” Kantorowicz *supra* note 37, at 276. Showing the wide sweeping influence of Aristotle, Kantorowicz points to a passage from Thomas Aquinas, himself an Aristillian interpreter who suggested at least the possibility that the world had no beginning. *See Summa Theol.*, I QU. 46, art. 2: “Respondeo Deicendum, quod mundum non simpliciter fuisse, sola fide tenetur, et demonstrative probari non potest.”

<sup>63</sup> *See Kantorowicz, supra* note 37, citing *Confessions, supra* note 67 (*nunc semper Stans*).

<sup>64</sup> Kantorowicz, *supra* note 37, at 279 *citing* Dante, *Paradiso*, xvii, 18. Kantorowicz devotes the last chapter of his work defining the King as man, primarily bound by time as a limiting factor on his sovereignty. *See Kantorowicz, supra* note 37, at 451 et seq.

<sup>65</sup> *Id.* Kantorowicz assigns this shift in temporal understandings to a confluence of John of Scot’s translation of *Pseudo-Dionysius*, the theological writings of Boethius, and the works produced by the school of Gilbert de la Porrre.”

<sup>66</sup> Kantorowicz, *supra* note 37, at 279.

therefore had to be distinguished. First, *aeternitas*, which belonged solely to the realm of God. Second, *tempus*, which likewise was held in the realm of man. Thus, *aevum*, fell between the two, and belonged to the realm of angelic beings. In a summary statement that details the complicated nature, Kantorowicz tells us that “if God was the immutable beyond and without time, and if man in his *tempus* was the mutable within a mutable and changing finite time, then the angels were the immutable within a changing, though infinite *aevum*.”<sup>67</sup>

What started with the heretical concept that time was boundless, developed towards a redefining of the meaning of time and thereby the worldly institutions that inhabit time. Thus, though “one did not accept the infinite continuity of a world without end,” he did accept a quasi infinite continuity and “began to act as though it were endless.”<sup>68</sup> Accordingly, one began to “presuppose continuities where continuity had been neither noticed nor visualized before.”<sup>69</sup> Falling in line were conceptions of human creation that could have similar eternal qualities.

Illustrative of a sempiternal institution, medieval scholars could look to two prominent institutions – the Church and the Roman Empire. To be fair, medieval jurists

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<sup>67</sup> *Id.* Kantorowicz points to the Aquinas teaching that “every angel represented a species: the immateriality of the angels did not allow the individuation of the species in matter, in a plurality of material individuals.” In contrast, one must consider the writings of Duns Scotus, who suggested that the ubiety of angels argued against such thoughts. See Alexander Broadie, *Duns Scotus on Ubiety and the Fiery Furnace*, 13 BRIT. J. FOR THE HIST. OF PHIL. 3, 18 (2005) (“There were believed to be substances, such as angels, which can be present at a place but not in a quantitative way, that is, not in such a way as to be coextensive or commensurate with it. An angel can be present at a place but only in such a way that the whole of the angel is present at every part of the place. If we wish, we can say that an angel has ubiety, as a way of acknowledging the fact that an angel can be present at a place even if in a non-quantitative manner. But, plainly, such ubiety is *ubietas improprie dicta*”).

<sup>68</sup> Kantorowicz, *supra* note 37 at 283.

<sup>69</sup> *Id.*

could not conceive of a world without the church.<sup>70</sup> Thus, the Augustinian influenced tenet by William of Ockham, “it cannot be that there be no church – *ecclesia nulla esse no potest*,”<sup>71</sup> became simply the maxim “*Ecclesia nunquam moritur*, the church never dies.”<sup>72</sup> The Roman empire also shared historical value as a sempiternal institution. For example, the church father Jerome identified Rome as the last of the four world monarchies prophesied in Daniel – an empire that was to continue to the end of the world. Kantorowicz tells us that Jerome’s interpretation was well received, even spawning a new theory that “the fourth monarchy was followed by a fifth – that of Christ, implicating the Roman church as the sempiternal inheritor of Rome.”<sup>73</sup>

But with the problem of sempiternity, also comes a problem of vestment. That is, Rome was conceived on the notion that the Roman people conferred its *imperium* on the ruler. As Kantorowicz points out though, if Rome and the empire were “forever” it followed that the Roman populous likewise was forever, no matter who may be substituted for the original people of Rome. This concept of the Roman people being the same, though different, runs through texts interpreting Roman law which recognized the

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<sup>70</sup> Perhaps the greatest work of fiction from the middle ages, *The Canterbury Tales*, posits a social order wherein the Parson’s tale “radically redefines the nature of the tale-telling itself.” He rejects the mythical, extraordinary and outlandish for concrete manifestations of mystical encounterings. As we recall, the host of the journey suggests the tale-telling to shorten their way and “a means of comfort and myrthe on their journey. Thus, the Parson, reminds the tale-tellers that their journey is grounded in reality not myth, though fantastic the story may be. See Lee Patterson, *From the Parson’s Tale and the Quitting of the Canturbury Tales*, 34 TRADITIO 331-80 (1978). In many ways the Parson represents the ever-present reality, reminding the travelers of the church’s presence and that they define the story.

<sup>71</sup> See WILLIAM OF OCKHAM, DIALOGUS 3:1:2. The Concept is Augustinian because it infers a normative worldview in which there perpetually remains the incarnation of the City of God in the Church.

<sup>72</sup> Kantorowicz, *supra* note 37 at 292.

<sup>73</sup> *Id.* at 293.

“principle of identity despite changes or ‘within changes.’”<sup>74</sup> The result postured a unique and interesting dichotomy: royal heads claiming to be eternal and appointed by God holding kingly courts over peoples with sempiternal qualities, but comprised of temporal beings. That is, the persons that form the corporation are not bound by space, but rather they are linear successors of the empire – all together at the same time, forming the Republic, assenting to Caesar, and watching her fall.

What makes the Kingship a corporation is a curious realization that the plurality of persons comprising the corporation need not simultaneously exist, but rather could exist in succession. “Normally, the plurality of persons needed to form a collective body was constituted” both “horizontally” (in time) and “vertically” (in succession).<sup>75</sup> But once it was discovered that plurality need not be restricted to “space, but could unfold successively in time, one could discard conceptually the plurality in space altogether.”<sup>76</sup>

Thus, as Kantorowicz elegantly states the point:

That is to say, once constructed a corporate person, a kind of *persona mystica*, which was a collective only and exclusively with regard to time, since the plurality of its

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<sup>74</sup> *Id.* 294. Kantorowicz cites for us the example of the continuity of a law court though judges may have been replaced by others:

For just as the [present] people of Bologna is the same that was a hundred years ago, even though all be dead now who then were quick, so must also the tribunal be the same if three or two judges have died and been replaced by substitutes. Likewise [with regard to a legion] even though all the soldiers may be dead and replaced by others it is still the same legion. Also, with regard to a ship, even if the ship has been partly rebuilt, and even if every single plank may have been replaced, it is nonetheless the same ship.

Kantorowicz, *supra* note 37, at 295 (citing Glos.ord. , on D.5.1.76 v.). Of course, Maitland also tells us that in England such conclusions were not easily grasped. *See supra* text accompanying notes 23 et seq.

<sup>75</sup> Kantorowicz, *supra* note 37, at 311.

<sup>76</sup> *Id.*

members was made up only and exclusively by succession; and thus one arrived at a one-man corporation and fictitious person of which the long file of predecessors and the long file of future or potential successors represented, together with the present incumbent, that “plurality of persons” which normally would be made up by a multitude of individuals living simultaneously. That is, one constructed a body corporate whose members were echeloned longitudinally so that its cross-section at any given moment revealed one instead of many members – a mystical person by perpetual devolution whose mortal and temporary incumbent was of relatively minor importance as compared to the immortal body corporate by succession which he represented.<sup>77</sup>

Having thus, outlined how the King was able to break from temporal reality, we shall now consider the specific effects of a “King that will not die.”

Kantorowicz understands the maxim *rex qui nunquam moritur* --“the King that never dies” as being girded on three factors: the perpetuity of the dynasty, the corporate character of the Crown, and the immortality of the royal dignity. We shall address these one at a time.

By alluding to the dynastic qualities of the Kingship, Kantorowicz wants to separate the condition upon which a King might be elected (say endorsed by the Pope) and the condition that a King may be King by virtue of his entitlement. This is precisely the distinction that Kantorowicz draws attention to in showing the examples of Phillip III of France and Edward I of England coming to the throne and beginning their reigns without Papal sacralization. Kantorowicz thus says:

Henceforth the King’s true legitimation was dynastical, independent of approval or consecration on the part of the church and independent also of election by the people. The “Royal Power,” wrote John of Paris, “is from God and from

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<sup>77</sup> Kantorowicz *supra* note 37, at 312-13.

the people electing the King in his person or in his house, *in persona vel in domo.*” Once the choice of the dynasty had been made by the people, election was in abeyance: the royal birth itself manifested the prince’s election to Kingship, his election by God, and divine providence.<sup>78</sup>

And Kantorowicz demonstrates how this move from anointing a King to anointing *the* King reveals itself in juristic writings of England. In Glanvill, the maxim appears “only God can make an heir.”<sup>79</sup> Two more interesting statements reveal more. First, Archbishop Cranmer, addressing Edward VI’s coronation in 1547 says that Kings

be God’s anointed, not in respect of the oil which the bishop useth, but in consideration of their power which is ordained... and of their persons, which are elected of God and indued with the gifts of his spirit for the better ruling and guiding of this people. The oil if added, is but a ceremony: if it be wanting, that King is yet a perfect monarch notwithstanding, and God’s anointed as well as if he were inoiled.<sup>80</sup>

More fully described in other parts, Kantorowicz uses the quote above to describe the contradiction that despite the trend away from anointing Kings, nevertheless they remained known as “the anointed.”<sup>81</sup>

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<sup>78</sup> Kantorowicz *supra* note 37, at 330. The vivid image the Dutches of d’Abrantes provides us in her memoirs of Napoleon Bonaparte snatching the crown from Pope Pius VII and crowning himself Emperor of France immediately comes to mind as both suggestive and contrary to this idea. That is emperors and kings need not be vested by religious organs to be made regents. On the other hand, Kings and Emperors must be vested by something other than themselves, presumably God.

<sup>79</sup> R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND 71 (G.D.H. 1965).

<sup>80</sup> Kantorowicz, *supra* note 37, at 318, *citing* Schramm, A History of the English Coronation 139 (1937).

<sup>81</sup> One such example is the anointment / reanointment of King Edward II. Edward II became king during the Campaign against the Scots in 1307 when his father Edward I demised. He was crowned by the Bishop of Winchester because the Archbishop of Canterbury was unavailable. Thus, Edward II wanted to know from the Pope whether being reanointed King, in England and by the Archbishop of Canterbury would be improper. Pope John XXII’s response was rather direct: because the anointing “left no

Second, Lord Coke in the famous *Calvin's Case* infers the continuation of the King, even during the *interregna*, or time between the death of the King and the coronation of his successor. Calvin's Case,<sup>82</sup> reported in Coke's reports garner rather simple facts. Robert Calvin was a Scottish born person born three years after the coronation of James VI of Scotland. The Coronation of James VI united Scotland and England under the same royal house. After the coronation of James, Calvin by and through his guardians (as he was not of legal age) obtained land in England. Richard and Nicholas Smith entered his lands and Calvin's guardians sued. Richard and Nicholas Smith's defense was simple: because Calvin was an alien, he could not own land in England.<sup>83</sup>

The entire matter revolved around when the King of England was deemed to accept his Kingship and the effects that his coronation had on his subjects. The two defendants, in a measure of audacity suggested that before the King's coronation, "he was no complete and absolute King," a statement Coke took to mean that logically before a King was crowned, any act of violence against the King could not be treason for lack of a head to commit treason against.<sup>84</sup> In an elaborate opinion, Coke reports that the nature of the Kingship was inheritable; that is "the King of England held the kingdom of

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imprint on the soul" he could repeat his anointing if desired. The interpretation that Kantorowicz recommends is that the anointing of kings there ceased to garner any sacramental value. See Kantorowicz, *supra* note 37, at 321.

<sup>82</sup> See IV Coke Reports at 3.

<sup>83</sup> *Id.* at 4. The argument of the defendants is simplified in the text here. Their argument actually nuanced nine discreet matters that Coke refines by four words: (1) *Ligeantia*: that Calvin made two allegiances, one to Scotland and one to England; (2) *Regna*: though the king binds several nations within himself, he is due the separate allegiance of each nation, and therefore, Calvin could owe only one allegiance; (3) *Leges*: the laws of both kingdoms bears this result; and (4) *Alienigena*: Calvin is an Alien and not entitled to the protection of the King as against his subjects.

<sup>84</sup> See Kantorowicz, *supra* note 37, at 317.

England ‘by birthright inherent’ and without any essential ceremony or act to be done *ex post facto*: for coronation is but a royal ornament and solemnization of the royal descent, but no part of the title.”<sup>85</sup> Coke seems to make clear that though the King may die, his peace does not die with him.<sup>86</sup>

The second aspect that Kantorowicz wants to emphasize about the perpetual nature of the King is the nature of the Crown as corporation. And by Crown as Corporation, Kantorowicz wants to emphasize the corporal image of “the Crown” representing the object of the monarchy, such as in Baldus de Ubaldis’s statement: “With regard to the succession of the son, I do not consider an interval of time; for the *Crown* descends on him in continuity, albeit that the *exterior Crown* demands an imposition of the hand and the solemnity of the offices.”<sup>87</sup>

In England, unlike in France, the Crown was understood in practical ways, particularly within the realm of “administration and justice,” as opposed to a patriotic symbol. Specifically, the word Crown generally was used in relation to the royal demesne. Kantorowicz shows us, though certainly unintended, how Henry II seems to have separated the objects of the “Crown” as being for the public sphere as opposed to the references to the King. For example, he cites to the *Dialogue of the Exchequer* in 1177 where the distinction of property rights derived from the King are set by “what pertains to the Crown,” as opposed to those who hold from the King a knights fee, not by

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<sup>85</sup> *Id.*

<sup>86</sup> IV Reports at 3. Coke alludes to a time when the “King’s peace died with him,” suggesting to Kantorowicz a time such as the deaths of Henry I and Henry III when the realm became disordered. See Kantorowicz, *supra* note 37, at 317.

<sup>87</sup> Kantorowicz *supra* note 37 at 337 citing Baldus, *Consilia* III, 159, n.2.

right of the royal Crown, but by that of some barony.”<sup>88</sup> This distinction is not universal; certainly, he shows numerous examples where the nomination King and Crown are used interchangeably towards the public sphere; yet, his point is that the word Crown does not get used after Henry II towards the King’s private person.

Similarly, the distinctions between Crown and King begin to show themselves in legal proceedings. Showing the same distinction in the writings of Glanvill and Bracton that “the Crown was used for the public sphere and King in the private, Kantorowicz identifies an interesting phenomenon in the chancery courts. He says:

It was apparently a must to quote both the Crown and royal dignity in cases entangled with ecclesiastical matters, whereas it was a may on other occasions. Nothing, however, could be more wrong than to claim rhetorical tautology on the part of the chancery which issued the writs. For while there could be no doubt that all pleas concerning the competency of either courts Christian or courts secular were *a priori* pleas of the Crown, since they affected the public sphere, the chancery apparently held that those cases affected also the King’s office or dignity as King, his sovereignty or “royalty.”<sup>89</sup>

In a final example of how the “Crown” became distinguished from the man who wore it, Kantorowicz points us to the *Leges Anglorum*, an anonymous tract published in London around 1200. In this fantasiful writing, in which the author seems to imagine the Kingdom in more Arthurian terms, claims that “by right of the Excellency of the Crown, [Britain] ought to be called empire rather than Kingdom,” and that the Crown had vast inalienable rights: “the universal and total land and the isles pertain to the Crown, including even Norway, because on the basis of the Arthurian legend, “Norway had been

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<sup>88</sup> *Id.*

<sup>89</sup> Kantorowicz *supra* note 37, at 344-45.

confirmed forever to the Crown of Britain.”<sup>90</sup> The author also reminds his readers of Edward the Confessor’s promise to return all the rights and dignities and lands which his “predecessors ‘have alienated from the Crown of the realm,’ and to recognize it as his duty “to observe and defend all the dignities, rights, and liberties of the Crown of this realm in their wholeness.”<sup>91</sup>

Featured another way, Kantorowicz wants us to associate King as to Crown as tutor is to property of a minor. Thus, the King was the guardian so to speak of the rights of the non-capacity-holding Crown. And his tutorship was bound into the oaths that Kings recited before ascending to the throne. For example, Kantorowicz points to the numerous charges against Richard II for “acting in prejudice of the people and in disherison of the Crown.”<sup>92</sup> Similarly, Henry III charged that Edward I “disinherited the Crown” by alienating the Isle of Ole’ron, and the magnates charged that Edward II acted in disherison of the Crown.<sup>93</sup> These charges relate specifically to the promises contained in the sacramental oaths of Kings.<sup>94</sup> Moreover, Kantorowicz tells us that, “Kings are heirs, not of Kings, but of the Kingdom.”<sup>95</sup> In this sense, the Crown is perpetually a minor, and incapable of being disinherited. This valuation is seen in the case *King v. Latimer*, where the Court said “the King presented to the aforementioned church, his aforementioned clerk Robert, as of the right of his Crown which is always so to say, in the age of a minor and against which in this case, no time runs.”<sup>96</sup> The Crown’s minority

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<sup>90</sup> *Id.*

<sup>91</sup> Kantorowicz *supra* note 37 at 346.

<sup>92</sup> *Id.* at 372-73.

<sup>93</sup> *Id.* at 373.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 376 *citing* 10 Edw. II at 46.

produced a peculiar result: the King was the guardian of the Crown -- as Kantorowicz says artfully, “for to the perpetual minor, the Crown, there belonged a perpetual adult as guardian, a King who, like the Crown, never died, was never under age, never sick and never senile.”<sup>97</sup>

Finally, the perpetual nature of the King is tied up in the dignity of the King. The notion of a King’s dignity is particularly difficult when Kings don’t act in a dignified manner. So to protect the dignity of the Crown from the improprieties of those that wear the Crown, English Jurists located the virtues of the “King” towards the Crown and not the fallible man. But, the ethical or moral activities of the King is only one way to consider his dignity; another is to consider all the vestments of honor that come with being King. So when Henry IV set aside the lands of the Duchy of Lancaster to be governed and held by the King “as though we would never have achieved the height of royal dignity,” he means to refer to that falling on the natural man a certain ordaining of higher honor separate from that of natural man.<sup>98</sup>

But as realist as England was, the notion of dignity was too intangible for English jurists. So another concept arose that embodied the notions of dignity but also affirmed the separateness from the natural man -- the body politic. The phrase “body politic” comes into the English juristic vernacular thanks again to the Duchy of Lancaster -- or to be more precise, the *Case of the Duchy of Lancaster*. It should be noticed that the judges refer to the King’s duality as comprised of both a body natural and “a body politic” who contains his royal estate and dignity royal.<sup>99</sup>

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<sup>97</sup> Kantorowicz, *supra* note 37 at 379.

<sup>98</sup> *Id.* at 403.

<sup>99</sup> *Id.*

Or consider the case of *Hill v. Grange* wherein the court calls the name of the King “the body politic,” a name of “continuance, which shall always endure as the head and governor of the people as the law presumes, . . . and in this the King never dies.” Based on this logic, the court came to the natural conclusion that the King’s death is in law not called death, but demise,

because thereby he demises the Kingdom to another, and lets another enjoy the functions, so that the dignity always continues. . . . And then when . . . the relation is to him as King, he as King never dies; but the King in which name it has relation to him *does ever continue*, and therefore . . . the word King shall extend [from Henry VIII] to King Edward VI [that is to the successor] . . . From whence we may see that when a thing is referred to a particular King by the name of King, it may extend to his heirs and successors.<sup>100</sup>

Thus, Coke in Calvin’s case concludes with sufficient authority that “It is true that the King in genere dieth not, but no question in *individuo* he dieth.”<sup>101</sup>

### ***c. Magna Charta: Kings, Crown, Corporation***

A cursory look at Magna Charta, the document signed by King John in 1215, and purporting to guarantee the rights of the Barons against the King would support the conclusions of both Maitland and Kantorowicz.

First, Magna Charta is a corporate document. That is, the document is signed by King John, as representative of the dynastic qualities of the Kingship. We see this primarily in the way Magna Charta refers to the collective “we” in assigning the rights of the barons. Moreover, the document refers to “our father King Henry” and our brother King Richard, suggesting both a familial and a collegial relationship of the Kings through

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<sup>100</sup> Kantorowicz, *supra* note 37, at 407 (citing 2 Plowden Reports at 164).

<sup>101</sup> See Kantorowicz *supra* note 37, at 408, citing 2 Coke Reports at 10b

the years. Yes, King Richard can be the Father, Brother and co-holder of the realm with John.

This is best understood in the context of a case arguing the meaning of statutes pertaining to the King; *Hill v. Grange*, a case of trespass against property of the King addresses the plurality of the King in binding documents.<sup>102</sup> The principle issue was whether the King acted in his personal right or by right of the dignity of the Crown. Had he operated under dignity of the Crown, his actions were binding on his successors in interest. The Chief Justice recommended that statutes often bind the fraternity of the King, even when the King's name is mentioned in particular: "And the reason is because the King *is* a body politic, and when an act says 'the King,' or says 'we' it is always spoken in the person of him as King, and in his dignity royal, and therefore it includes *all of those who enjoy his function.*"<sup>103</sup>

Second, Magna Charta, properly read, is a document limiting the rights of the King from usurping the rights of the Barons by, amongst other things, using the powers of the Crown. This is most notably seen in the only place where the Crown is specifically mentioned. In Paragraph twenty-four, the document reads: "No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown." Or said simply, those holding offices by virtue of the King, shall not sue in the name of the Crown. This distinction is quite extraordinary. If read on its face, it would mean that the King, though he may appoint certain government officials, those officials have no capacity as to the Crown. This is just one more example of how King and Crown were separate.

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<sup>102</sup> 1 Plowden Reports 164.

<sup>103</sup> *Id.* at 176.

Again, *Hill v. Grange* is instructive. The court cites to Magna Charta C. 17 “Common Pleas shall not follow our court” to prove that our great charter did not refer to King John individually, but to the “King as King.”<sup>104</sup> Thus, *Hill v. Grange* provides us a paradox: the Crown authority used by members of the kingly fraternity who, bind themselves both naturally and in their dignity to not abuse the authority of the Crown; as if the dignity would ever seek to abuse its own authority.

Finally, the existence of the document itself suggests a need to reign in, so to speak, unkingly Kings. That is, not everyone that held the powers of the Crown acted nobly. As suggested by Kantorowicz and described above, Richard II or Edward II were thought to have “blemished the Crown.”<sup>105</sup> Thus, Magna Charta stands as an attempt to remind Kings of their noble office and to limit their human tendencies, at least in regards to the baron’s property. At the same time, it implicitly recognizes their dynastic qualities: existing across time, in sempiternity and as a collective body.

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The features of the body sovereign in England are difficult to distinguish apart from the representative of sovereignty in England – namely the King. One way of understanding the body sovereign is to consider its nature as wrapped up in the mystical dual personality of the King, such as Kantorowicz. Another is to see the King as a living contradiction as Maitland. But even Maitland understands that the body of the King holds sovereignty tight. That is to say, the Kingship serves as the best foremost example of what a sovereign is, and why sovereignty attaches, no matter how vain those fictions

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<sup>104</sup> *Id.* at 176

<sup>105</sup> Kantorowicz *supra* note 37, at 403.

may be. It is the conflict of those fictions, and the gradual displacement of the body sovereign outside the Kingship and towards the people that garners our attention next.

## B.

### THE BODY AND THE REALM

*And therefore at the Kinges Court, my brother, ech man for himself – there is none other.*

*Geoffrey Chaucer, The Knights Tale from  
Canturbury Tales*

*A people is a group of men united by consent of law and by community of interest. But such a people does not deserve to be called a Body whilst it is acephalous, that is, without a head. Because, just as in natural things, what is left over after decapitation is not a body, but what we call a trunk, so in political things, a community without a head is not by any means a body.*

*Sir John Fortescue  
On the Governance of England*

In the previous chapters, we focused primarily on the King's personhood, his duality, dynastic qualities of being incorporated, and how the King "defeats" natural death by standing in sempiternity. These questions reveal the "myth" of the sovereign's source of power and authority -- the *nomos* of his being. But the question of the King's personhood does not answer the central question of how the King relates to his realm. Indeed, the King's personhood, being as it were a super-human expression of the natural life may indeed answer the "why" one asks when seeing the specific ways that the King relates to his realm. But as with other inquiries the "why" is irrelevant when we don't understand the "what."

Ultimately, the question we posed at the beginning regarding sovereignty can be reduced to how the sovereign interacts with his people and the narratives told about the origins of that relationship. One commentator summarized the sovereignty question this way:

One of the distinguishing features of the seventeenth century was its effort to work out a theory of sovereignty. Modern legal positivism never entirely forgot to ask whether laws were just or unjust, but it much prefers to ask whether they are clearly binding and enforceable. What established their power to bind is their origin in an undoubted authority which, simply because it is the lawmaking power, is the supreme power on which all others depend for their validity. Sovereignty is thus its own validation, not necessarily because it is *right* but because it is, by definition the authority from which all others spring. The central question of political science thus becomes the location of such power in a community.<sup>106</sup>

This chapter proposes three ways of locating that power by looking at the King's interaction with the realm. The first and most basic way considers the King as fundamental owner of the realm. Indeed, this view highlights the King's relationship to his people as primarily an economic relationship; accordingly, all members of the King's realm exist to serve the interests of the King. Thus, in the same way a property owner expects his land to be economically beneficial, so too the King in this relationship relies upon the realm. A second view of the Kingship is Sir Robert Filmore's view of the King as patriarchal inheritor of regal power. This fatherly King cares for his people as the people reciprocally enrich their King. The third way of viewing the Kingship's relationship to the realm, and arguably the one that was most influential to the American framers is the Trust. That is, the King indeed holds the realm, but does so for the benefit of the realm itself and exists for the "common weal." Implicit in the trust relationship is the initial grant of authority by the people. Principally, this section will deal with the manifestations of the trust by Sir John Fortescue, John Locke, and William Blackstone.

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<sup>106</sup> JAMES DALY, *SIR ROBERT FILMER AND ENGLISH POLITICAL THOUGHT* 29 (1979).

All three theoretical frameworks depend on a normative narrative. Each theory discussed in this section weaves a theory of the Kingship into a theory of humanity and of political society. Filmer and Locke in rebuttal to each other spend more time defining the way that creation and human existence determine a theory of Kingship. Alternatively, Blackstone's and Foresque's narratives are more strongly tied to a context-specific history of the Kingship; Blackstone in particular has something very interesting to say in light of revolts and revolutions that tended to define the sovereign. (Can there be a more descriptive way of defining a sovereign's relation to his realm than to highlight when some of his people claim he has breached the limits of his rule?) This work, a polemic, understands the philosophical contrivances of the Kingship as built upon narratives and norms as rehearsed by specific authors at specific times. This work's value is its recognition that the normative location of "beginnings" (both as norm and narrative) is an imperative towards understanding sovereignty. Succinctly, this section more than any other tries to make sense of something that is not necessarily coherent: a theological value-set that is challenged by the historical framework, that is shaped by its authors to create a new narrative, and that ultimately works out sovereignty in the terms of the narrative.

**a. *The King as Conquering Landlord***

The description of the King as landlord is quite simple in terms of his relation to real property in England. Indeed, Arthur Hogue carefully turned our eyes to the relation of socage and burgage tenures to the aspect of kingly sovereignty.<sup>107</sup> The legal mark

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<sup>107</sup> See ARTHUR HOGUE, ORIGINS OF THE COMMON LAW 102 (1966) (Liberty Fund Reprint 1986). Socage tenures are those that derive from no military service, but rather relate to

imprinted on the English countryside (literally) by the Norman Kings was characterized by tenures derived ultimately from the King himself. As Hogue aptly says, In England, the King was “supreme landlord over the realm.”<sup>108</sup> But though the image of King as “supreme landlord” is helpful for understanding the way property rights devolve, it does not explain per se how the people relate to the King outside of the property relationship, though it may illuminate a distinct aspect of the King’s relationship to his people.

What it does provide is the image of the conqueror as possessor. Image may indeed be all we have. As the English historian Charles Howard McIlwain has written, the sources following the conquest until the reign of Henry I are “slight, scattered, and rather inconclusive.”<sup>109</sup> Yet the image itself is certainly telling. Certainly, the power that King’s had to rule stemmed directly from the first “Conqueror” and extended only as King’s maintained the power to rule in the Norman’s image. Indeed, from the time of the conquest till the thirteenth century, the auspices of English law appear similar to the “*coutumes* of northern France,” as opposed to the cultural traditions of the Anglo Saxon predecessors in possession of the English Crown.<sup>110</sup> Even the source of authority being traced to someone called “the conqueror” speaks to the normative view of those that follow in the conqueror’s place. Implicit is the recognition that with a conqueror comes new law, new order, and new loyalty.

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production upon the land of a lord. Burgage are more nuanced, and relate to status within the realm rather than effects upon the land.

<sup>108</sup> *Id.*

<sup>109</sup> CHARLES I. MCILWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* 70 (1940).

<sup>110</sup> F.W. Maitland, *History of England in F. W. MAITLAND, HISTORICAL ESSAYS* 97, 101 (1938). Namely Maitland means the vernacular of law and customs traditionally associated with the English form of law, but which have no source in Anglo Saxon tradition. i.e. trial by jury. *Id.*

That image was one that capitalized on the station of “King” towards erecting beneficial structures for the collection of taxes and fees. For example, the compilation of the *Doomsday Book*, an attempt to systemize the payments of fees to predecessor’s in title emphasized the connection between land, duty, and King.<sup>111</sup> Indeed, the innovation of the Norman Conquest was to divorce the King from the feudal tenures that so bound the French King. Now the King stood with no other person in his realm above him. Thus, the sheriffs were the King’s officers, the court’s the King’s courts, and accordingly all the people owed their ultimate allegiance to him and him only; only subsidiarily to their lords.<sup>112</sup> The conquering King was one way to understand the King’s relation to the people; as conqueror, he was entitled to not only their loyalties but their treasures as well.

But the image that the Norman conquest brings is not just a pyramidal description of ultimate power. This question returns us to a consideration we breezed by in the last part – that of the King’s corporational character.<sup>113</sup> So that our formulation of the King is clear at this point, we suggest that the corporational model of the Kingship includes members of the royal dynasty together with his subjects in the realm, along with his predecessors and successors to the Crown. In Norman England, the King was indeed the realm. That image survived through successive generations.

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<sup>111</sup> *Id.* at 102.

<sup>112</sup> *Id.* Maitland makes this point well emphasizing William’s personal knowledge of the fallacies of the French system, himself being the “rebellious vassal” of the French King. *Id.*

<sup>113</sup> Indeed, though we answered what aspects of a corporation the king tends to resemble, we ignored purposefully his posture within the corporation. Instead, in our last chapter, we only talked about the temporal aspects of the corporate character, that the king is incorporated through time with his brethren monarchs holding the realm as a dynasty. This section looks principally at the second group comprising the King’s corporation – his realm.

Two cases highlight this view of the King. The first, *Willion v. Berkely*,<sup>114</sup> is often cited for its compelling language that supports the King's two bodies. In *Willion*, Henry Willion brought suit for trespass and damages against Henry Berkley and Richard Knight, who entered the manor of Weston possessed by Willion and ejected him by "force of arms, viz., swords, staves and knives."<sup>115</sup> Both Berkley and Willion claimed seven acres of land attached to the Weston Mannor by rightful claim. During the reign of Henry VII, the property was given to William Marquess Berkley for life, with a fee tail to Henry VII. The property transfer also contained a condition that if Henry VII died without male heirs, then the property would revert to the next heir of the William Marquess Berkley.<sup>116</sup> Edward VI indeed died without male issue and Berkley claimed the chain of property proceeded as follows: Henry VII – William Marquess Berkley – Henry VII – Henry VIII – Edward VI – Next heir of the Marquess Berkley, namely Henry Berkley.

Willion, on the other hand claimed possession of the land through the grant of a third party, Henry Cook, who claimed rightful ownership of the property by virtue of a second grant by Henry VIII. Succinctly, Willion agreed that property reverted back to Henry VII upon the death of the Marquess, and that title then passed to Henry VIII. However, Willion claimed that Henry VIII then deeded the land in fee simple to Lady Catherine, his first wife, thereby breaking the reversionary right in the King. Thus Willion's chain of

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<sup>114</sup> *Willion v. Berkely*, 75 Eng. Reports 339, 2 Plowden Reports 222, 242 (K.B. 1559).

<sup>115</sup> *Id.* at 340.

<sup>116</sup> *Id.* at 346.

title looked so: Henry VII – William Marquess Berkley – Henry VII – Henry VIII – Fee simple to Lady Catherine Latimer – Henry Cock, lessee of Henry Willion.<sup>117</sup>

Importantly, the litigants and the justices did not perceive this case to be simply a question of instruments and heirs. Rather it was a question that touched the metaphysical nature of the King, and how the King relates to his realm. Like the conqueror, who related to the realm as possessor, the court saw this issue as touching the very narrative of the King, not just a technical question of reversions. For example, one exception raised by Defendants was the King Henry VIII did not have the capacity to deed the property to Catherine. The court then recited the traditional mystical view of the King and his natural body: “[a]nd as to this, it was argued on this side that 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.”<sup>118</sup> But then, in describing the mystical political body, the court citing Lord Southcote incorporates the realm as bound together by the King: “[t]he other is a body politik, and the members thereof are his subjects, and he and his Subjects together compose the corporation... 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...”<sup>119</sup> The idea expressed in *Willion v. Berkely* is simply that the King and realm form a body inseparable by the death of the King.<sup>120</sup> As King, the head of the Body, he has full capacity to control and govern the members held up in his body.

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<sup>117</sup> *Id.* at 346.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* citing *Calvin's Case*, 7 Coke's Reports. 10.

<sup>120</sup> And this body (politic) is not subject to passions, as the other is nor to death, for as to this Body the King never dies, and his natural death is not called in our law (as Harper

But *Willion v. Berkley* suggests more than just the headship of the King over the corporate body of the realm; it also suggests a comity between King and realm. The court describes the reciprocal relationship in relation to an exception taken on the basis of an act presumed only to apply to certain members of the realm. The court in ruling that the statute was a general act and thereby universally applicable, discussed the reciprocal nature of the realm to the King:

For every subject has an interest in the King, and none of his subjects that is within his law is divided from the King, who is his head and sovereign. So that his business and things concerns the whole realm; and forasmuch as the whole realm has an interest in the King and by the same reason in the queen who is his wife, the said act is concerns the whole realm...<sup>121</sup>

Ultimately, Willion's argument fails. The Court, distinguishes the rights of Henry VIII as regent from Henry as natural person. Justice Brown says:

For the King naturally, properly, and fully cannot purchase by any other name than by the name of King, for the name of King has drowned his surname, and in the name of King, his surname and proper name also are included.... So that the name of the Lord the King contains the King in certain viz, the King which then in, or the King spoken of. And although it is usual at this day to say King Henry 8, or King Edward 3, or King Edward 4 this is but for distinctions sake, to know what King we mean.... For the word King is a name of substance by itself without the name of baptism.... And if land is given to Edward 6 or Henry 8 omitting the word King, they shall take nothing. But contra if a patent is made by King Henry 8 by the words "the King hath granted, omitting Henry...the gift is good....So that if

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said) 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 is a separation of the two bodies, and that the Body politic is transferred and conveyed over from the Body natural now dead, or now removed from the dignity royal to another body natural. So that it signifies the removal of the body politic of the King of this realm from one Body natural to another. *Id.* at 235.

<sup>121</sup> *Id.* at 230.

land is given to a King by the name of baptism and by the name of King also, .. this shall go in succession as the Crown shall go.<sup>122</sup>

By holding land in his mystical body, it meant that the King had an interest in that land through time. It further meant that the mystical elements of the King became incorporated into the things he touched – his property. But the King’s metaphysical character did not just control his property but his subjects as well, as discussed one year later.

*Hales v. Petit* was an action for trespass by Margaret Hales, plaintiff against Cyriack Petit. Margaret Hales, with her Husband James Hales owned the land in fee simple. But James Hales “voluntarily and feloniously” drowned himself leaving only widowed Margaret Hales.<sup>123</sup> Upon the death of Mr. Hales, the Archbishop re-leased the lands to Defendant, Cyriack Petit for a new term of years. The ultimate question was whether by virtue of Hale’s suicide was the land he and his heirs had title to, now escheated to the state. The Court ruled it was.

Hale’s “homicide” is characterized as an offense against, God, nature and King.<sup>124</sup> Pertinently to the King, the Court says that Hale’s suicide was an offence,

Against the King in that hereby he has lost a subject, and (as Brown termed it) he being the Head has lost one of his mystical members. Also he has offended the King in giving such an example to his subjects, and it belongs to the King, who has the Government of the People, to take care that no evil Example be given them, and an evil Example is an offense against Him.<sup>125</sup>

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<sup>122</sup> *Id.* at 244.

<sup>123</sup> *Hales v. Petit*, 75 Eng. Reports 387, 1 Plowden Reports 253 (K.B. 1560).

<sup>124</sup> *Hales v. Petit*, 1 Plowden Reports at 259. As to Nature, the crime was failing to self-preserve. As to God, it was a violation of the Sixth Commandment of “Thou shall not Murder.”

<sup>125</sup> *Id.* at 259a.

Implicit is the orientation of the court towards viewing the subject, as not just static members of the King's body, but as productive members that benefit the King in his body politic. So, the court terms the offense not as a moral offense for the sake of being immoral, but rather as a deprivation of a principle part of the King's realm – one of his persons.

*Hales v. Petit* and *Willion v. Berkely* demonstrate how the laws related the King's interest in his "political body." Interestingly, in both cases the treatment of individuals and property held by the "King's body" is symmetrical. Henry of York (Henry VIII) has no more right to deprive himself, or Edward VI for that matter, of property than James Hales can deprive the King of a life. They confirm the image of a conquering King that by virtue of his victory is entitled to the revenues of his body, regardless of the decisions natural persons make. The "beginnings" that are honored are an economic relationship that began in the conquest, that entitled the King as King to certain property, as well as the lives of his subjects. They confirm a merger on certain levels of subjects as property.

***b. King as Father***

A similar metaphor to support the divine right of the King to rule appears in the late seventeenth century when Sir Robert Filmer published his *Patriarcha*, a narrative of the Kingship as Father, inheritor, and provider of the realm.<sup>126</sup> In looking at Filmer, it is important to ground his work in both the historical moments surrounding him, and his own conception of "what he was trying to say." Historically, *Patriarcha* was composed

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<sup>126</sup> ROBERT FILMER, *PATRIARCHA OR THE NATURAL POWER OF KINGS* (1680) *available at* <http://www.constitution.org/eng/patriarcha.htm>

in 1628 and published posthumously in 1680 as Tory propaganda.<sup>127</sup> Importantly, the events that Filmer has in mind when he writes *Patriarcha* are not the ones that immediately are associated with Filmer's political rhetoric; in Filmer's mind are the reigns of Richard II and Edward II which ended in civil war and the death of both Kings.

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<sup>127</sup> See JAMES DALY, *SIRE ROBERT FILMER AND ENGLISH POLITICAL THOUGHT* 9 (1979). *Patriarcha* went through several editions starting in 1680. Daly seems to rebuff the influence that Filmer may have had on Tory political philosophy, suggesting that other royalist paths besides Filmer's provided the basic line of discussion. See *id.* at 11. On the other hand, Filmer was deemed a voice to be answered by the Whigs, who "dealt Filmer punishing blows" from his lengthy excursion on the book of Genesis and his general natural theology of the King as father. *Id.* Among those that offered rebuffs to Filmer's thought are Algernon Sidney, who described *Patriarcha* as "grounded on wicked principles equally pernicious to magistrates and people" (see Algernon Sidney, Colonel Sidney's Speech Delivered to the Sheriff on the Scaffold, (Dec. 7, 1683)), and John Locke, whose first part of *Two Treatises of Government* is solely dedicated to rebuffing the thought of Robert Filmer. Sidney also produced a longer, more copious work that spent considerable time debasing the political order of Filmer. See Algernon Sidney, *Discourses Concerning Government*, (1702).

Notably, Filmer was not without his supporters. A defense of Filmer was taken up by Edmund Bohun specifically relating to the attacks by Sidney in his Speech on the Scaffold. Specifically, the author performs a line-by-line exegesis of Sidney's speech, trying to demonstrate the speech as a "unseasonable and unbecoming declamation." See Edmund Bohun, *A Defense of Sir Robert Filmer, Against the Mistakes and Misrepresentations of Algernon Sidney Esq. in a Paper Delivered by him to the Sheriffs upon the Scaffold on Tower-Hill, on Friday December the 7<sup>th</sup> 1683 before his execution there* 2 (1684) (Hereinafter Defense). One passage from Bohun's writings seem to capture the ideological and religious nature of this tension:

Tho' the season of the year, the infirmities of this age, increased by [Sidney's] close imprisonment of about five months, might be allowed as reasonable causes why he should not speak much at his execution; yet in my poor judgment, they will afford him little excuse either for what he hath or what he hath not delivered in writing, since he was pleased to take that way: For it had been as easy, and much more becoming a Christian, a Subject, and a Martyr, as he seems desirous to be thought, to have told the world whether he were guilty, or not, or of the things laid to his charge, than to Arraign his Judges, to have Exhorted the people to Loyalty and Obedience towards their gracious King, and to have prayed for the peace and prosperity of his Prince and his Country, as to complain of the Age, and yet at the same time endeavor to make it worse by an unseasonable and unbecoming declamation.

*Id.*

He probably sees parallels between the public response to both prior Kings and the current King Charles I, whose unpopularity amongst the noble class was growing.<sup>128</sup>

Notably, he does not have in mind at this time the dissolution of Parliament in 1629 by Charles I,<sup>129</sup> the Long and Short Parliaments of 1640,<sup>130</sup> the Ship Money crisis<sup>131</sup> and the

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<sup>128</sup> Charles was given the benefit of the doubt at least early on in his reign. One commentator has noted that most parliamentary objections were aimed at Lord Buckingham and the King's advisors for "misleading" a "helpless monarch." DAVID UNDERDOWN, *A FREEBORN PEOPLE: POLITICS AND THE NATION IN SEVENTEENTH CENTURY ENGLAND* 39 (1996). Indeed, the theology of the Kingship dictated that "the king could do no wrong." As Sir John Eliot said to the House of Commons, " 'no act of the King can make him unworthy of his Kingdom;' such an idea would be 'against our religion.'" See William B. Bidwell and Maija Jansson, eds, *PROCEEDINGS IN PARLIAMENT 1626 III*, 358 (1991) cited in Underdown, *supra* at 133. However, this perception of a "helpless monarch" would not last as the ultimate trial and regicide of Charles I would show.

<sup>129</sup> In 1629 Charles I dissolved the Parliament session in large measure deeming Parliament's approval as unnecessary to collect various taxes for the continuation of wars against Spain, France, and Scotland. In the midst of this dispute the sovereignty of the King arose in the curious form of legal recognition as opposed to regal tradition. Charles McIlwain reports that when the Petition of Rights, which would require Parliament's approval of taxes before collection, came before the House of Lords, they sought to add a clause "saving the sovereign power of the King." Notably, the Commons understood that to allow such an addition would be to recognize not only a regal right by a legal right. John Pym said that "All our Petition is for the laws of England, and this power seems to be another distinct Power from the Power of the law: I know how to add Sovereign to his person, but not to his power: And we cannot leave to him a sovereign power..." See CHARLES MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 83 (1979). It would seem that at least by 1628, questions relating to the location of the sovereign were being raised by the House of Commons.

Initially, Charles was hesitant to consent to the Petition of Right, but after consultation, he was informed that it could have no binding force against him. After signing the Petition, he levied taxes, and then dissolved Parliament for eleven years.

<sup>130</sup> Having no Parliamentary session since 1629, Charles I, needed more revenue to continue his wars, specifically against Scotland. Accordingly, he recalled Parliament on April 13, 1640. At that time, many members of Parliament challenged the legality of the prior dissolution and John Pym spoke forcefully for two hours against the acts of the King. Three weeks later, on May 5, 1640, Charles again dissolved the Parliament believing the political tension insurmountable.

Several months later, on November 3, 1640 Charles convened what is known as the Long Parliament which did not formally dissolve until May 16, 1660.

accompanying losses in the Bishops Wars with Scotland, the trial and ultimate regicide of Charles I,<sup>132</sup> the assumption by the Lord Protector of the Commonwealth, or the return to the throne of Charles II. Notably, *Patriarcha's* ultimate publication came thirty-one years after the regicide of Charles I, and eight years before the abdication of Charles II, known as the Glorious revolution; thus though Filmer may have been spared this knowledge, his reader would certainly recall these events in parsing Filmer's rhetoric. A primary question these issues spurred was the nature of the King's power and authority, making *Patriarcha* an interesting solution to a King's usurpation of power.<sup>133</sup> Filmer sets out to answer the central question: can liberty be a natural right. Filmer's work answers that question most pertinently in relation to the King.<sup>134</sup>

Ultimately, Filmer's theological lens informs his view of human history. That is, the "beginnings" for Filmer are normatively tied to the authenticity and meaning behind the biblical story; the necessity for modeling the timeless structures present in the biblical

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<sup>131</sup> "Ship money" was a means of Royal Taxation upon local governments done to raise money for armed naval vessels. The tradition of "Ship Money" dates back to early medieval times when Kings would raise money for armies and navies through local barons. For a more detailed discussion of Ship Money, and its implications in the Seventeenth Century, see Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Advisors and Judges*, 38 AM. J. LEGAL HIST. 117, 141-43 (1994); see also UNDERDOWN, *supra* note 133, at 43 (suggesting that Ship Money never really became an issue until the Hampden Case in 1637 where, instead of receiving Parliamentary advice, King Charles utilized the advice of his own judges).

<sup>132</sup> See Sarah Barber, *Charles I: Regicide and Republicanism*, 1996 HIST. TODAY 29, AT 31 ("the tragedy of Charles I: in 1649 the new rulers of England, holding their positions by virtue of conquest over the anointed symbol of divine power on Earth, chose to make the most public and graphic display of the way in which the person of the monarch could be separated from the sovereignty he was meant to express."). This point was made clear by an announcement of the establishment of a new political order in a publication called the *Moderate*: "The Corpse of the King was sent to Windsor, to be buried in St. George's Chappel." As one commentator noted "the point was clear: not only was the King dead, but the kingly office as well." See Amos Tubb, *Printing the Regicide of Charles I* at 517.

<sup>133</sup> See Daly, *supra* note 132, at 4.

<sup>134</sup> *Id.*

narrative thus becomes a fulfillment of normative values. So for Filmer, Adam was not just a person given “economic power” in the garden, but a person vested with political power over the world as father of the world.<sup>135</sup> According to Filmer, civil power flows by “divine institution.”<sup>136</sup> The divine institution that Filmer refers to is Adam’s election as the first human in creation and the powers that derived from his estate.<sup>137</sup> Thus, Filmer’s model understands Kingship as deriving power from beginnings. Succinctly, there is significance in being the first. For Filmer, the description of King as Patriarch or *Pater Patriae* affirms the nature of beginnings inherent in Kingship.

And fatherhood carries a mystical quality about who should be King. King’s, though not the natural parents of their citizens, are the mystical parents, holding their children within their reign. Kings are not chosen by human hands but by the mysteries of “first birth.”<sup>138</sup> The picture that Filmer has in mind is the King’s receipt of power directly from God himself:

All such prime heads and fathers have power to consent in the uniting or conferring of their fatherly right of sovereign authority on whom they please; and he that is so elected

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<sup>135</sup> Filmer, *supra* note 131, at 4 (“I see not then how the children of Adam, or of any man else, can be free from subjection to their parents. And this subjection of children being the fountain of all regal authority, by the ordination of God himself.”).

<sup>136</sup> *Id.* at 4 (“it follows that civil power not only in general is by divine institution, but even the assignment of it specifically to the eldest parents, which quite takes away that new and common distinction which refers only power universal and absolute to God, but power respective in regard of the special form of government to the choice of the people.”).

<sup>137</sup> Filmer refers to Adam’s lordship, which descended to the patriarchs as being as “large and ample as any dominion of any monarch” *Id.* at 4. That dominion included the power to decree a death sentence (*see* Judah’s pronouncement of a death sentence to Tamar, Gen. 38); power to war and command armies (*see* Abraham’s commanding of an army, Gen. 12); power to make peace with other nations (*see* Abraham declaring peace with Abemilech, Gen. 20). He summarizes thus: “These acts of judging in Capital Crimes, of making war, and concluding peace, are the chiefest marks of ‘sovereignty’ that are found in any monarch.” Filmer, *supra* note 131 at 5.

<sup>138</sup> *Id.* at 6.

claims not his power as donative from people, but as being substituted properly by God from whom he receives his Royal Charter of an Universal father, though testified by the ministry of the heads of the people.”<sup>139</sup>

Two ideas are gestating here for Filmer: first, just like the King received from God the Royal Charter, he may place upon his own heir the royal charter, subject of course to the hand of God, which ultimately chooses the heir. Second, the “ministry of the heads of people” includes the act of ministering to the King; it confirms the people’s submission to, not authority over the body of the King.

The first idea posed by Filmer – that Kings receive their grant directly from God and therefore may grant royal authority to their own heirs – captures the nature of the royal grant. His heirs are considered the “next heirs to those first progenitors who were at first natural parents of the whole people, and in their right succeed to the exercise of supreme jurisdiction. And such heirs are not only lords of their own children but also of their brethren, and all others that were subject to their fathers.”<sup>140</sup> Indeed, as discussed in Part II, the mystical continuation of the King’s corporation, is reflected in Filmer’s view of primogeniture and the ascent of new Kings.<sup>141</sup>

This does not mean that the forceful removal of Kings does not occur or is not ordained. Indeed, Filmer has to make sense of the falls of Richard II and Edward II from Royal power. What Filmer makes clear is that this removal from power is not because of the people’s will but solely from God.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 7-8.

<sup>141</sup> *Id.* at 7 (“as long as the first fathers of families lived, the name of the patriarchs did aptly belong unto them; but after a few descents, when the true fatherhood itself was extinct, and only the right of the father descends to the true heir, then the title of prince of King was more significant to express the power of him who succeeds only to the right of that fatherhood which his ancestors did naturally enjoy.”).

“If it please God, for the correction of the prince or punishment of the people, to suffer princes to be removed and others to be placed in their rooms, either by the factions of the nobility or rebellion of the people, in all such cases, the judgment of God, who hath power to give and to take away kingdoms, is most just; yet the ministry of men who execute God’s judgments without commission is sinful and damnable. God doth but use and turn men’s unrighteous acts to the performance of His righteous decrees.”<sup>142</sup>

Said more directly, Kings fall because of the need to discipline the King, or to discipline the people, or both.

Specifically in England’s case, Filmer notes that the Kingdom has never truly suffered under a tyrant. “Edward II and Richard II were not insupportable either in their nature or rule.”<sup>143</sup> Rather, it was the wickedness of the people that led to both insurrections; the result was the “miserable wast[ing]” of the Kingdom by civil war, which only affirmed the nature of the Britain’s to the world:

These three unnatural wards have dishonoured our nation amongst strangers, so that in the censures of Kingdoms the King of Spain is said to be the King of Men, because of his subject’s willing obedience; the King of France, King of Asses, because of their infinite taxes and impositions; but the King of England is said to be the King of devils, because of his subjects often insurrections against and depositions of their princes.<sup>144</sup>

But most supporting Filmer’s point that deposition is brought about because of the need for discipline is the successor reign of Henry. Quoting the Historian known as

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<sup>142</sup> *Id.* at 7.

<sup>143</sup> *Id.* at 23. Indeed, Filmer says “Edward II by many historians is reported to be of a good and virtuous nature, and not unlearned;” his misfortune being a result of “fortune” rather than despotic rule. Likewise, Richard II was deposed by a “tempestuous rage, neither led nor restrained by any rules of reason or state.” *Id.*

<sup>144</sup> *Id.* at 23-24.

Hollingshed, Filmer shows how the deposition of Richard II led to the people's long-suffering at the hands of his replacement:

That he was most unthankfully used by his subjects; for although, through the frailty of his youth he demeaned himself more dissolutely than was agreeable to the royalty of his estate, yet in no King's days were the commons in greater wealth, the nobility more honoured, and the clergy less wronged, who notwithstanding, in the evil-guided strength of their will, took head against him, to their own headlong destruction afterwards, partly during the reign of Henry, his successor, whose greatest achievements were against his own people in executing those who conspired with him against King Richard. But more especially is succeeding times when, upon occasion of this disorder, more English blood was spent than was in all the foreign wars together which have been since the Conquest.

Filmer's point is simple; a deviled people deserve a deviled King.<sup>145</sup>

Filmer's second point is social: the ministry of the people Filmer understands as containing a distinct economic authority. Adam was not only first father, but also first possessor, first caretaker, first economic provider. Filmer, therefore, sees the "political fatherhood" in a reciprocal relationship to his children. The King extends his care over the many families to "preserve, feed, clothe, instruct, and defend the whole" family. But the King also may extract the "bounties" of his people.<sup>146</sup> Filmer's reading of the prophet Samuel's admonition of Kingship<sup>147</sup> demonstrates this:

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<sup>145</sup> Filmer's notion of cosmic justice -- that good peoples get good kings, while bad people get tyrants -- was a well documented theory in the early middle ages that explained why people suffer under tyrannical leaders. See e.g., John of Salisbury, *Policraticus*, in O'DONOVAN & O'DONOVAN, FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 283 (1999) (describing the Bishop of Rome's "welcoming" Attila the Hun, "the Scourge of God").

<sup>146</sup> Filmer *supra* note 131 at 8.

<sup>147</sup> I Samuel 8:10-18 (NIV):

Samuel told all the words of the LORD to the people who were asking him for a king. He said, "This is what the king

it is evidently shown that the scope of Samuel was to teach the people a dutiful obedience to their King, even in those things which themselves did esteem mischievous and inconvenient; for by telling them what a King would do he, indeed, instructs them what a subject must suffer, yet not so that it is right for Kings to do injury, but it is right for them to go unpunished by the people if they do it. So that in this point it is all one whether Samuel describe a King or a tyrant, for patient obedience is due to both; no remedy in the text against tyrants, but in crying and praying unto God in that day. But howsoever in a rigorous construction Samuel's description be applied to a tyrant, yet the words by a benign interpretation may agree with the manners of a just King, and the scope and coherence of the text doth best imply the more moderate or qualified sense of the words.<sup>148</sup>

Filmer supposes that Samuel's discursion on Kingship is not about tyrants or good Kings; its rather neutral towards the moral culpability of Kings. Rather, the passage is about what the people can expect from their King.

One such expectation towards the Kingship is that the people's economic interests are subordinate to the King's. First, the people can expect a tenth of their "seed, of their vines, and of their sheep" to be taken by the King as a right of tribute. Second, the taking

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who will reign over you will do: He will take your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties, and others to plow his ground and reap his harvest, and still others to make weapons of war and equipment for his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive groves and give them to his attendants. He will take a tenth of your grain and of your vintage and give it to his officials and attendants. Your menservants and maidservants and the best of your cattle and donkeys he will take for his own use. He will take a tenth of your flocks, and you yourselves will become his slaves. When that day comes, you will cry out for relief from the king you have chosen, and the LORD will not answer you in that day."

<sup>148</sup> *Id.* at 25.

of such things may be by force when necessary to erect the Kingdom, “for those who will have a King are bound to allow him royal maintenance by providing revenues for the Crown, since it is both for the honour, profit, and safety, too, of the people to have their King glorious, powerful, and abounding in riches.”<sup>149</sup> Thus, Filmer’s conception of the Kingship includes one that is owed tributes and who may, if necessary, seize the economic engines of his people for the benefit of the people.

Importantly, Filmer finds normative proof that the King as Father is justified as a natural theory. That theory like the Conqueror\Landlord model combines the economic and political capacities of the Kingship together. It establishes that there is a mystically ordained King, who passes his line like a father passes the family estate to his eldest son. And though the King should protect his people like a father protects his children, no one has the authority to correct the King when he fails to do so, or when he unjustly usurps the people.

Whether the image that endures is the traditional view of the conqueror, the baronial landlord, or the *pater patriae* the same end is reached by the discussion suggested in this part: the King is the supreme person stationed above the rest; he is entitled to political power, which includes the economic resources of the people. There is no separation in King and Common; both Court and Cottage are conjoined together irrevocably to serve one another; cottage towards maintaining the honours of Kings and Court towards representing the justice of God for the people. The next section considers alternative images of a slightly restrained King.

**c. *The King as Holder of the Corpus’s Trust***

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<sup>149</sup> *Id.*

The formulation that begins to take shape in the seventeenth century actually began formulation in the fifteenth century. Various revolts showed the theory was believable: people started thinking that sovereignty may actually originate in the people, who then grant the power to rule to their leaders, Kings etc... The normative analogy that I wish to set forth here is that of a trust between King and public. Specifically three formulations of that trust are discussed. The earliest is John Fortescue's binding of the King to the law in the name of the public good. The second, by John Locke, builds on Fortescue's notion that law binds Kings, but offers a remedy to despotic Kings. The third, by William Blackstone, mitigates Fortescue and Locke. In all three, narratives of beginnings formulate the theory.

### **1. Sir. John Fortescue of Governance of England are of the Laws of England**

The earliest formulation of a "trust relationship" is raised by Sir John Fortescue, who believed that the public served to benefit the King economically while the King offered his protection and justice. But these reciprocal actions were not contractual. There was no bargain, per se, that the King reached with his people to assume an elevated station. Rather, they were simply duties attached to the station each assumed within the social strata of the realm.

So, for example, when Fortescue describes the reason for this social order, he looks specifically to the economic duty of the people to not just support the King, but to do so abundantly. For "if a King is poor, he shall by necessity make his expenses and buy all that is necessary to his estate, by credit and borrowing; wherefore his creditors will win

upon him the fourth or the fifth penny of all that he spends ... What dishonor this is, and abating of the glory of a King.”<sup>150</sup>

Fortescue’s concern is as much towards a stable social government as it is towards the “glory of a King.” Fortescue’s theory of Kingship infers that Kingship arises in two distinct forms – *dominium regale* and *dominium politicum et regale*; England is represented by the later while France the former.<sup>151</sup> The narrative that Fortescue gives is a juxtaposition between the Biblical pagan King Nimrod and the more civilized and wise King of the Britains’ Brutus.<sup>152</sup> The distinction for Fortescue solely revolves around the aim of the government. For Nimrod and his progeny, the King governed solely by his own will, and arose from the might of the conquering prince. The latter, on the other hand began as a cognitive act of the people and their vesting in the person and line of the King a power to rule over them justly.

And in this sense, Fortescue makes clear that “the head does not swallow the body,” but rather each exist with their own areas of supremacy.<sup>153</sup> Specifically, his King that rules by both Royal and political means specifically subjects himself to the laws of the land that he rules over. “For the King of England is not able to change the laws of his Kingdom at pleasure...”<sup>154</sup> Unlike the civil laws of the continent which holds the pleasure of the prince as the “force of law,” England has chosen to restrain its King from the

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<sup>150</sup> SIR JOHN FORTESCUE, ON THE GOVERNANCE OF ENGLAND 92 (Shelly Lockwood, ed. 1996)..

<sup>151</sup> *Id.* at. 87 (“Although the French King reigns upon his people ‘by royal dominion,’ yet neither Saint Louis, sometime King there, nor any of his progenitors, ever set any tax or other imposition upon the people of that land without the assent of the three estates.

<sup>152</sup> *Id.* at 85-86.

<sup>153</sup> Kantorowicz, *supra* note 37, at 231.

<sup>154</sup> SIR JOHN FORTESCUE, ON THE LAWS OF ENGLAND 18 (Shelly Lockwood, ed. 1996).

power of his own prerogative.<sup>155</sup> Indeed, restraining the King politically is the only means of protecting the realm from the rule of a tyrant.<sup>156</sup>

Were we tempted to stop here in Fortescue's political theory, then we might begin to equate his theory with Locke's social contract; indeed, Locke even perceived Fortescue as suggesting that a prince may forfeit his power to the "obedience of his subjects."<sup>157</sup> But Fortescue wants to make clear that political communities require Kings. Quoting from Augustine's *City of God* and Aristotle's *Politics*, he describes the difference between a body with and without a head:

Sainte Augustine, in the nineteenth book of the City of God, Chapter 23, said that "a people is a group of men united by consent of law and by community of interest." But such a people does not deserve to be called a Body whilst it is acephalous, that is, without a head. Because, just as in natural things, what is left over after decapitation is not a body, but what we call a trunk, so in political things, a community without a head is not by any means a body. Hence Aristotle in the first book of the Politics said that "whenever one body is constituted out of many, one will rule, and the others will be ruled."<sup>158</sup>

For Fortescue, removal of a sovereign is not the answer to a tyrant; rather a more forceful restraining of the King by the laws is the proper answer. Continuing his metaphor of the body and the head, Fortescue says that the law restrains a King like tendons serve as connectors in the human body:

The law, indeed, by which a group of men is made into a people resembles the sinews [tendons] of the physical

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 26.

<sup>157</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 207 (Yale University Press 2003) (aligning Fortescue, Bracton, and "the author of the Mirror"). We shall endeavor more deeply into Locke's social contract theory in Subpart "c -- the King as Obligee" to this Chapter.

<sup>158</sup> Laws, *supra* note 159, at 20.

body, for just as the body is held together by the [tendons], so this body mystical is bound together and preserved as one by the law, which is derived from the word “binding,” and the members and bones of this body, which signify the solid basis of truth by which the community is sustained, preserve their rights through the law, as the body natural does through the [tendons]. And just as the head of the physical body is unable to change its sinews, or to deny its members proper strength and due nourishment of blood, so a King who is head of the body politic is unable to change the laws of that body or to deprive that same people of their own substance uninvited or against their wills.<sup>159</sup>

Fortescue accomplishes the combination of a political theory that originates sovereignty in the people with the learned experience of having a King who holds that sovereignty to the exclusion of all others. In certain measure, this is the accomplishment of all the theorists discussed herein, and so Fortescue is not necessarily remarkable in that fashion. He is remarkable for his ability to separate what he perceives to be the “political origins of the Kingship” from the mystical qualities that the King inherits when he assumes the throne. Thus, Fortescue is perfectly happy to attribute to the King all the qualities discussed in the first part of this paper (*The Gemina Persona*) if you understand that the starting place for the King’s power begins as an investment by the people and is limited by the expression of the people through law. Foremost, though Fortescue’s trust is built on the presence of a wise King that honors the law – just like Brutus.

## **2. John Locke’s Two Treatises of Government**

Locke’s beginnings, like Filmer, start in creation: the very beginnings of the natural world that endow humans with certain qualities, rights, and duties towards each

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<sup>159</sup> *Id.* at 21.

other.<sup>160</sup> “To understand political power right,” we are told by Locke,” and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man.”<sup>161</sup> That state was the state at creation.

Locke’s narrative of creation is rather matter of fact. “[Adam] was created, or began to exist, by God’s immediate power, without the intervention of parents, or the pre-existence of the same species to beget him, when it please God he should.” Adam was created like the beasts of the field.<sup>162</sup> In creation, he was vested with a general authority over the beasts of the earth, not singularly, but as representative of the grant to all mankind: “it was not to Adam in particular.”<sup>163</sup> Additionally, there is nothing in the biblical text that would recommend that Adam was granted similar authority over mankind.<sup>164</sup> Adam (and Noah) receive on behalf of mankind, the general suppositions of nature, not as any privilege or elevation of position, but simply because they were there.<sup>165</sup> Most notably, the role of creator does not pass to Adam from God in the

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<sup>160</sup> Locke interprets Filmer’s theory as establishing four primary justifications for Monarchy through Adam: creation, donation, subjection of Eve, and Fatherhood. This work will not attempt to parse each of those themes, but rather try to string together Locke’s affirmative theory of beginnings.

<sup>161</sup> Locke, *supra* note 162, at 101.

<sup>162</sup> *Id.* at 14-15

<sup>163</sup> *Id.* at 20-21.

<sup>164</sup> *Id.* at 20-22. Locke chastises Filmer’s theory by suggesting that Filmer’s norm of Monarch would entitle Kings to dine upon the flesh of their subjects, being in subjection to Monarchs in the same way that beasts are subjected to him. *Id.* at 22 (“methinks Sir Robert should have carried his Monarchical power one step higher, and satisfied the world that Princes might eat their subjects too, since God gave full power to Noah and his heirs to eat ‘every living thing that moveth,’ as he did to Adam to have dominion over them.”).

<sup>165</sup> *Id.* at 32-33.

creation; rather God remains the sovereign creator, with Adam simply being the first of his workmanship.<sup>166</sup>

Because Adam gains no preeminence over others by being first, neither do other men have such a claim to privilege. In that way, nature informs mankind that “being all equal and independent, no one ought to harm another in his life, health, liberty or possessions...” Mankind exists as “servants” of “one sovereign master;” “they are his property, whose workmanship they are, made to last during his, not another’s, pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any subordination among us that may authorize us to destroy another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.”

From this initial state of creation / nature, man comes together to form political societies.<sup>167</sup> Though he does not tell us precisely how man comes together (i.e. he does not give us a meeting hall or general election theory) he does tell us why: “we are naturally induced to seek communion and fellowship with others;”<sup>168</sup> and to avoid states of war.<sup>169</sup> In doing so, man reorders his interaction with humanity and the natural world “by their own consents,” making themselves into a “political society,” and thereby comes to agreements regarding crime, family, war, and most importantly property, money, and exchange. Thus, “God, having made man such a creature, that in his own judgment it was not good for him to be alone, put him under strong obligations of necessity, convenience,

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<sup>166</sup> *Id.* at 36-37.

<sup>167</sup> *Id.* at 106.

<sup>168</sup> *Id.* at 106.

<sup>169</sup> *Id.* at 109.

and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.”<sup>170</sup>

That reordering occurs by the common agreement of transgressions that are worthy of punishment (the making of laws) as well as the authority to execute those laws against transgressors (what Locke calls the power of war and peace).<sup>171</sup> Importantly, Locke identifies the three primary functions that our Western tradition has embraced as the powers of government; the determination of norms (legislative); the determination of specific violation of those norms (magisterial); and the enforcement and execution of those norms (executive).<sup>172</sup> Importantly, the reordering occurs when man, in political community, agrees to “resign to the public” his executive power by instituting one “supreme government.”<sup>173</sup> What defines Locke’s civil society is the availability of men to whom grievances may be made regarding the trespass of individual rights.<sup>174</sup>

In this way (and in this narrative) Locke finds absolute monarchies inconsistent with civil society. The story told above was man’s purposefully removing himself from the law of nature by erecting means of airing grievances to the state. Absolute Monarchy from Locke’s perspective retains “both legislative and executive power in” the King alone, leaving “no judge to be found,” no appeals of wrong doings, and likely no relief.<sup>175</sup>

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<sup>170</sup> *Id.* at 133.

<sup>171</sup> *Id.* at 137.

<sup>172</sup> *Id.* at 137. And herein, we have the original of the legislative and executive power of civil society, which is to judge by standing laws, how far offenses are to be punished, when committed within the common wealth; and also to determine by occasional judgments founded on the present circumstances of the fact, how far injuries from without are to be vindicated; and in both these to employ all the force of the members, when there shall be need. “ *Id.*

<sup>173</sup> *Id.* at 138.

<sup>174</sup> *Id.* at 138

<sup>175</sup> *Id.* at 138-39

In a description of Government that closely resembles the English constitution, Locke sets forth the attributes of the legislative and executive powers, noting that while the legislature is “supreme” the executive must retain “prerogative” to accomplish the necessary functions of the state.<sup>176</sup> In doing so, the executive acts in the “the people’s trust” to act “according to the public good,”<sup>177</sup> Specifically, the public good is definable by the laws that restrain the executive, and protect the people from such vices as undue taxation or takings of their property, declaring unjust wars, and the maintenance of even-handed justice.

Locke’s narrative ends in the same place it begins: with people able to recapture their sovereignty from despotic leaders. Specifically Locke’s remedy for the people was available when the executive abused his executive authority by refusing to call parliaments or by abusing his trust of maintaining the public good.

[B]etween an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth: as there can be none between the legislative and the people should either the executive or the legislative, when they have got the power in their hands, design or go about to enslave or destroy them. The people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to heaven.<sup>178</sup>

Perhaps the events of Charles I’s reign remain quite fresh on Locke’s mind, with the abrupt adjournment of Parliament in 1629; its lengthy recess until 1639, and the episodes.<sup>179</sup> Plausible as well is Locke’s stern warning to Charles II, and his imminent heir to the throne as the monarchy was reinstated. But Locke’s narrative is not confined

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<sup>176</sup> *Id.* at 171.

<sup>177</sup> *Id.* at 172.

<sup>178</sup> *Id.* at 175.

<sup>179</sup> RICHARD ASHCRAFT, *LOCKE’S TWO TREATISES OF GOVERNMENT* (1987).

to one tyrant: it's applicable to all. By hedging his theory away from specifics and towards abstract theories of cosmology, Locke develops a picture of sovereignty more transportable than any of the other theories discussed herein. Unlike Filmer, you don't have to see the sovereign as only fulfilled in a monarchy; but you can.

### 3. William Blackstone

Blackstone is not unaware of the manner in which cosmology and creation informs law and political structures; he says in his introduction to the *Commentaries on the Laws of England*:

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answer the end of its formation.<sup>180</sup>

Blackstone sets forth the principle that a natural function of social systems is to make rules for their efficient operation; (and that's what he wants us to know of the laws of England -- that they and the branches that enforce their operations are a part of a system).<sup>181</sup> Foremost, Blackstone understands that government must conform to certain natural principles of order, it's the specific manifestations of law that concerns

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<sup>180</sup> 2 COMMENTARIES, *supra* note 7, at 38; *see also id.* at 48.

<sup>181</sup> *See id.* at 48 (“for when society is once formed, government results of course, as necessary to preserve and to keep that society in order.”).

Blackstone and those manifestations will inform his narrative of law making, law enforcing, and judicial discretion.<sup>182</sup>

Indeed, Blackstone sees the systems of Britain as being better than the other systems of the world since in Britain, the “Constitution” affords the executive “all the advantages of strength and dispatch, that are to be found in an absolute monarch,”<sup>183</sup> while the legislative functions are divided into the spheres of Kings, Aristocrats, and Commons.<sup>184</sup> The Constitution so endowed represents all England from Peasant to Lord; the English Constitution comprises England.<sup>185</sup>

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<sup>182</sup> *Id.* at 49 (“By the sovereign power ... is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on.”)

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 49. “first the King; secondly the lords spiritual and temporal, which is an aristocractical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the house of commons, freely chosen by the people from among themselves. In this total body is lodged the sovereignty of Britain for the benefit of British society.

<sup>185</sup> *Id.* at 49:

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happy united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principle ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king has not negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power.

But in Blackstone, the experience of Kings is really what defines sovereignty. For example, Blackstone not only tells us that the power to dissolve a parliament rests solely with the King,<sup>186</sup> that Parliaments cannot exist without Kings,<sup>187</sup> but that the occasional termination of Parliament benefits society by refreshing Parliament on a regular basis;<sup>188</sup> he also turns our attention to the dangers that exist when Parliaments are allowed to perpetually exist by showing concretely what happens:

And this would be extremely dangerous if at any time it should attempt to encroach upon the executive; as was fatally experienced by the unfortunate King Charles the First who having unadvisedly passed an act to continue the parliament then in being till such a time as it should please to dissolve itself, as last fell a sacrifice to that inordinate power, which he himself had consented to give them.<sup>189</sup>

King's are entrusted with great prerogative; but that prerogative can be dangerous when abused.

And indeed, the primary way of understanding this monarchy is as a trust on behalf of the people. The trust that Blackstone specifically refers to consists of three elements: "to govern according to law; to execute judgment in mercy; and to maintain the established religion."<sup>190</sup> The experience of the monarchy (particularly the plight of James II) affords Blackstone a concrete way of explaining how that trust is upheld or violated, and then remedied within the British Constitution.<sup>191</sup> Constitution is not the idea that the people retain the elements of sovereignty under the terms of a social contract with its

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 233.

<sup>191</sup> *Id.* ("And these reciprocal duties are what I apprehend, were meant by the convention in 1688, when they declared that King James had broken the original contract between King and people").

leaders. It is rather a purposeful divesting of authority from the people to a body that contains representative, hereditary, and noble elements. Importantly, that divesting is irrevocable. If the people once held sovereignty, they gave it up, not to a King but to a Constitution – a constitution that includes among other things a King.

The narrative that Blackstone tells thus has two beginnings. The first under King Egbert in the year 800 begins the reign of monarchs and ends in 1688 with the Glorious Revolution and the abdication of government by James II.<sup>192</sup> The Glorious Revolution “was not a defeasance of the right of succession, and a new limitation of the Crown, by the King and both houses of parliament: it was the act of the nation alone, upon an apprehension that there was no King in being.”<sup>193</sup> Blackstone specifically wants to make clear: the abdication by James is not some act by the public that removed a tyrant from power; nor should it be interpreted in itself as a limitation on the power of future monarchs. Instead, it was the conscious decision by James II, in deciding to break the people’s trust, to abdicate the throne.

Blackstone’s reading assumes that this breach was intended by James II as an abdication. For Blackstone that is the only way to understand James II’s actions. The mystical body existed as close to perfection as a human body could.<sup>194</sup> And yet, Blackstone and the English people had to make sense of this fundamental breach of the English trust – a breach that was arguably more egregious than the over-taxation by

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<sup>192</sup> *Id.* at 197 (Blackstone traces the lineage of Royal successors from Egbert to James II).

<sup>193</sup> *Id.* at 213.

<sup>194</sup> *See id.* at 238 (“Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful...”)

Charles II or the quartering of soldiers in the city by the same.<sup>195</sup> The only plausible solution was that James II made the conscious decision to no longer be King when he broke the people's trust. It certainly helped Blackstone's case that James peacefully left the city, instead of fighting for his throne.

Next, Blackstone informs us that the Abdication by James II resulted not in the termination of his reign, but in the termination of the old Constitution of Britain. Notably, King James II "endeavored to subvert the constitution of the Kingdom," not just the monarchy.<sup>196</sup> Because he broke faith, he also broke "the original contract between King and people;... having violated the fundamental laws; and having withdrawn himself out of this Kingdom; has abdicated the government, and that the throne is thereby vacant."<sup>197</sup> And having abdicated the government, "which abdication did not affect only the person of the King himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine."<sup>198</sup> Indeed, Blackstone does not render ancestors to mean necessarily the members of Parliament, but rather "society at large." He explains:

for, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society.<sup>199</sup>

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<sup>195</sup> See Robert Zaller, *The Figure of the Tyrant in English Revolutionary Thought*, 1993 JOURNAL OF THE HISTORY OF IDEAS 585, 587 (describing the association of Charles I as the embodiment of the Tyrant image).

<sup>196</sup> 2 COMMENTARIES, *supra* note 7, at 211.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 212.

One possibility is that Blackstone perceives the abdication of government by James II as though the entire English system was tossed back towards a state of nature. Thus, the Declaration of Rights in 1689 was not an act of Parliament, per se, but of society.

And under the English Constitution, this makes sense. Only a King can call a Parliament. Upon a King's demise, Parliament terminates. Thus, upon James II's abdication, that Parliament terminated. With no King in place, and no one able to call a Parliament, the English Constitution was terminated with it. (Note the difference between the mere demise of the King and the abdication by James II. With demise, there is always a successor.<sup>200</sup> However, by breaking the sacred line of succession, there was no successor that the Kingship could fall upon and therefore no person who could call a Parliament).

Finally, Blackstone believes that upon the reinstatement of the King in the form of William of Orange, a new social contract was reached – this time expressly composed as the Declaration of Rights.<sup>201</sup> To be clear, the contract for the most part looks the same as the one that James II abdicated; indeed the contract itself proclaims that the lords and commons declare their “ancient rights and liberties.”<sup>202</sup> The declaration of rights to William of Orange was no Constitution – it was a marriage proposal. It laid forth the grievances that the commonwealth shared against the prior monarch; set forth the expectations and limitations that the people placed on the monarch; and then prayed that

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<sup>200</sup> See *id.* at \*191 (“the grand fundamental maxim upon which the *jus coronae* or right to succession to the throne of these kingdoms depends, I take to be this: ‘that the crown is, by common law, and constitutional custom hereditary.’” The title descends on “the death or demise of the last proprietor.”).

<sup>201</sup> See *id.* at 211.

<sup>202</sup> See Declaration of Rights, available at <http://www.parliament.uk/documents/upload/g04.pdf>.

the Prince of Orange “accept the same accordingly.”<sup>203</sup> Thus, upon William of Orange’s ascension to the throne, the compact was solemnized, a Parliament was called, and the new Constitution began. Such is the naturalist narrative of the Glorious Revolution.

Blackstone, though has a slightly different one. He would agree with all of the elements of the story: that England is a Constitution; that Kings call Parliaments and so on. But his conclusion passively ignores the facets of the story and instead suggests that the Constitution remained whole. Blackstone’s sometimes inconsistent portrayal of the normative story that unfolded in the Glorious Revolution is certainly due to his appetite for the English Constitution. He is quite willing to accept the normative story that was recorded instead of concluding that the Constitution was indeed subverted. He says “I, therefore *choose* to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a dissenting or revolting from it, in case we should think it to have been unjust, oppressive or inexpedient.”<sup>204</sup> Blackstone has a narrative; but, as he acknowledges the conclusion to that narrative runs on different terms than the narrative would suggest, partly because he foresees that the narrative itself may be subverted by the conclusion.

What is important for our purposes is two principles: what actually happened and what normatively happened. What happened in actuality was the removal of a King, the reestablishment of a new monarch, and the carrying on of British government. Indeed, the monarchs after William of Orange don’t seem to look much different from his

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<sup>203</sup> *Id.*

<sup>204</sup> 2 COMMENTARIES, *supra* note 7, at 212.

predecessors.<sup>205</sup> But normatively, the theoretical hurdles are enormous. How do you explain the removal of an unpopular King that breaks trust with the social contract, particularly when your social contract affords no means for his removal?<sup>206</sup> Once removed, how do you explain a still standing parliament that has no authority to exist without a King to call it into session?<sup>207</sup> But even Blackstone would agree that even if the Glorious Revolution did not subvert the Constitution, it certainly qualified it. His narrative importantly sees the abdication of James II as a climax in the Constitutional narrative. After James's abdication, and as a result of Parliament's solicitation of William of Orange, Blackstone can conclude that when the throne is vacant, Parliament may choose a new King.<sup>208</sup>

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The Kingship in England relates to the realm according to the story you tell. Those stories have normative values of what the beginning means. And accordingly, those beginnings shape the way each writer perceives the sovereign's relationship to the

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<sup>205</sup> See Noah Webster, *An Oration on the Anniversary of the Declaration of Independence* (New Haven 1802) in CHARLES S. HYNEMAN & DONALD S. LUTZ, II *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805* at 1234 (1983) (comparing King George III to Charles I and James II); WILLIAM WHITING, *An Address to the Inhabitants of Berkshire County, Mass.* (1778) (“decrying the charter of Connecticut as dead being composed under the tyrant Charles I: “But dust to dust, earth to earth, ashes to ashes, without either hope or fear of its resurrection; let us dismiss this frightful corpse of a charter”).

<sup>206</sup> See 2 COMMENTARIES, *supra* note 7, at 148 (restating the apprehension that “James II” abdicated his throne; *Id.* at 213; *but see id.* at 212 (acknowledging that the old line ended with James II, and that James II “did endeavor to subvert the Constitution.”).

<sup>207</sup> Note that Blackstone calls the gathering of Lords and Commons that issue the Declaration of Rights a “Parliament of Necessity.” See *id.* at \*148. Thus Blackstone sees a distinction between Parliaments called by the king and the 1688-1689 version.

<sup>208</sup> See *id.* at 192 (noting that the inheritance of the Crown is limitable by Parliament).

realm. For some the notion of King Conqueror explains why no court can have jurisdiction over him; for Filmer and his followers Fatherhood explains his normative conflation of scripture and reality. Likewise the Lockean and Blackstonean narratives describe norms qualified by Human imperfections. In all three narrative forms, as the normative values begin to align, the story teller weaves his conceptions of the normative values into history, making them appear to be timeless truths, when instead they are more likely new found alterations that explain the story being told.<sup>209</sup>

From the American perspective, the conflicting narratives of Locke and Blackstone do reveal a certain attribute of how a sovereign should be understood. First, both demonstrate that the narrative relates directly to how the story is formulated. For Locke, the story is about how humans create states. Therefore, his principles are timeless and are drawn, not from English historical texts, but from his notion of creation. For Blackstone, his narrative is about England, specifically that attribute of English politics that we call the English Constitution. Importantly, both narratives, even at points that are problematic, remain true to their story. In the next section, we show how American jurisprudence conflated the two and created a fiction that existed away from its narrative.

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<sup>209</sup> Though Blackstone would certainly agree that the Glorious Revolution brought forth a “new era” where the bounds of prerogative and liberty were “better defined,” he is hesitant to call the events a subversion of the Constitution. The republicans, he tells us, “held that this misconduct of King James amounted to an endeavor to subvert the Constitution; and not to an actual subversion or total dissolution, of the government according to the principles of Mr. Locke.” Therefore, Blackstone’s conclusion is that the abdication of James II is no different than if he were to have died: “the constitution was kept entire.” *See id.* at \*213-14.