CHAPTER 2
SELF-GOVERNANCE AND THE LITERATURE OF SOVEREIGNTY

Michael Wilks begins his discussion of the “problem of sovereignty” in the later middle ages by reducing to three the “main schools” of late-medieval political thought:

In the first place there are those who continue to favour the omnipotence of a divinely constructed ruler, and these can be fairly sharply divided off from those who seek an alternative source of power in the community at large. Whilst between them there now appears an ever-increasing number, headed by Aquinas himself, who endeavour to unite both parties in an ideal of the ruler who is both absolute and limited at the same time. By the second quarter of the fourteenth century this latter attractive but inadequate theory has gained the field, and writers like Augustinius Triumphus and Marsilius of Padua, the exponents of sovereignty papal and popular, are left as lonely and isolated giants on the fringes of the main body of late medieval political thinkers.¹

Wilks admits that “all attempts to separate writers and thinkers into groups and categories” are “necessarily of an arbitrary nature and exhibit a certain degree of artificiality,” but nevertheless maintains that “it still remains possible to discern three alternative views of the proper structure of authority in medieval society.”² On the one hand, he gives us the authoritarian model of divine-right kingship—with the papacy as its

² Ibid., 16.
chief exemplar--supported by “the development of Roman law principles in the twelfth century” in Europe. On the other, he offers an “Aristotelianism” that “revitalised old doctrines of the supremacy of the popular will and of an ideal of limited government which had all but disappeared beneath the encroachments of the absolute monarch, and provided a radically different answer to the problem of the origin of political authority.” Negotiating between these two, according to Wilks, was a third strand of political theory, of which Thomas Aquinas was perhaps one of the earliest and most-influential proponents, that attempted to reconcile the monarchy and the republic through an ideal of limited royal sovereignty.³

In the fifty years or so since Wilks first addressed “the problem of sovereignty,” his analysis has continued to exert a substantial influence over scholars who have approached the issue. Thus for the most part, more recent studies of the evolution of English political theory during the late-medieval period have emphasized the perceived antagonism between royal and individual sovereignty. They have also tended to focus upon the question of how English authors received and incorporated material and ideas appropriated from their continental predecessors. In discussing Gower’s Confessio Amantis, for example, Lynn Staley explains that, “By incorporating the broader rhetorical structure of Brunetto Latini’s Trésor into the version of the Confessio addressed to Henry of Lancaster, Gower attempts to translate into English the more republican concerns of Latini’s work:

Thus, where the first recension of the Confessio lavishly praises Richard, using encomium as the vehicle for advice, Gower holds up to Henry of

³ Ibid., 15.
Lancaster the duties of a good prince in relation to the need for secular reform. The two versions of Gower’s closing lines are even more different than they appear. In the first, Gower presents his book to his king, protesting his own simplicity and Richard’s worthiness; he then reaffirms his age and resolves to write of mundane love no longer. In the later ending, Gower promises that “whatever” king obeys God’s laws shall bring prosperity to his kingdom and earn a memorial for himself. . . . Despite his modest disclaimers, Gower achieves an English poem capturing the treasures of the past for his own place and time. While the poem can serve as a gift for princes, it can also become a storehouse of civic memory.4

As Staley reads the poem, “[t]he king’s individual reformation is one piece of what Gower outlines as a general process of reformation in which each person, by living according to the demands of his office, will share in recapturing a vanished peace.”5 She argues that Gower’s attention to the “office” of the king, as opposed to his “person,” locates him “within a relational hierarchy,” wherein as in Latini’s Trésor, educating citizens is just as, if not more important than educating the prince.6 Similarly, James Simpson discusses the debts that Middle English authors of the fourteenth and early-fifteenth centuries owe “to a powerful Aristotelian tradition that has a built-in scepticism about political theory”:

5 Ibid., 38.
6 Ibid., 34, 38.
The presuppositions of this tradition are as follows: that the ideal form of a given entity is an embodied form; that the political order is a natural and desirable phenomenon, produced, intelligible, and controlled by human powers; and that the political order is either self-sufficient or at the very least a desirable good in and for itself. This tradition fed into late medieval English vernacular poetry from the political writings of both French and Italian scholastic theologians and Italian republican intellectuals. It is represented in English vernacular works both before and after Hoccleve’s *Regement.*

Among the earlier works that Simpson discusses in some detail are Gower’s *Confessio* and the anonymous *Wynnerere and Wastoure.* The latter poem in particular, he argues, “brilliantly exposes the heterogenous interests of nobles, merchants, and the king in a wonderfully candid account of national economic policy.”

My goal in this chapter is to reconsider Wilks’s narrative of influences. I would like to explore the possibility that the idea of an absolute but nevertheless still limited monarch, as it emerges in English literature of the fourteenth century, may draw at least as much from a distinctly English debate regarding the legal and metaphorical relationship between the king and his subjects as it does from continental political theory. My argument will proceed primarily through an examination of two of the most significant and influential legal treatises written during the medieval period in England, Henry de Bracton’s *De Legibus et Consuetudinibus Angliae* and the anonymously-

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8 Ibid., 223.
authored, vernacular French treatise known as *Britton*. Both texts have been dated to the thirteenth century. Thus they are roughly contemporary with and perhaps even predate the influential work of Giles of Rome, Thomas Aquinas and Jacob de Cessolis. As texts that were apparently in relatively wide circulation in England by the beginning of the fourteenth century, they suggest the existence of English as well as continental origins for a Middle English literature of sovereignty. Taken together, they also tend to show that from an early period, English authors were concerned with the problem of whether and to what extent the king could serve as a model for the political subject more generally.

I do believe that Wilks’s distillation of the problem of sovereignty continues to provide a useful framework for classifying and distinguishing among the important schools of medieval political thought. Nevertheless, in thinking about how we might go about defining the literature of sovereignty in general, and an English literature of sovereignty more specifically, I think we can gain a key insight by understanding how medieval authors in all three categories treat the problem of governance--of communities, institutions or realms--as first and foremost a matter of self-governance. In addition, as I noted in the preceding chapter with regard to Habermas and his discussion of the evolution of the public sphere, we should be attuned to the ways in which even the most “royalist” discussions of kings and kingship are also simultaneously, and almost inevitably concerned with individual political agency as exercised (or not) by the population at large.

As I use the term throughout, the literature of sovereignty includes efforts in the mirror for princes or *Furstenspiegel* tradition that use the exemplum as the primary
vehicle of royal instruction as well as those, such as the pseudo-Aristotelian *Secretum Secretorum* and Giles of Rome’s *De Regimine Principum*, that rely more on exposition and “theory” drawn from Aristotelian and patristic sources to describe the virtues and vices associated with the exercise of temporal and, in some cases, spiritual dominion. It also comprises works, like the *Libellus de Moribus Hominum et Officiis Nobilium ac Popularium Super Ludo Scachorum*, commonly referred to as the *Chessbook*, of Jacobus de Cessolis and the *Trésor* of Brunetto Latini that address a broader audience on emerging ideas regarding collective political participation and show the influence of an Italian, pre-humanist concern with more republican political forms. ⁹ As a subset of English (meaning texts in Latin and French produced by English authors) and Middle English writing, the literature of sovereignty includes obvious candidates such as Wyclif’s *De Officio Regis*, John Gower’s *Miroir de L’homme* and *Confessio Amantis*, and the Wycliffite *Tractatus de Regibus*, in addition to works, such as Chaucer’s *Man of Law’s Tale*, that engage traditional mirror for princes subject matter but do not take the *Furstenspiegel* form. ¹⁰ Also, for reasons that I hope will become clear as this chapter and the dissertation itself continue, I think writing that addresses as a primary concern the role self-government plays in creating order and disorder within the polity must be read

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¹⁰ Traditionally the mirror for princes or *Furstenspiegel* addresses a royal audience or a prominent patron who is depicted as a “prince” among men. As noted earlier, the primary vehicle of instruction is often the exemplum, and thus formally, the narratives tend to take shape as an extended series of episodes organized thematically and drawn from the matter of Rome, saints’ lives and chronicle histories. Chaucer’s *Man of Laws Tale*, although it does not share the formal characteristics of a mirror for princes, retells the story of Custance, which Chaucer has drawn from Nicholas Trivet’s *Chronique* and Gower’s *Confessio Amantis*. Chaucer, by appropriating from its traditional source material and invoking Gower by name, signals the tale’s relationship to that genre, even as he rejects the majority of its narrative conventions.
as contributing to the genre. This final category includes works such as the *General Prologue* to the *Canterbury Tales* and Langland’s *Piers Plowman*.

The emphasis that Staley, Simpson and others place on the influence of thirteenth-century, continental political theory in Middle English political writing of the fourteenth and fifteenth centuries is not unwarranted. Middle English authors regularly and openly acknowledge source material drawn from works such as the *De Regimine*, the *Secretum Secretorum* and the *Chessbook*. Further, in reworking the “matter of Rome” transmitted via the various continental mirrors for princes and the *Gesta Romanorum*, authors such as Gower, Chaucer and Hoccleve are clearly and consciously situating their own work within or in relation to the *Furstenspiegel* tradition. Nonetheless, I think that to date we have failed to appreciate the extent to which the Middle English reception of continental political theory may have been influenced by an English discourse of sovereignty embodied in thirteenth-century juridical writing such as *De Legibus* and *Britton*. Not only were these works themselves apparently widely disseminated and read among the learned and literate members of both the clerical and secular bureaucracies throughout the late-medieval period in England, they document and perhaps even provided the model for a legal debate over the relative sovereignty of the king, the law and his subjects that shaped political events from the mid-thirteenth century onward. To an extent, I think Middle English authors may have recognized the utility of Aristotelian political theory, particularly in its more republican formulations, because the functional model of the polity that it provides was already familiar, and perhaps more recognizably “English” than that provided elsewhere. To the extent, however, that English conceptions of royal
and individual sovereignty were not antagonistic, but rather complementary, English authors may have been just as interested in the king as a model political subject.

I. **Henry de Bracton and “King-Centered” Law**

As discussed in the previous chapter, Ernst Kantorowicz identifies in Bracton’s *De Legibus et Consuetudinibus Angliae* a version of “law-centered” kingship in which “restriction and exaltation of the king seem evenly distributed . . . because they were interdependent; for his restriction alone produces also, and justifies, his exaltation: he is recognized as the ‘vicar of God’ only when and where he acts ‘God-like’ by *submitting* to the Law which is both his and God’s.” My intention here is to demonstrate how Bracton’s “law-centered” kingship creates a “king-centered” jurisprudence wherein the system of justice (“*ius*”), 11 which Bracton creates from both the laws (“*leges*”) and

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11 Henry de Bracton, *On the Laws and Customs of England*, ed. George Woodbine, trans. Samuel Thorne (Cambridge: Harvard University Press, 1968-77) (Hereinafter cited in the text and notes as “*De Legibus*.” Throughout, citations to the *De Legibus* have been provided in the text, while citations to Woodbine’s and Thorne’s introductory and prefatory materials can be found in the footnotes.) In the text, Bracton’s use of the same terms (*lex* and *leges*) to describe both “whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the res publica, the authority of the king or prince having first been added thereto” (II.19), and the entire body of English law, which also includes “usage” or “custom” that has not undergone this process of decision and authorization, tends to obscure the important conceptual distinction he maintains between the two. Given the difficulty of making this distinction in modern English, which gives us only “law” and “laws,” I think that we can forgive Bracton on this point. I have tried to clarify the conceptual distinction where it is important in my own discussion of Bracton’s text by using “law” or “laws,” “jurisprudence,” “system of justice,” and “law of the land” as well as Bracton’s own “laws and customs” when referring to the entire system, and “statutory law” or “common law” when referring specifically to those discrete branches of it. Bracton does on occasion use “*ius*” clearly to refer to the entire system of law and custom with which he treats, as in this passage:

> INTENTIO autem auctoris est tractare de huiusmodi et instruere et docere omnes qui edoceri desiderant, qualiter et quo ordine lites et placita decidantur secundum leges et consuetudines Anglicanas, et de huiusmodi habere tractatum, ut doceantur et corrigitur errantes, puniantur contumaces. Item communis intentio est de *iure* scribere ut rudes efficiantur subtiles, subtiles subtiliores, et homines mali efficiantur boni et boni meliores, tum metu pœnarum tum exhortatione præmiorum, iuxta illud, Oderunt peccare boni virtutis amore, Oderunt peccare mali formidine pœnæ. (II.20, emphasis mine)

The intention of the author is to treat of such matters and to instruct and teach all who desire to be taught what action lies and what writ, [and], according as the plea is real or personal, how and by
customs ("consuetudines") of the realm, becomes a mechanism through which sovereignty is transmitted to king and--here is the important point--subjects alike. What results is a model of the polity that creates itself in the process of creating and applying the laws and customs that govern it. It is a polity that comprises the entire jurisdiction of England, where unwritten law and custom prevail, as distinct from “almost all [other] lands [where] use is made of the leges and the ius scriptum” (II.19). It nonetheless acknowledges and accommodates local difference through the incorporation of the “consuetudines” by which those localities are governed and distinguished into the general law of the land. Finally, and perhaps most significantly, it is a polity in which the idea of self-governance plays a prominent role.

A. History and Authorship of De Legibus et Consuetudinibus Angliae

De Legibus et Consuetudinibus Angliae was composed during the first half of the thirteenth century, was most likely complete by 1256 and in circulation by 1277. Of the continental works mentioned above, only the Secretum Secretorum has an earlier composition date, with the Arabic original dating to the tenth century and the first Latin translation to circa 1150. The text as it has come down to us survives in at least forty-

what procedure, [by suing and proving, defending and excepting, replicating and the like,] suits and pleas are decided according to English laws and customs, and [the art] of preparing records and enrollments according to what is alleged and denied, and to treat of these so that those who err may be instructed and set right and those who obstinately do otherwise punished. The general intention is to treat of law that the unskilled may be made expert, the expert more expert, the bad good and the good better, as well by the fear of punishment as by the hope of reward, according to this [verse]:

Good men hate to err from love of virtue;
The wicked from fear of pain.

Here, Bracton makes it clear that the “ius” from which his treatise has been compiled and in which those who desire it are to be instructed comprises both “leges et consuetudines”.  
12 Latin: Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine.  
13 Thorne, De Legibus, I.x-xliv  
14 Giles of Rome’s De Regimine Principum dates to circa 1280. The Chessbook of Jacob de Cessolis to
six manuscripts, most of which George Woodbine, who produced the most authoritative modern edition of Bracton, dates to the first half of the fourteenth century.\textsuperscript{15} It has been attributed to Henry de Bracton (d. 1268) (or “Bratton” as he was most likely known to his contemporaries), an ecclesiastic who eventually became canon of Well’s Cathedral and a justice of the coram rege. At the outset, I must note the question of authorship presents some difficulty. Not only do many, though not all, scholars now dispute the long-standing attribution of the text to Bracton, a great deal of controversy has always existed regarding what material can and cannot be described as the work of the text’s original author. Because both of these issues are relevant to my own argument regarding Bracton’s status as a medieval \textit{auctor}, I want to take some space to address them here.

Samuel Thorne and Paul Brand both put forth persuasive evidence that the bulk of the text was originally composed by another author (or perhaps authors). Thorne argues that the text’s first author was William of Raleigh (along with one or more of his clerks) who was Bracton’s mentor and himself a former clerk of the renowned justice Martin Pattishall, and that Bracton, who had acquired the text sometime between 1234-45, merely revised and updated the treatise, occasionally interpolating or appending new material.\textsuperscript{16} The exemplars that survive suggest they were derived from an imperfect “original” created by a posthumous redactor from Bracton’s own copy of the work as it existed at his death, complete with Bracton’s marginalia updating and clarifying the main text. In discussing the problem of the \textit{addiciones}, which he defines as \textquotedblleft any passage,

\begin{footnotesize}
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\item Woodbine, \textit{De Legibus}, I.1-3.
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irrespective of its length, which the manuscripts prove was added to Bracton’s original draft of his work,” Woodbine asserts:

Nothing is more plainly shown by the manuscripts than that after writing out the first copy of his treatise Bracton kept adding thereto. The definition of an “original draft” must not be made too rigid. As has already been suggested, the assumption which will best explain the peculiarities of the different text traditions is that a first copy, plus its marginalia added by Bracton, was copied as a new text, and that in this second copy Bracton wrote other marginalia, both the first and second copies being used as exemplars for later manuscripts. But whether Bracton worked over one or more than one copy of his treatise would be immaterial as far as the addiciones are concerned, were it not for the fact that many of the owners or users of the manuscript descendants of the author’s own copy followed his example and kept working over the text to suit their own ideas, and to keep it up to date, making corrections and adding marginal passages. It is these later additions which have so complicated the problem as to make it almost too difficult to be solved. The discovery of additional passages is easy enough; the determination as to whether or not a particular addicio was written by Bracton is often impossible.\footnote{Woodbine, De Legibus, I.321.} \footnote{Ibid., I.321-22.}
For the most part, according to Woodbine, the *addiciones* share a set of common traits: “The typical *addicio* is a passage absent from some manuscripts, found at different places in others, marked as additional by others, and marginal in yet others.” Although he is careful to note that “[n]ot all the *addiciones* combine all of these features,” he goes on to affirm, “in general these are the characteristic marks of an *addicio* which are revealed by a comparison of the manuscripts.”

Thorne, who produced the most widely-used English translation of *De Legibus* from an edited version of Woodbine’s text, believes many of the *addiciones* can in fact be attributed to the original author or authors and describes the process of the book’s composition as the preparation of a “long, repetitious, and somewhat out of date book for publication,” that “needed the firm hand of an editor more than most.” According to Thorne, *De Legibus*’s firm-handed editor, “did not take everything it contained; indeed, more might well have been eliminated without loss. He deleted large-scale repetitive passages, eliminated the confusing marginal additions by incorporating most of them, and turned a tangled and untidy manuscript into one which, whatever its internal difficulties and contradictions, could be put in the hands of a copyist.” Regarding *addiciones* that exist as marginalia in some manuscripts but have been incorporated into the continuous body of the text in others, Thorne maintains:

> We would naturally expect additions to have been in the margin at first and taken into the text afterwards, that is, to be marginal in earlier manuscripts and in the texts of later. Since the text of OA is earlier and

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19 Ibid., I.322.
20 Thorne, *De Legibus*, III.xlv.
closer to the original than that of any other extant manuscript . . . and the
additions are in its margin, that would seem to be their first appearance.
Entered there at one time, in one or at most two hands . . ., they cannot, at
this stage in the life of the De Legibus be anything but portions of the
treatise omitted when the text proper was constructed. There then are
more additions at the start than there are later on . . ., an apparent absurdity
if they are afterthoughts. But they cannot be such if the manuscripts with
the most marginal additions are the earliest and those with the fewest the
latest, and if, as will appear, the subject matter of the additions is not
recent and newly added but old and present from the beginning.21

Because the *addiciones* were in fact part of Bracton’s text from the outset, as Thorne
concludes, “[i]t is not surprising, therefore, that the addiciones, passages omitted from the
treatise and then reintroduced, cannot be distinguished from the text in language form or
content.”22

Without attempting to settle the question of authorship, I think that we can
perhaps draw a few conclusions of our own based upon the work of both Woodbine and
Thorne. The first conclusion we might draw is the one I have already noted, that the
continuous text as we have it today is most likely not the text Henry de Bracton produced
during his lifetime. Nevertheless, to the extent the manuscript evidence confirms a
particular *addicio* circulated in at least a majority of the medieval witnesses, particularly
where it is incorporated into the main body of the text, we can infer that it was considered

21 Ibid., III.xliv.
22 Ibid.
“authoritative” by many medieval readers and copyists. Second, for those *addiciones* that seem more likely to have been contributed by the readers themselves, they provide evidence that *De Legibus* continued to be relevant as a manual of practice, which needed to be updated and clarified periodically to maintain its utility, until well into the fourteenth century. Spurious *addiciones* also open a window onto how medieval readers and annotators may have interpreted and applied the book’s content.23

In addition to the unique questions raised by the particular circumstances of its composition and transmission, *De Legibus* also presents the usual issues we confront whenever we are discussing medieval “authorship.” Careful study by a number of experts on Roman (civilian) law has revealed that in addition to Azo’s twelfth-century *Summa Codicis*, large sections of which are copied verbatim into *De Legibus*, the text’s author also appropriated a significant amount of material from the *Digest* as well as Justinian’s *Code*.24 Yet in spite of this heavy reliance upon civilian authorities, the composition of *De Legibus* is clearly motivated by the author’s desire to describe English law, using a vocabulary that he has synthesized from his Roman sources. In his preface,

23 A similar methodological perspective has been taken by scholars who have considered spurious work attributed to Chaucer, Lydgate and Rolle, among others. The *Canterbury Tales* as a case in point offers some guidance in the use we can make of non-authorial interventions when attempting to understand medieval readership and their interpretations of a particular text. For example, the question of whether or not Chaucer’s Plowman was a Wycliffite figure seems to have vexed his later medieval and early-modern readers as well as modern scholars. Some medieval interpolators seem to have intervened in an attempt to insulate Chaucer’s text from charges of heterodoxy, or perhaps to inject an additional layer of irony (see my discussion of Hoccleve’s “orthodoxy” in chapter five) by inserting Hoccleve’s “Miracle of the Virgin” as the Plowman’s tale. In contrast, an early-modern edition of the *Canterbury Tales* has the Plowman reciting an early fifteenth-century anti-fraternal piece that clearly reflects Wycliffite sympathies. See, e.g., John M. Bowers, “The Ploughman’s Tale: Introduction,” in *The Canterbury Tales: Fifteenth-Century Continuations and Additions* (Kalamazoo: Medieval Institute Publications, 1992), 23. In short, manuscript evidence is relevant on a number of issues, of which the question of original authorship is only one. Since I am less interested in the question of “who wrote what” than in determining “what circulated when and how widely,” the approach to the manuscript evidence I have adopted here strikes me as a sound one.

24 Thorne, *De Legibus*, Lxxxvi.
he acknowledges the differences that distinguish the common law from the civil code, and even claims that England is unique in its use of the former:

Though in almost all lands use is made of the *leges* and the *jus scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved. Nevertheless, it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law. England has as well many local customs, varying from place to place, for the English have many things by custom which they do not have by law, as in the various counties, cities, boroughs and vills, where it will always be necessary to learn what the custom of the place is and how those who allege it use it. (II.19)

Although *De Legibus*’s author drew upon Roman sources for the authority of his text, its documented utility to jurists and practitioners derived from his incorporation of legal matter taken from the huge collection of English court precedent to which he had somehow gained access. Further, as Thorne has noted, although its author used the

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25 Latin: *Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine. In ea quidem ex non scripto ius venit quod usus comprobavit. Sed non erit absurdum leges Anglicanas licet non scriptas leges appellare, cum legis vigorem habeat quidquid de consilio et consensu magnum et rei publicae communi sponsione, auctoritate regis sive principis precedente, iuste fuerit definitum et approbatum. Sunt etiam in Anglia consuetudines plures et diverse secundum diversitatem locorum. Habent enim Anglici plura ex consuetudine que non habent ex lege, sicut in diversis comitatibus, civitatibus, burgis et villis, ubi semper inquirendum erit que sit illius loci consuetudo et quater utantur consuetudine qui consuetudines allegant.*

form of the *Digest* as a model for *De Legibus*, his organization of the matter he borrowed from civilian legal authorities owes almost nothing to that work or any other:

There is, in fact, no discernible Institutional framework, nor anything to suggest that Bracton ever contemplated a *summa* in that form. That he knew the Institutes well and often borrowed from that work is clear, but his borrowings from it, as from Tancred, the Digest, and his other Roman and canon law authorities, serve the purposes of a treatise on English law, arranged in its own way. . . . It will be readily agreed that this is not the work of a man modeling his book on the scheme of the Institutes, but of one borrowing material from the Institutes to fit a scheme of his own.  

Thorne then goes on to note a number of places where the arrangement of Roman law material follows a clear pattern dictated by the English system of legal actions and the relationships and distinctions that medieval English jurists and practitioners made among them.

For the sake of convenience, I attribute authorship of the text to Bracton since that is the familiar attribution deployed by legal practitioners and scholars to this day, noting--when such details are significant for both readers of *De Legibus* and for my own argument--where quoted material may be a non-authorial *addicio* and/or where it can be traced back to one of the author’s sources.  

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28 The original attribution of the work to Bracton dates to the last-quarter of the thirteenth century. Paul Brand explains:

The ascription of the treatise to Henry of Bratton can be traced back to within a few years of his
wrote” is, I think, in keeping with medieval notions of authority and attribution that emphasize the role authors played as the “sources” as well as the “creators” of the material and ideas contained in the texts they composed and transmitted. It also acknowledges Bracton’s status as a model for both the medieval readers and annotators of *De Legibus*, and those later medieval writers who consciously and explicitly attempted to position their own juridical writing within a tradition that Bracton was seen as having established. After *De Legibus*, three more English legal treatises were produced during the last quarter of the thirteenth century. The most important of these was *Britton*. The two others are in Latin, one being the work commonly known as *Fleta* and the other a true “abridgment” of *De Legibus* by Gilbert de Thornton, who was Chief Justice of the King’s Bench from 1289-95. All of them derive, to one extent or another, from Bracton’s *De Legibus* and the two Latin treatises often reprint large sections of Bracton’s text verbatim, omitting the citations to civilian authorities that Bracton included in his own text. In a process much like the one that A. J. Minnis describes in his seminal study of medieval authorship, Bracton seems to have quickly supplanted the *auctores* upon whom he himself relies, becoming for his medieval readers an *auctor* in his own right.

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death. The first folio of one of the earliest surviving manuscripts of Bracton has an inscription recording that this is “beginning of the book of lord H. de Bratton” and early in 1278 Robert of Scarborough acknowledged having received a loan of “the book which lord Henry of Bratton composed,” evidently a copy of the treatise. When the book found its way into print in 1569, the unknown editor (T. N.) not only ascribed authorship of the treatise to Bratton, but also adopted a reading of one passage near the beginning of the treatise (found only in a minority of surviving manuscripts) in which the authorial “I” was extended to “I Henry of Bratton.” The same anonymous editor also transformed Bratton’s surname into “Bracton,” the name by which both justice and book have generally been known since.


Bracton thus provides us with an early example of the English literature of sovereignty as well as a primary “source” for later English efforts in that genre.

B. Law, King and Polity in Bracton

Bracton begins the *De Legibus* with a brief discussion of “the needs of a king”:

To rule well a king requires two things, arms and laws, that by them both times of war and of peace may rightly be ordered. For each stands in need of the other, that the achievement of arms be conserved [by the laws], the laws themselves preserved by the support of arms. If arms fail against hostile and unsubdued enemies, then will the realm be without defence; if laws fail, justice will be extirpated; nor will there be any man to render just judgment. (II.19)

In these first few lines, Bracton offers a model of the polity that will shape his discussion of sovereignty throughout the text. The realm of England is a geographic area that must be guarded against “hostile and unsubdued enemies,” but it is also a territory governed by a given set of laws and customs that Bracton goes on to define as unique among all other systems. On the one hand, law, like military force, is the king’s tool, to be used by him for preserving the peace of the realm. On the other hand, it is a necessary precursor for the existence of the realm and hence, the king in the first place. Where the realm without

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Latin: Quae sunt regae necessaria: In rege qui recte regit necessaria sunt duo hæc, arma videlicet et leges, quibus utrumque tempus bellorum et pacis recte possit gubernari. Utrumque enim istorum alterius indiget auxilio, quo tam res militaris possit esse in tuto, quam ipsæ leges armorum podio sint servatae. Si autem arma defecerint contra hostes rebelles et indomitos, sic erit regnum indefensum: si autem leges, sic exterminabitur iustitia, nec erit qui iustum faciat iudicium.

The substance of the text regarding the relationship between force and justice and their utility to the king, Bracton has drawn from Azo and Glanville. The particular formulation regarding the king’s relationship to the law, though, is Bracton’s own.
an army is simply left defenseless, a realm without law ceases to be, leaving no man to “render just judgment.” Further, as noted earlier, the law of the land comprehends and orders a jurisdiction, controlled by local custom, that is not necessarily dependent upon the king for its operation.

Through the law, the realm becomes governable, and sovereignty, the capacity for governance, is conferred by the law upon the king and also his subjects. Regarding the utility of his treatise, Bracton has this to say:

The utility [of this work] is that it ennobles apprentices and doubles their honours and profits and enables them to rule in the realm and sit in the royal chamber, on the very seat of the king, on the throne of God, so to speak, judging tribes and nations, plaintiffs and defendants, in lordly order, in the place of the king, as though in the place of Jesus Christ, since the king is God's vicar. For judgments are not made by man but by God, which is why the heart of a king who rules well is said to be in the hand of God. (II.20)³²

As Kantorowicz notes, a large portion of this passage is copied verbatim from Azo’s *Summa*. Bracton has, however, elaborated on the authority conferred by knowledge of the law by placing the apprentices ennobled through perusal of his work, not just in the royal chamber, but upon the “very seat of the king, on the throne of God, so to speak,” so that they not only “judge tribes and nations, plaintiffs and defendants, in lordly order,”

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³² Latin: *Utilitas autem est quia nobilitat addiscentes et honores conduplicat et profectus et facit eos principari in regno et sedere in aula regia et in sede ipsius regis quasi in throno dei, tribus et nationes, actores et reos, ordine dominabili iudicantes, vice regis quasi vice Ihesu Christi, cum rex sit vicarius dei. Iudicia enim non sunt hominis sed dei, et ideo cor regis bene regentis dicitur esse in manu dei.*
they do so “in the place of the king, as though in the place of Jesus Christ.” According to Bracton, men trained in the law exercise the same sort of vicarious sovereignty that the king does. Through the law, they come to govern themselves on behalf of, or just as the king who governs them. The relationship between the king and his subjects mirrors the relationship between God and the king, and the law is the means through which sovereignty is transmitted throughout the realm.

In a passage that combines language drawn from Azo and Justinian, and also shows parallels with William of Drogheda’s *Summa Aurea*, Bracton states: “The end of this work is to quiet disputes and avert wrongdoing, that peace and justice may be preserved in the realm. It must be set under ethics, moral science, as it were, since it treats of customary principles of behaviour.” (II.20) In synthesizing his knowledge of English and Roman law, Bracton has not simply recast the former into the mold of the latter, or vice versa. Rather, for Bracton, the law derives from many sources, parliamentary statutes, the decisions reached in civil and criminal actions, customs and morals. By linking “law” (*lex*) with justice (*ius*), precedent (*praecedent*), custom (*consuetudines*), and morals (*mores*) throughout the text, he allows the term to accrete a multiplicity of connotations that express its identity as something more than a collection of statutes or causes of action. Even in its most codified form, as “whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been

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34 Latin: *Item finis huius rei est ut sopiantur iurgia et vitia propulsentur, et ut in regno conservetur pax et iustitia. Ethicæ vero supponitur quasi morali scientiæ quia tractat de moribus.*
added thereto,” the law remains an expression of a shared and time-tested morality that connects lords and kings with the rest of the res publica of England.

Bracton’s development of the concept of lex within his treatise is inextricably bound up with his analysis of the problem with which Kantorowicz was centrally concerned, that is the nature of the king’s relationship to the law. Before turning to Kantorowicz, though, I want to take a moment to highlight one of the main features that distinguishes Bracton’s treatment of the polity from that offered in Giles’s De Regimine or even John of Salisbury’s twelfth-century Policraticus and marks one of his primary contributions to the English literature of sovereignty. Where the other works take up matters of law in the process of addressing the question of how eminent men should govern themselves,35 Bracton subsumes the discussion of self-governance within an exposition of the law that governs everyone. By doing so, Bracton deploys a form of exemplarity that seems to track very closely with the legal operation of precedent. The exemplarity of kings, clerics and other great men in the De Regimine and Policraticus stems in part from their distinctiveness, their elevation above or separation from the rank-and-file commons. De Regimine and Policraticus begin with a prince among men, and from there draw analogies that connect him with those of lesser status. Bracton, however, reconfigures the polity so that the example set by the king becomes laterally,36 as opposed

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35 Giles addresses the De Regimine to Prince Phillip, soon to become Phillip the Fair of France. John of Salisbury dedicates the Policraticus to Thomas Becket, king’s chancellor and future Archbishop of Canterbury.

36 In the context of discussing my own work with me, Vincent Gillespie was the first one to offer “lateral visibility” as a way of describing the operation of exempla within the Middle English discourse of self-governance. I later discovered that Jenny Adams in her book Power Play: The Literature and Politics of Chess in the Late Middle Ages, also describes “lateral visibility” and its significance in Jacob de Cessolis’s Chessbook (36-41). De Cessolis wrote at least ten years after Bracton and more than a century after one of Bracton’s primary auctores, Azo. Given the fact that Bracton’s influence appears to have spread quickly and widely, I think that the idea of lateral visibility may already have been an established feature of the English literature of sovereignty by the time the Chessbook began to circulate.
to hierarchically, visible as an operation of law, as opposed to station or office. He starts out with bondsmen (II.31), freedmen (II.31), children (II.31), men (II.31), women (II.31) and hermaphrodites (II.32), and only after treating with these fundamental categories does he turn to a discussion of the offices, or estates of men. The king is indeed a special case, but his utility as an exemplum stems from how he is nevertheless still like the least of those who are subject to him.

Traditional mirrors for princes address specific, royal or prominent persons in order to explore the problems of government associated with the estate or office that person held. Bracton, however, uses the office to get at a different way of thinking about the “person” who occupies it as yet another legal or political abstraction. The “public law” “which pertains to the common welfare of the Roman *res publica* and deals with religion, priests and public officers” concerns the manner in which offices and officers, including those of the church, are created for the public benefit. The “private law,” which “pertains primarily to the welfare of individuals and secondarily to the *res publica*” widely in England.

37 With regard to the hermaphrodite, Bracton notes only that, “A hermaphrodite is classed with male or female according to the predominance of the sexual organs ("HERMAPHRODITUS comparatur masculo tantum vel feminæ tantum secundum prævalescentiam sexus incalescentis") (II.32). Thus even within the classes “male” and “female,” some variability and instability may exist.

38 Est autem ius publicum quod ad statum rei Romanæ pertinet, et consistit in sacram, in sacerdotibus et in magistratibus. Interest enim rei publicœ ut habeat ecclesias in quibus homines petant veniam suorum peccatorum. Expedit enim esse sacerdotes, a quibus de peccatis nostris penitentiam accipiamus, et qui orent pro nobis et dei nobis adiutorium adquirant et providentiam. Expedit etiam magistratus rei publicœ constitui, quia per eos qui iuri dicendo præsunt effectus rei accipitur. Parum est enim ius in civitate esse nisi sint qui possint iura regere.

There is public law, which pertains to the common welfare of the Roman res publica and deals with religion, priests and public officers. For it is in the interest of the res publica that it have churches in which men may seek pardon for their sins. There must also be priests, from whom we may receive penance for our sins, who may pray on our behalf and obtain for us the aid of God and His providence. The public interest also requires that there be magistrates appointed in the state, for through such persons, men pre-eminent in the doing of justice, the law is given effect. For it is of little value that law exists in the state if there are none to administer it. (II.25-26)
(II.26), governs personal causes of action. Although he distinguishes between them, Bracton also highlights how both branches require a delicate balancing act between personal and social good: “Hence we say that it is in the public interest that no one misuse his own. And so conversely, that which is primarily public looks secondarily to the welfare of individuals.” (II.26) The Bractonian polity comprises essentially private individuals who become public actors through the operation of the law--both “public” and “private”--governing the realm. When Bracton turns to the king and the problem of sovereignty that he presents, he does so in the context of discussing the general category of “persons” and the many ways in which the “whole of the law,” which has been variously defined as “natural law,” (II.25) the ius gentium, (II.27) the civil law (II.27) and “English laws and customs,” treats with “persons” as opposed to “things” and “actions” (II.29). The categories of persons that he enumerates, rather than compartmentalizing men according to function, instead represent how one “person” or individual can occupy multiple, potentially overlapping stations defined by factors such as age, sex, marital status, etc., in addition to office as he or she progresses through life and becomes integrated into the fabric of society.

Now we turn to what is perhaps the most widely-quoted passage of De Legibus and Kantorowicz’s exposition of it:

The king has no equal within his realm, [Subjects cannot be the equals of the ruler, because he would thereby lose his rule, since equal can have no authority over equal.] nor a fortiori a superior, because he would then be subject to those subjected to him. The king must not be under man but
under God and under the law, because law makes the king, [Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.] for there is no rex where will rules rather than lex. Since he is the vicar of God, [And that he ought to be under the law appears clearly in the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption of the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. For He did not wish to use force but judgment. And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord, who by an extraordinary privilege was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established laws. Let the king, therefore, do the same, lest his power remain unbridled.] There ought to be no one in his kingdom who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff. If it is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend his act; if he does not, it is punishment enough for him that he await God's vengeance. No one may presume to question his acts, much less contravene them. (II.33)³⁹

³⁹ Latin: Parem autem non habet rex in regno suo, quia sic amitteret praeceptum, cum par in parem non habeat imperium. Item nec multo fortius superiorem, neque potentiorum habere debet, quia sic esset inferior sibi subjectis, et inferiores pares esse non possunt potentiioribus. Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei,
In this passage, Bracton gives his fullest description of what Kantorowicz has described as “law-centered” kingship. According to Kantorowicz, for Bracton, “[t]he king, though peerless as God’s vicar, is yet bound by the Law, and he shall be like the least of his subjects before the judge--of course, only when being plaintiff, since it belonged to his prerogative that there lies no action against the king”:

Bracton’s method is always the same: exaltation through limitation, the limitation itself following from the king’s exaltation, from his vicariate of God, which the king would jeopardize were he not limited and bound by Law. This method may be called dialectical. It relies upon the logic that there cannot be a genuine “Prerogative” on the one hand without submission to the Law on the other, and that a legal status above the Law could only exist if there existed also a legal status under the Law. The Law-abiding king, therefore, becomes ipso facto a “Vicar of God”; he becomes a legislator (auctor iuris) above the Law and according to the Law; and he becomes the responsible expounder of the existing laws and of royal actions which may not be disputed by either officials or private
persons. For were the king not Law-abiding, he were not a king at all but a tyrant.\textsuperscript{40}

Regarding the text of the key passage from Bracton, Thorne believes that the italicized, bracketed material originated as interlinear and supplementary additions by Bracton or perhaps a later annotator, which were later drawn into the main body of the text. Woodbine, however, based on his own assessment of the manuscript evidence, considered it to be part of the original text. Regardless of how the passage as we now have it came into being, collation of the manuscript witnesses by both Woodbine and Thorne confirms that this is its substance as it most likely circulated in most of the medieval copies of \textit{De Legibus}. Further, the text that both Woodbine and Thorne consider authorial is sufficient, I believe, to support the key point Kantorowicz makes. That is, namely, that in the Bractonian polity, the king is a creature of the law who, in abiding by its mandates even though he is beyond the reach of its jurisdiction, invests the law and hence his own office with the legitimacy both require in order to be instruments of just governance.

Kantorowicz and his thesis have not escaped the critique of legal historians expert in both medieval and Roman law. For the most part, Kantorowicz’s critics have faulted him for giving Bracton too much credit, for thinking that Bracton could have understood and grappled with the potential contradictions inherent in his conception of the king’s relationship to the law. For example, Ewart Lewis argues the dialectic that Kantorowicz reads in \textit{De Legibus} is actually just a “gap in [Bracton’s] conception of the law itself,” a gap “that accounts for his ability to explain so very easily that the \textit{auctor iuris}, in spite of \textit{q.[uod]} \textit{p.[rincipi]} \textit{p.[lacuit]}, can do nothing except in accordance with \textit{ius}”:

\textsuperscript{40} Kantorowicz, \textit{The King’s Two Bodies}, 157.
I have argued that the key to Bracton’s conception of kingship is the
formula he himself used, “non sub homine, sed sub deo et sub lege,” and
that nowhere, unless in one ambiguous passage, did he even suggest that a
king might also be above the law. His insistence that law was the limit
and criterion of royal power was not novel, but it was re-enforced, I think,
by his professional reverence for the law, in its most concrete forms, as the
standard by which all rights are measured and apart from which justice
and judgment are meaningless: “si defecerint leges, sic exterminabitur
iustitia, nec erit qui iustum faciat iudicium.” Thus, he gathered arguments
to emphasize that the function of a king, as the earthly representative of
God’s justice, required his conformity with law. At the same time, he
sharply stated other inferences, also not wholly novel, from the king’s
role: he must be superior to his subjects; powers related to justice and
peace were in principle inseparable from the crown; the king’s conformity
with law could be attained only through his self-restraint. The logic of
these inferences was, of course, the logic of any concept of sovereignty;
but the sovereignty recognized by Bracton was essentially judicial and
executive; he did not set the king above the law.41

Because Bracton viewed the king as an “executor” or “mouthpiece” of the law, Lewis
argues, he could “describe the leges Anglicanae in terms of requisite procedures,” but
lacked the “sophistication” to consider “these in terms of power.” According to Lewis,
Bracton did not acknowledge the existence of a “will above the law,” such that “the

placet that authorizes the law tends to connote a ‘pleasure’ that determines what the law shall be.”

In spite of Lewis’s careful and well-documented textual analysis of both Bracton and his sources, I find his argument puzzling for two reasons. First, it tends to overlook how, throughout Bracton’s treatise, the law is what turns the individual, or private, will into an instrument of the public good by taking the place of purely personal preference in all judgments: “And though one is fit to judge and to be made a judge, let each one take care for himself lest, by judging perversely and against the laws, because of prayer or price, for the advantage of a temporary and insignificant gain, he dare to bring upon himself sorrow and lamentation everlasting” (II.21). In confronting the king’s role as both an author as well as an administrator of justice, Bracton confronts one formulation of a problem that he will return to again and again throughout his discussion of what constitutes lex and ius. The king, as the first among his judges, becomes an example for those who would sit “on the very seat of the king,” judging their fellow Englishmen. Thus Bracton’s discussion of how the king’s will should be bound by the law in fact reformulates and restates the proposition with which he begins, that those who presume to judge must follow the law, not their own personal pleasure. Clearly Bracton understood the potential contradiction between the statements, “What pleases the prince has the power of law,” and “There is no king where will rules rather than law.” In the case of the king, Bracton avoids the potential conflict between personal desire and the

42 Ibid., 269.
43 For a more detailed discussion of how this “problem of sovereignty” informs the structure of De Legibus as a whole, see my discussion in chapter four, pp. 167-76, infra.
44 “Quod principi placet legis habet vigorem.” (II.305)
45 “Non est enim rex ubi dominatur voluntas et non lex.” (II.33)
demands of justice as he has elsewhere, by subordinating the individual will to the
demands of the public good as embodied in the law of the realm. Kantorowicz’s key
insight regarding Bracton is not that Bracton places the king above the law, but rather that
Bracton offers a definition of kingship that is not just “law-centered” but “law-bound.”
In submitting to the law of the realm and acknowledging its ultimate sovereignty, the
king strengthens that law as the instrumentality that authorizes his own office, and
incidentally every other office, right and prohibition that it has created.

This brings me to the second problem that I see with Lewis’s analysis. In his
discussion of Bracton, Lewis treats Bracton’s theory of sovereignty as if it were a
universally accepted idea that simply reflects relatively stable English attitudes regarding
the king and the scope of royal prerogative in the late-thirteenth century. He does not
consider how the formulation of sovereignty that we find in *De Legibus* enabled new
metaphorical and theoretical relations between the king and his subjects within the
English polity as Bracton imagines it. Nor does Lewis acknowledge its practical
consequences for those involved in and affected by the political struggles between the
king and the baronage that influenced English politics throughout the late-medieval
period.

C. Bracton and the Late-Medieval Politics of Sovereignty

A brief study of the history of the English coronation oath quickly reveals that,
rather than simply restating received truisms regarding medieval kings and kingship,
Bracton develops a legal theory of sovereignty that acknowledges and attempts to resolve
an ongoing debate regarding the duty of the English king to maintain and observe English
law. As part of his long discussion of “jurisdiction,” that elusive concept whereby judgments acquire their validity and which necessarily includes the power of coercion so that judgments may be executed, Bracton states that the king “in matters pertaining to the realm . . . ought to act as judge . . . for to that he is held bound by virtue of his oath” (II.304).  

Bracton then goes on to offer an accurate summary of that oath as it was set forth in the coronation office prior to 1308. As H. G. Richardson persuasively argues in a seminal article, the exact wording of the oath probably varied from the Latin text given in the coronation office, since the oath was delivered in the vernacular, first in French and later in English, starting at least as early as the twelfth-century. In substance, though, during Bracton’s time it consisted of three promises:

In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace. (II.304)

Through an examination of documentary evidence, Richardson also demonstrates that Henry III and Edward I most likely gave a fourth promise, required by canon law

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46 Note how Bracton establishes and relies upon a metaphorical economy wherein a king can be exchanged for a judge and vice versa. “Judge” becomes a metonymy for the duties of the king, and “king” becomes a kind of metonymy for the power and authority exercised by the judge.

regarding the king’s feudal subjection to the pope and not preserved in the text of the office, to maintain or preserve the rights and prerogatives of the crown. As Richardson notes, Bracton’s knowledge of the oath was probably limited to what he could glean from available books, so he does not include this fourth promise in his consideration of the coronation oath.

Regarding that fourth promise, Richardson maintains that both Henry III and Edward I relied on it to argue they should be released from obligations or limitations placed on the crown by Magna Carta and other legislation favoring the magnates. Edward I eventually “made use of this oath to secure papal sanction [from Clement V] to the annulment of his [1301] confirmation of the charters,” in 1305. In essence, Edward I argued that his promise to conserve the rights of the crown on behalf of the church negated the recent concessions he made to the baronage pursuant to Magna Carta and the Charter of the Forest. Consequently, “[c]onfronted with this situation, the baronage required from Edward’s son a new promise binding him to observe the charters.”

Prior to Edward II’s coronation in 1308, most likely in late 1307 during the Michaelmas parliament, the oath was revised, resulting in what we now know of as the “fourth recension”:

Archbishop:

Sire will you grant and observe and by your oath confirm to the people of England the laws and customs granted to them by the ancient kings of

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49 Ibid., 44-45. If Thorne and Brand are correct, and Raleigh actually authored De Legibus, the omission of the fourth promise may have been deliberate, since Raleigh certainly would have been of an age to remember Henry III’s coronation.
50 Ibid., 74.
England your predecessors just and devoted to God and especially the laws and customs and franchises granted to the clergy and to the people by the glorious king Saint Edward your predecessor?

King:
I grant them and promise them

Archbishop:
Sire will you keep toward God and holy church and clergy and people entire peace and concord in God according to your power?

King:
I will keep them

Archbishop:
Sire will you cause to be made in all your judgments equal and right justice and judgment in mercy and truth according to your power?

King:
I will do it

Archbishop:
Sire do you grant that the just laws and customs will be observed which the commonalty of your realm have chosen and do you promise to protect and enforce them to the honour of God according to your power?

King:
I grant and promise it\textsuperscript{51}

Although he may not have known in their entirety the promises given by his own king, Henry III, at his coronation, Bracton predicted with a great deal of accuracy the formula of sovereignty embodied in the oath taken by Edward II and all subsequent English monarchs until the reformation.

In expanding and clarifying the scope of the king’s duties as keeper of the peace and merciful judge, the fourth recension establishes the laws and customs of the realm as both the source and limit of royal authority. Richardson describes the revisions that resulted in the fourth recension in this way:

The first and third *precepta* were redrafted and became the second and third promises of the new oath. The second *preceptum* became superfluous in view of two new promises, the first and the fourth. While the first promise required from the king the observance of the whole body of law granted by ‘ancient’ kings, it especially singled out the laws of St Edward. This was a reference to a particular edition of the laws attributed to the Confessor, which embodied a tract on the duties of the king. A separate promise to maintain the rights of the Crown was consequently unnecessary. It is to be noted that this tract also requires the king to rule by the counsel of his magnates. The fourth promise is directed to securing the king’s observance of the charters (as Edward II’s advisers themselves recognized) and any similar “rightful laws and customs that the commonalty of the realm shall have chosen.” While this clause is both retrospective and prospective, it is imprecise in that it does not define any
particular legislative process by which the will of the commonalty\textsuperscript{52} is to be ascertained, but it does protect them from the arbitrary recision of rightful laws to which they have assented and inferentially from arbitrary law-making against their will.\textsuperscript{53}

The king’s abstract promise from the third recension, to “forbid rapacity to his subjects of all degrees,” becomes in the fourth recension two specific undertakings. First, to observe the laws established by his predecessors, particularly those of Edward the Confessor, and second, to observe those laws that are established during his own reign. Richardson finds it “worth while” to note “that the theory of kingship embodied in the Laws [of Edward the Confessor, the work incorporated by reference in the text of the oath,] is transmitted substantially unaltered by Bracton and \textit{Fleta}. The king is God’s vicar, but he must rule by the counsel of his magnates.”\textsuperscript{54}

Returning once more to Bracton, he has the following to say on the subject of “for what purpose a king is created”:

\begin{quote}
To this end is a king made and chosen, that he do justice to all men \textit{[that the Lord may dwell in him, and he by His judgments may separate]} and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish \textit{jus} from \textit{injuria}, equity from iniquity, that all his subjects may live uprightly,
\end{quote}

\textsuperscript{52} Note from AWC: Take a look at Emily Steiner’s essay in \textit{New Medieval Literatures}.  
\textsuperscript{53} Richardson, “The English Coronation Oath,” 75.  
\textsuperscript{54} Ibid., 63.
none injure another, and by a just award each be restored to that which is his own. He must surpass in power all those subjected to him, *[He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be said of him, ‘Great is our lord and great is his virtue etc.,’ though in suing for justice he ought not to rank above the lowliest in his kingdom.]* nevertheless, since the heart of a king ought to be in the hand of God, let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure,* *[despite the statement that the will of the prince has the force of law, because there follows at the end of the lex the words ‘since by the lex regia, which was made with respect to his sovereignty’; nor is that anything rashly put forward of his own will, but what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it auctoritas.]* His power is that of *jus,* not *injuria* *[and since it is he from whom jus proceeds, from the source whence jus takes its origin no instance of injuria ought to arise, and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself.]* as vicar and minister of God on earth, for that power only is from God, *[the power of injuria however, is from the devil, not from God, and the king will be the minister of him whose work he performs.]* whose work he
performs. Therefore as long as he does justice he is the vicar of the Eternal King, but the devil's minister when he deviates into injustice, For he is called rex not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. (II.305)

According to Bracton, in the exercise of his office, the king is the servant of justice. He puts on the “bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice.” Such restraints include “what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon,” as well as the principle “what one is bound by virtue of his office to forbid to others, he ought not to do himself.” The maxim that “the heart of a king ought to be in the hand of God” links this passage to the one from the preface, quoted above, where Bracton addresses his

55 Latin: Ad hoc autem creatus est rex et electus, ut iustitiam faciat universis, et ut in eo dominus sedeat, et per ipsum sua iudicia discernat, et quod iuste judicaverit sustineat et defendat, quia si non esset qui iustitiam faceret pax de facili posset exterminari, et supervacuam esset leges condere et iustitiam facere nisi esset qui leges tuetur. Separare autem debet rex cum sit dei vicarius in terra ius ab iniuria, æquam ab iniquo, ut omnes sibi subjecti honeste vivant et quod nullus alium laedat, et quod unicumique quod suum fuerit recta contributione reddatur. Potentia vero omnes sibi subditos debet praeccellere. Parem autem habere non debet nec multo fortius superiorem maxime in iustitia exhibenda, ut dicatur vere de eo, magnus dominus noster, et magna virtus eius etcetera. Licet in iustitia recipienda minimo de regno suo comparetur, et licet omnes potentia praeccellat, tamen cum cor regis in manu dei esse debeat, ne sit effrenata frenalum apportionis et lora moderantia, ne cum effrenata sit trahatur ad iniuriam. Nihil enim aliud potest rex in terris, cum sit dei minister et vicarius, nisi id solum quod de iure potest, nec obstat quod dicitur quod principi placet legis habet vigorem, quia sequitur in fine legis cum lege regia quod de imperio eius lata est, id est non quidquid de voluntate regis temere praeceptum est, sed quod magnatum suorum consilio, rege auctoritatem praestante et habita super hoc deliberatione et tractatu, recte fuerit definitum. Potestas itaque sua iuris est et non iniuriae, et cum ipse sit auctor iuris non debet inde iniuriarum nasci occasio unde iura nascuntur, et etiam qui ex officio suo alios prohibere necesse habet, id ipsum in propria persona committere non debet. Exercere igitur debet rex potestatem iuris sic ut dei vicarius et minister in terra, quia illa potestas solius dei est, potestas autem iniuriae diaboli et non dei, et cuius horum opera fecerit rex eius minister erit cuius opera fecerit. Igitur dum facit iustitiam vicarius est regis aeterni, minister autem diaboli dum declinet ad iniuriam. Dicitur enim rex a bene regendo et non a regnando, quia rex est dum bene regit, tyrannus dum populum sibi creditum violenta opprimit dominatione.

56 Although Thorne marks these passages as addiciones, Woodbine considers them authorial. Even if they are non-authorial, they suggest how Bracton’s own text was interpreted in light of the events discussed above and infra.
treatise to all men who would presume to judge their fellows. Throughout the paragraph, Bracton draws upon English sources, such as Glanvill’s *Tractatus De Legibus et Consuetudinibus Regni Angliae*, John of Salisbury’s *Policraticus*, in addition to the Bible and civilian authorities such as the *Institutes*. Bracton synthesizes, rather than simply compiles and parrots, the ideas that he has drawn from these diverse sources to produce a concept of royal sovereignty that addresses specific issues that troubled the English polity at the time he was writing and for a long time after. If Bracton’s idea of kingship had a predecessor in the *Laws* of Edward the Confessor, it nevertheless came to be firmly associated with his treatise in the minds of his medieval readers by the late thirteenth-century.

What Bracton offers in the *De Legibus* is an idea of “law-centered” kingship in which the monarch’s sovereignty is constrained by the law of the land. He imagines a polity in which men are governed, not by will, but by a system of justice flowing from and intended to sustain a shared set of moral precepts. Through the law of the realm, governance becomes a tightly-regulated form of self-governance, since those who participate in the making and administration of law, including those who simply try to live in accordance with it, exercise a sort of vicarious sovereignty delegated through it from the king. With the idea of “law-centered” kingship, Bracton establishes a lateral, as opposed to hierarchical, metaphorical relationship between the king and his subjects under the law, and to the extent the law works to limit the monarch’s sovereignty, Bracton opens up a space for the exercise of political agency in the form of restraint through counsel, and in the role the *res publica* plays in creating *ius*. If Bracton is less than clear
about the procedures through which that agency is actually exercised, his equivocation in such matters leaves room for two possible scenarios. In the first, the king must get the approval of his counsel and “the people” before taking action on his own initiative. In the second, the king provides his seal of approval, as it were, to legal action initiated from below.57

This theory of sovereignty was not only, as Richardson so persuasively demonstrates, incorporated into the English coronation oath at the beginning of the fourteenth century. It provided the foundation for the Ordinances of 1311, which put the Ordainers in charge of Edward II’s household and attempted the banishment of his favorite, Piers Gaveston.58 It was also deployed to justify Edward’s “abdication” of the throne in 1327.59 In spite of its utility as an instrument of political action,60 it was not, however, universally accepted and acknowledged. In an attempt to reassert the king’s authority to prevent encroachment on the royal prerogative, Edward II retaliated against the baronage in 1322 with the Statute of York, which repealed the Ordinances and

58 Statutes of the Realm, I.157-167. The Ordinances reaffirmed Magna Carta and the Charter of the Forest and required Edward II to obtain the approval of the baronage before making official appointments, leaving the realm, going to war and raising revenues through customs and prises. They also instituted annual parliament, repealed unpopular customs levies already in effect and required all future revenues to be paid to the exchequer, rather than to the king’s household.
59 Bertie Wilkinson, “Articles of Accusation against Edward II,” in The Constitutional History of England, 1216-1399 (London: Longmans, 1948-58), II.170. The “Articles” accuse Edward of, inter alia, being unwilling “to listen to good counsel, or to adopt it, or to give himself to the good government of his realm; but he has always given himself up to unseemly works and occupation, neglecting to satisfy the needs of his realm.”
60 My discussion of how the medieval “theory” of sovereignty influenced thirteenth and fourteenth-century politics draws upon the work of John Watts, Henry VI and the Politics of Kingship (Cambridge: Cambridge University Press, 1996), and Paul Strohm, Politique: Languages of Statecraft Between Chaucer and Shakespeare (Notre Dame: University of Notre Dame Press, 2005). Watts and Strohm have suggested a return to the study of the institutions and ideas, as well as the people and places, of the Middle Ages. Both argue that medieval political discourse may in fact have offered a consistent framework for thinking through and rationalizing political behavior, even if that framework did not operate as a prescription or prospectus for action that might be predicted in advance.
purported to void any and all lawmaking—past, present and future—that tended to diminish the “Estate of the Crown.” These two concepts of royal power, one “law-bound” and the other absolute, would compete with one another throughout the fourteenth century, and perhaps well into the fifteenth. That ongoing competition, and its ultimate outcome in favor of the Bractonian model, would have significant consequences for the evolution of the Middle English literature of sovereignty.

II. Britton and the King’s Law

Although I am ultimately interested in points of correspondence between the model of the polity as represented in Britton and that which takes shape in De Legibus, I nevertheless think it useful to begin by highlighting how significantly Britton’s author deviates from the Bractonian concepts of law and kingship. Where Bracton’s king is created by the law, in Britton the law is entirely the king’s creature. The book begins with a Prologue that purports to issue from Edward I himself, and the entire text is spoken in the royal first-person plural. Bracton imagines a law that comprises “the ancient judgments of just men,” (“vetera iudicii iustorum”) (II.19) “the judgments and the cases that daily arise and come to pass in the realm of England,” (“facta et casus qui quotidie emergunt et inveniunt in regno Angliæ”) and “customary principles of behavior” (“mores”) (II.20). Britton’s author, in contrast, defines the law as what the king has “commanded” or “ordained.” Further, the law of Britton does not include the consuetudines that form an essential part of Bracton’s idea of lex:

Desiring peace among the people who by God’s permission are under our protection, which peace cannot well be without law, we have caused such

61 Statutes of the Realm, I.189.
laws as have heretofore been used in our realm to be reduced to writing according to that which is here ordained. And we will command, that throughout England and Ireland they be so used and observed in all points, saving to us the power of repealing, extending, restricting and amending them, whenever we shall see good, by the assent of our earls and barons and others of our Council; saving also to all persons such customs as by prescription of time have been differently used, so far as such customs are not contrary to law.\textsuperscript{62}

While \textit{Britton} does acknowledge the existence of law before the king, in the king’s voice, \textit{Britton’s} author reclaims and reauthorizes that law for the king alone, “saving to [the king] the power of repealing, extending, restricting and amending [it], whenever [he] shall see good.” Similarly, the text’s author recognizes how “earls and barons and others” of the king’s council participate through their assent in lawmaking, while still making clear that the legislative process begins at the king’s initiative. Unlike the Bractonian polity that to an extent governs itself, including the creation of its own king, through the operation of a law that arises organically from multiple sources, the legal polity of \textit{Britton} is governed by a law created for the realm by the king. In \textit{De Legibus}, the king is

\textsuperscript{62} F.M. Nichols, trans., \textit{Britton}, 1-2:

Desirauntz pes entre le poeple qe est en nostre proteccioun par la suffrance de Deu, la quele pes ne poet mie ben estre sauntz ley, si avoms les ley qe hom ad usé en noster reaume avaunt ces hores fet mettre en escrit solum ceo qe cy est ordeyné. Et volums et comaundums qe par tut Engleterre et tut Hyrelaunde soint issi userz et tenuz en touz poyntz, sauve a nous de repeler les et de enoyter et de amenuser et de amender a totes les foiz qe nous verums qe bon serra, par le assent de nos Countes et Barouns et autres de noster conseyl, sauve les usages a ceux qe par prescripcioun de tens ount autrement use en taunt qe lour usages ne soynt mie descordauntz a dreiture.
a member of the polity under the law. In Britton, the king creates the polity by speaking
the law through which he governs it.

**A. Britton, Authorship and History**

*Britton* was most likely completed sometime during the twentieth year of Edward
I’s reign, circa 1291-1292. It is written in the French of late-thirteenth century
England. Previous scholars assigned a somewhat earlier date to the text’s composition,
circa 1275, based upon attribution of *Britton* to John le Britton or le Breton, Bishop of
Hereford, in a few manuscripts of another text, the *History of Matthew of Westminster*;
by
the same author. F. M. Nichols, who produced what continues to be the only authoritative
modern edition and translation of *Britton*, has fairly clearly demonstrated that John le
Breton could not have authored the text. He bases his conclusion on the copious and
well-integrated references in the work to statutes that were not enacted until many years
after the bishop’s death as well as the fact that, if it were indeed le Breton’s work, it
would have to have been composed within the few months that separated Edward I’s
coronation and le Breton’s passing. Even if le Breton did author an early version of the
treatise, it was substantially reworked and amended to incorporate later events and to
produce the text as we now have it. Although he does not offer another likely candidate
in le Breton’s place, Nichols suggests “if there were any materials to aid the search, that
the author of *Britton* would be found among the clerks employed in the legal service of
the Crown; and there are one or two passages which confirm . . . that the author was an
ecclesiastic.”

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63 Ibid., xviii.
64 Ibid., xviii.
65 Ibid., xx-xxi.
66 Ibid., xxii.
As I noted earlier, *Britton* is one of three late-thirteenth-century works that update and condense the matter of Bracton’s treatise. In addition to being the only vernacular law treatise to be produced during the period, Nichols notes that *Britton* also “appears to have been the only one which came into general use, the two others having scarcely survived in single manuscripts to modern times.”

It is also the only medieval English legal treatise that purports to issue directly from the will and mouth of the king. Nichols’s catalogue of all of the manuscript copies of *Britton* held by public libraries includes twenty-two that contain the complete text, and another five that contain excerpts. These manuscripts do produce some variant readings, which Nichols identifies in his edition of the text. *Britton* does not, however, present the problems arising from extensive interpolation that are associated with *De Legibus*. The manuscript witnesses cover the period following the text’s composition through the late-fourteenth century. *Britton* is often bound with fourteenth-century legal matter, for example statutes or other commentaries on the law, and marginalia added by copyists and owners confirm its value to practitioners throughout the late-medieval period. Like the *De Legibus*, the first print edition of *Britton* appeared in the sixteenth-century, and as we will see in chapter six, citations to *Britton* appear in some of the first examples of early-modern juridical writing.

I have provided this summary of *Britton*’s history in order to draw out some additional points of comparison with *De Legibus*, and in an effort to establish the status

67 Ibid., xxv.
68 Ibid., xvii.
69 Nichols surmises that the public holdings to which he had access represent only a part of the surviving manuscripts, but he does not estimate how many more witnesses might be held in private collections.
of Bracton’s text as the leading medieval authority on English law. Britton’s author assumes the persona and in all likelihood received the imprimatur of the king. Yet this posture has not been sufficient to prevent Britton’s readers, both medieval and modern, from searching for the book’s “real” author. Bracton’s treatise, though, presents the greater difficulty in terms of determining what parts of the text were or were not the work of its original author, but only because Bracton himself seems to loom so large in the history of English jurisprudence. The marginalia appended to Britton by near contemporaries of the author, many of whom must have been the king’s own justices, tended to remain firmly in the margins rather than being subsumed within the rubric of the “king’s” law. In contrast, Bracton’s text, almost like the body of English law that he describes, accreted to itself and to Bracton’s authority the work of later jurists and practitioners.

In thinking about the relationship between Britton and De Legibus and the influence of Bracton’s work upon later authors and practitioners, the peculiarity of Britton’s title proves noteworthy:

We owe to the ingenuity of Selden a conjecture respecting the origin of the name of Britton, which, if adopted, dispenses us from seeking for an author bearing the same name as the book. After observing that the surname of Henry de Bracton, the reputed author of the treatise known by his name, was sometimes written Britton, Briton, and Breton, he states his opinion, that the compendium of law called Britton (which he elsewhere

71 For example, Nichols makes a persuasive argument that the annotator of MS Cambridge Dd. vii. 6, which he identifies as N, was one John de Longueville of Northampton, who was either a Justice of the Bench or a Judge of Assise during the late-thirteenth and early-fourteenth centuries (Ixii-Ixiv).
describes as the royal abridgement of Bracton increased by the addition of some subsequent statutes), “took its name from the author out of whose work, in the king’s name and by the king’s command, it was composed.”

Although Britton does draw upon Bracton, Nichols’s examination of the text reveals that the treatise known as Fleta, which was itself a redaction of De Legibus, must have served as the primary source. Further, again according to Nichols, Britton’s author substantially alters the organization of his source material, and adds much that is new. Even Fleta, which consists in large part of verbatim reproductions of Bracton’s text and clearly did not have the circulation that Britton commanded, came to be known by its own name. Given that fact, and in light of the substantial differences between Britton and De Legibus, shared subject matter would hardly seem sufficient basis for attributing the former to the author of the latter. Selden’s hypothesis is attractive, however, because of what it suggests about Bracton’s stature as a medieval auctor. As outlined above and as will be discussed in further detail, Britton’s author seems to respond, if not to Bracton’s De Legibus in particular, then to a version of sovereignty that was already in circulation at the end of the thirteenth century and that had already come to be closely associated with Bracton’s treatise. His response takes the form of an alternative concept of kingship that, while it is still perhaps “law-centered” is no longer “law-bound.” Yet, in spite of his attempts to reclaim the law for the king alone, the history of Britton and perhaps its very title suggest that its author may have been less than successful in establishing the king as the first and last authority on the law.

72 Ibid., xxiii.
73 Ibid., xxvii.
74 Ibid., xxiv.
75 In one of the marginal annotations contained in MS N, for example, a near contemporary of Britton’s
B. The King’s Jurisdiction in Britton

All legal jurisdiction in Britton begins with the king: “First, with regard to ourselves and our Court, we have ordained, that, inasmuch as we are not sufficient in our proper person to hear and determine all the complaints of our said people, we have distributed our charge in several portions, as is here ordained.” (I.2)6 At first blush, this seems like a simple restatement of the Bractonian principle that, “the king himself and no other, could he do so unaided,” ought to act as the judge of all temporal matters within his realm. According to both texts, it would seem, the king exercises “ordinary” or, as modern legal scholars might say, “original” jurisdiction, and all other jurisdictional authority is “delegated” from the crown. As we have seen, though, in describing the king’s ordinary jurisdiction, Bracton defines it as yet another form of delegated or, to use a term I introduced earlier, “vicarious” jurisdiction, except the king’s jurisdiction is delegated from God. In Britton, in contrast, the king’s jurisdiction is truly original:

We will that our jurisdiction be superior to all jurisdictions in our realm; so that in all kinds of felonies trespasses and contracts, in all manner of other

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author has clarified the statement that the king alone has the “power of repealing, extending, restricting and amending [it], whenever [he] shall see good, but the assent of [his] earls and barons and others of [his] Council” with the following:

This Preamble or Prologue is divided into two parts; first, the regal style, where he says, “Edward &c.;” and then the salutation, where he says, “And we will and command &c;” affirming a prerogative in his person, that what he thinks right ought to be held law; according to the saying “Quod principi placuit pro lege habetur.” Because peace cannot be without law, nor law without a king: who can change the laws and establish others, but not without the assent of the Earls and others of his Council: quia ubi voluntas unius in toto dominatur, ratio plurimum succumbit [because where the will of one man dominates entirely (or in all things), the reason of many gives way].

Nichols, Britton, I.2 note b.

6 French: En primes en dreit de nous mesmes et de nostre Curt avoms issi ordine, qe, pur cee qe nous ne suffissums mie en nostre propre persone a oyer et terminer totes les quereles del poeple avauntdit, avoms parti noster charge en plusours parties, sicum est issi ordinee.
actions personal or real, we have the power to give, or cause to be given, such judgment as the case requires without any other process, whenever we have certain knowledge of the truth, as judge. (I.3)\textsuperscript{77}

By an act of royal will, the king creates himself as the supreme lawgiver. His will, not the public law or the \textit{res publica} itself, creates the various offices and officers, courts and causes of action through which the law is to be administered. Where in \textit{De Legibus}, the royal will, and indeed the will in general, is to an extent depicted as a potential opponent of the law, in \textit{Britton}, they become synonymous. The law derives its authority, not from the king who submits his will to it, but from the will of the king who dominates it.

\textit{Britton’s} author exhibits a remarkable singularity of purpose regarding the reclamation of the king’s power over the law. In spite of that, however, he gives away a significant portion of the crown’s power over the realm as a whole by adopting a very narrow understanding of what that law comprehends. I have already noted how \textit{Britton’s} author exempts “custom” from his definition of law. Even though Bracton’s \textit{consuetudines} do not depend upon the king for their existence or administration, they nonetheless make up an important part of the system of justice by and through which he governs. In a sense, what Bracton has given away with one hand, he takes back with the other. His broad definition of \textit{lex} means that, as illustrated by the case of the king, the law’s reach potentially extends beyond the jurisdiction of the king’s courts. Such is not the case for the author of \textit{Britton}.

\textsuperscript{77} French: Nous volums qe nostre jurisdiccioun soit sur totes jurisdicciouns en noster reaume; issint qe en totes maneres de felounies trespas et contractz, et en totes maneres de autres acciouns personeles ou reales, eyoms poer a rendre, ou a fere rendre, les jugementz teus cum il afeert saunz autre proces par la ou nous savoms la certyne verité cum judge.
So, in explaining how the crown’s jurisdiction is reserved to matters temporal, Britton’s author makes a fairly clear distinction between the law with which he treats and that which pertains to matters spiritual: “For we will that Holy Church retain her liberties unimpaired, so that she have cognizance of judging of mere spirituality, of testaments, of matrimony, of bastardy, of bigamy, and in the felonies of clerks, and in the correction of sins” (I.28). As a result of this division of labor, the law of Britton does not extend into those areas where the church exercises exclusive jurisdiction. Thus, for example, in cases where the outcome turns upon the question of bastardy, Britton’s author describes how the proceedings are to be stayed while the matter is referred to an ecclesiastical court (II.130, 150). Although he notes that the matter may be submitted to a jury upon the consent of all parties involved, his text is silent regarding what procedures will be followed after the matter is referred to the church. Like Britton’s author Bracton acknowledges that some determinations are beyond the jurisdiction of the secular legal system, yet they are not therefore outside the scope of his treatise. He offers a detailed description of how an inquest of bastardy should proceed:

The duty of the ordinary will be this: after calling the parties together, in their presence, if they wish to be present, let him make a diligent and summary enquiry, according to the form of the writ, whether there were espousals or marriage, or there were none at all, or there was a marriage but an unlawful one. We must therefore see [something] of marriage, of which we have spoken above in the tractate “who is a lawful heir,” where

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78 French: Car nous volums qe Sainte Eglise eyt ses fraunchises desblemies, issi qe ele eyt conisaunce a juger de pure espiritualité, de testament et de matrimonie, de bastardie et de bigamie, et en felonies de ses clers, et en correciouns des pecchez . . . .
it is said that he is the lawful heir whom lawful nuptials prove to be such, whether the marriage is secret or public, by words de praesenti or de futuro, as long as it cannot be dissolved, or [if] contracted under a prohibition, has not been dissolved in the lifetime of the contracting parties, since espousals or marriage is the joining together of a man and a woman holding to a single tenor of life. By this it may easily be ascertained who is legitimate and who a bastard. When the ecclesiastical judge has made the inquest, there is to be no appeal from him by anyone, neither by the demandant nor the tenant: not by the demandant, since he chooses that jurisdiction and that judge; not by the tenant, because he could in this way protract the cause from judge to judge ad infinitum, until it reached the pope, who could thus indirectly take cognisance of a lay fee. Also because the enquiry proceeds equally well whether the tenant is absent or present. But from a judge delegate or an official he may appeal, if they are alleged to have erred or acted collusively, to the bishop or other ordinary, because the ordinary may correct the error of such persons and revoke their judgment, though not his own, except with difficulty. When the enquiry has been made, as said above, and when the party who sues comes to court with the inquest, let the plea which remained sine die be at once resumoned . . . . (IV.305-06)

79 Latin: OFFICIUM vero ordinarii erit quod convocatis partibus, in earum præsentia si interesse voluerint fiat diligens et summaria inquisitio secundum formam brevis, et si sponsalia vel matrimonium sint vel omnino nullum, vel si matrimonium tamen illegitimum, videndum igitur erit de matrimonio de quo supra dictum est in tractatu, quis heres sit legitimus, et ubi dicitur quod heres legitimus est quem iustæ nuptiæ demonstrant, sive clandestinum fuerit matrimonium sive publicum, sive per verba de praesenti sive per verba1 de futuro, sive sub condicione contractum, dum tamen dissolvi non posset nec in vita
I have quoted at length here in order to highlight how Bracton subsumes the inquiry of the ecclesiastical court into a seamless procedure whereby the entire cause of action may be determined. He even provides several examples of writs alleging the various circumstances upon which an exception of bastardy may be maintained. The writ issued by the secular court determines the scope and purpose of the ecclesiastical inquiry, and appeals therefrom are limited based upon the secular nature of the original proceedings. The silence of Britton’s author regarding the procedures of the “court Christian” (II.130) suggests that the law of Britton governs but a single slice of the polity as he imagines it, a polity that comprises a multiplicity of jurisdictions, each governed according to its own special set of rules. Ideally, these jurisdictions cooperate with one another, but Britton’s author does not provide any evidence of an overarching scheme that regulates the terms of that cooperation. The polity of De Legibus also consists of multiple jurisdictions, but they are all governed according to the single body of Bractonian lex. Although Bracton may maintain that “nothing relating to the clerical estate is relevant to this treatise” (II.304), acknowledging that the clergy are in many cases to be considered “dead” as far as the secular legal system is concerned (IV.310), officers of the ecclesiastical courts

contrahentium fuerit dissolutum, cum sponsalia sive matrimonium sit coniunctio maris et femæ individuum vitae retinens consuetudinem. Et per hoc de facili perpendi poterit quis legitimus fuerit et quis bastardus. Cum autem iudex ecclesiasticus inquisitionem fecerit, non erit ab eo appellandum ab aliquo, nec a petente nec a tenente: a petente non ex quo talem jurisdictionem et talem iudicem eligit, a tenente non quia sic posset causam in infinitum prostrahere de iudice in iudicem usque ad papam, et sic posset papa de laico feodo indirecte cognoscere. Item quia tantum operatur tenentis absentia quam praesentia, sed a delegato et ab officiali si dicantur errasse vel collusionem fecisse appellari poterit usque ad episcopum vel alium ordinarium, quia ordinarius errorem talium et sententiam poterit revocare et corrige, licet non possit proprium nisi cum difficultate. Facta igitur inquisitione secundum quod predictum est cum pars sequens venerit ad curiam cum inquisitione, statim resummoneatur loquela que remansit sine die, et summoneatur tenens per hoc breve.

80 Bracton makes a clear distinction between matters that pertain to the church and matters that pertain to the realm. He makes such distinctions, however, in the context of his discussion of jurisdiction. The king may not intrude upon the jurisdiction of the church and vice versa. Regarding English law, however, as demonstrated by his definition of the “public law,” it creates and governs both jurisdictions. 81 COMPETIT etiam exceptio tenenti ex persona petentis peremptoria propter mortem civilem, ut si quis
are, like the king, nonetheless officers of lex, created by it so that they can assist in its implementation and administration.

Further, by removing the “correction of sins” from the purview of the law as pronounced in Britton, that work’s author deprives the law of some of its coercive force. Kantorowicz observes that the law of the Bractonian polity binds the king because it is an embodied form of divine law. The law as described by Britton’s author has a claim to moral authority solely because it is an expression of the king’s will. The king’s subjects in Britton may have a moral and spiritual obligation to follow the law, but that obligation is derivative of their moral and spiritual obligation to submit to the king. Bracton’s lex, however, to the extent that it expresses natural law (“ius naturale”) as well as shared morality (“mores”), exerts a moral imperative all on its own. Thus, as S. J. T. Miller explains, self-interest and the desire to preserve one’s immortal soul ultimately serve the ends of justice in the Bractonian polity:

[That the king should be bound by the law even though he cannot be forced to submit to any earthly jurisdiction] appears to be a form of double-talk, but it is more than this. No human agency can force the king’s will in a legal manner. However, the king is surrounded by convention and must act according to his conscience, with the strong hint

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se religioni contulerit et postmodum ad sæculum reversus agere velit et hereditatem petere, non audietur, cum semel quis se religioni contulerit renuntiat omnibus quæ sæculi sunt, habita tamen distinctione utrum habitum probationis tantum susceperit vel habitum professionis.

A peremptory exception arising from the person of the demandant also lies for the tenant because of civil death, as where one has betaken himself to religion and afterwards, having returned to the world, wishes to sue and claim an inheritance; he will not be heard, since he who has once betaken himself to religion renounces all things that are of the world, this distinction, however, being taken, whether he has assumed only the habit of probation or the habit of profession. IV.310

82 Kantorowicz, The King’s Two Bodies, 149.
that he must also act with regard to due process. Although such men as Frederick of Sicily and John of England may have been rulers who scoffed at revealed religion and thought in terms of royal absolutism, the normal king, if he was not insane, a truly malignant person, an idiot or a child, would have his conscience and his sense of justice so sharpened by training and admonition that he would tend to act within the patterns of feudal justice. One of the primary tenets of that justice, as we have seen, was that the king should be as the least among his subjects in submitting to the law.83

According to Bracton, governance, the exercise of dominion or sovereignty over things and people, is always inextricably bound up with self-governance. If one would compel another’s compliance with the law, one must first willingly submit to the network of private and public obligations that binds each individual to the larger community of the realm. To get justice as a plaintiff, one must first give oneself over to the jurisdiction of the court. Even more importantly, though, in exercising the dominion one has by right, one must always be mindful of how that dominion, even when granted by “private” law, is limited by the “public interest.” In Britton, in contrast, where the law takes shape as the mechanism through which the will of one man (tempered, of course, by “counsel”) is imposed upon everything subject to his temporal dominion, governance becomes a simple matter of enforced obedience.

What Bracton offers that Britton’s author does not is a means whereby the law compels the will, even in the absence of judicial process. In Britton, the “law” is defined in terms of offices and officers, processes and procedures that, for the most part, surface in daily life only when one becomes the subject or servant of legal proceedings. In the Bractonian polity, however, the law is omnipresent because it comprises more than statutes and the results of judicial proceedings. It governs the relations between man and wife, and mothers and their children, as well as the dealings between king and subject.

C. Britton and Bracton On the Subject of the King

I have attempted to draw out and highlight the distinctions between De Legibus and Britton in order to demonstrate how both texts participate in a contested discourse of sovereignty, of kings and kingship, that shaped English politics of the late-thirteenth century and beyond. As divergent as they are, though, taken together, the two texts confirm what Habermas seems to have suspected all along, that in medieval political writing, particularly in England, the legal conception of sovereignty tends to “trickle down.” In Britton, the author’s deployment of what some scholars might call a more “continental” model of kingship, with its relatively uncomplicated understanding of “quod principi placuit,” results in the formation of a polity that reflects what Habermas and others have characterized as distinctly medieval institutional and jurisdictional divisions. The king’s exercise of temporal dominion is as absolute as that exercised by the church in matters spiritual, and the right of either to claim such authority is never called into question. The jurisdictionally compartmentalized polity imagined by Britton’s author can be read as an alternative to the polity imagined by Bracton wherein the king’s
own power is conceptually limited by a single body of law that creates, organizes and regulates the various jurisdictions from which the realm is composed. In such a polity, where the law’s power to compel obedience potentially extends beyond the jurisdiction of the courts and institutions established to administer and enforce it, self-governance plays a prominent role in regulating all manner of social transactions, both public and private. In addition, the law that authorizes the exercise of power by an individual or institution becomes the standard according to which their right to dominion in the first instance can be measured.

In addition to determining institutional relations within the polity, the idea of the king also influences how these two authors are able to conceive of political identity more generally. According to both authors, the king is without peer. Only for the author of Britton, though, does the king’s peerlessness govern the metaphorical as well as the “actual” relations between the king and his subjects. Taking on the persona of the king, Britton’s author thereby excludes the king as a potential auditor. Britton may be a manual of instruction, but the book’s author does not number the king among those who might benefit from it. Further, because he exercises a truly “original” or “ordinary” jurisdiction, the king cannot effectively lead his subjects by setting a good example. He is neither an “officer” nor a “person” as the law of Britton defines such things. The king is, as much as Britton’s author can make him, literally and figuratively unlike anyone else. The author isolates the king so completely that he is immune not only from suit but from the rhetorical operations of analogy as well.
Although Bracton pays lip service to the obligatory idea that “[t]he king has no equal within his realm” (II.33), he dedicates a substantial part of the text to enumerating the various ways in which the king is nevertheless “like” his subjects in every way that counts, save one. The king is immune from judicial process, but he is bound by his oath of office to obey the law, nevertheless. Quoting Azo, Bracton observes that when one defines freedom as the “natural power of every man to do what he pleases, unless forbidden by law or force,” even the bondsman is free. Because the bondsman, “contrary to the law of nature” has been “subjected to the dominion of another,” however, he is not “free” as defined by the *ius gentium*. In the example of the bondsman, the category with which Bracton begins his discussion of persons under the law, we have perhaps the least of the king’s subjects. In one sense, the bondsman and the king are fundamental opposites. The bondsman is subjected to the dominion of his fellow man, while the king exercises absolute temporal dominion over all persons, things and actions within his realm. Yet in another, equally significant way, they are quite similar. Both men are “free,” to the extent they exercise the “natural power of every man to do what he pleases, unless forbidden by law or force.” Through a classification of the differences--such as sex, age, status, and office--that distinguish persons within the realm from one another, Bracton synthesizes a handful of characteristics that seem to be common to them all. The first and foremost among these seems to be the manner in which all persons--from king to bondsman--exercise a limited, extremely limited in the case of the bondsman, form of sovereignty. Through this shared trait, Bracton creates a network of analogy that potentially links the king to them all.
III. The Bractonian Polity and Political Subject in Middle English Literature

We can read the intellectual legacy of Bracton’s political model in the absolutist framework that Britton attempts to reinscribe into English law, as well as the heated debates regarding the relative sovereignty of the king and the baronage that occupied a great deal of parliamentary discourse throughout the fourteenth century. We can read that same legacy, I think, in a number of fourteenth-century Middle English texts that confront the question of how and by whom the polity can and should be ordered. Within these texts, the subject of political discourse bears a striking resemblance to the Bractonian political subject, an individual, generic person who is subject to the laws and customs of England. The “subjects” of these texts configure and reconfigure the polity through the exercise of personal, as opposed to institutional or official, political agency, and they provide a textual site where discourses of individual self-governance drawn from a wide variety of sources, including the mirror for princes tradition, converge with a literary project of socio-political reform. In the next two chapters, I will examine how Bracton’s ideas resonate within the three most canonical examples of Ricardian literary production, Geoffrey Chaucer’s *The Canterbury Tales*, William Langland’s *Piers Plowman* and John Gower’s *Confessio Amantis*. Because these three texts clearly and explicitly invoke the vocabulary of estates satire in order to describe what appears to be a Bractonian idea of the individual, self-governing political subject, they provide fruitful sites for exploring the question with which I begin in chapter one: How do the conventions of estates literature come together with other social and literary forms in Middle English writing?
At this point, however, I would like to take a moment to examine how even the individual subject of fourteenth-century Middle English romance might be read as drawing upon and operating within a Bractonian framework. In a key episode in the early-fourteenth-century romance, *Bevis of Hampton*, after Bevis has returned from his wanderings in Europe and the Holy Land and been reconciled with the king, Bevis’s extraordinary horse, Arondel, strikes and kills the king’s son when he attempts to steal the horse from Bevis’s stables (3555-64). The king, distraught and angered by his son’s death, calls for Bevis’s execution:

Men made del and gret weping
For sorwe of that ilche thing;
The king swor, for that wronge
That Beves scholde ben anhonge
And to-drawe with wilde fole. (3565-69)

The reference to hanging and quartering makes clear that the king believes Bevis to be guilty of treason for killing the heir to the throne. Collectively, the baronage stays the king’s hand, however:

The barnage it nolde nought thole
And seide, hii mighte do him no wors,
Boute lete hongen is hors;
Hii mighte don him namore,
For he servede tho the king before. (3570-74).

The barons argue that, since Bevis was serving in the king’s hall at the time the accident happened, all the king can do is hang Bevis’s horse. The poet appears to refer here to the law of the deodand, which was intended to repair harm to the community caused negligently or even unintentionally. Bevis, who had no deliberate hand in the killing, cannot be punished for treason. Rather, the crime is more akin to involuntary homicide, in which cases the instrument or chattel that resulted in the death is to be “given to God,” i.e. confiscated by the crown. In these ten lines, the poet provides a neat summation of the Bractonian idea of kingship. The king’s will must be governed by law and reason, not passion, and the baronage, voicing the law, acts as the primary source of legal restraint. The reference to the deodand, from “deo dandum,” serves as a reminder, though, that even though his power is thus limited, the king is nevertheless god’s vicar on earth. Just as significant as the judgment itself is Bevis’s response:

“Nai,” queth Beves, “for no catele
Nel ich lese min hors Arondele,
Ac min hors for to were
Ingelonde ich wile forswere;” (3575-78)

In a surprising turn, Bevis defies the judgment of the king and his counsellors, and instead chooses to resume his long exile rather than forfeit his horse. In contrast to the king, who gives up whatever private claim he may have against Bevis as his subject, Bevis refuses to relinquish his claim of private dominion in the interest of the public good. His defiance, though, still works within the English legal framework, since his

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self-imposed exile effectively operates as a form of outlawry. At this moment in the text, the law results from a sort of compromise undertaken by the king, the baronage, and Bevis himself.

After several more adventures in exile and the birth of his heirs, Bevis eventually returns to England, where the king receives him with clemency, and with the assent of the baronage, restores to Bevis his ancestral holdings. Justice is temporarily thwarted, however, by the king’s steward who, acting under false color of the king’s authority, names Bevis as a traitor and rouses the London populace to move against him:

And of all the stiward telle we,
That hateth Beves, also is fo.
Sixty knightes he tok and mo,
In to Londene sone he cam,
And into Chepe the wei he nam
And dede make ther a cri
Among the peple hasteli,
And seide: “Lordinges, veraiment,
Hureth the kingses comauement.
Sertes, hit is befalle so,
In your cité he hath a fo,
Beves, that slough the kingses sone;
That tresoun ye oughte to mone.
I comaunde, for the kings sake,
Swithe anon that he be take!” (4324-38)

Bevis eventually wins the day, and the king restores peace to the realm by wedding his
daughter to Miles, Bevis’s heir (4560-69), but not until “al Temse was blod red,” and “To
and thretti thosent” had been slain (4530-32). Taken together, the two episodes explore
how sovereignty may be exercised within the realm by various constituents to different
ends. Although Bevis’s act of self-governance has dangerous consequences for himself
and his household and arguably leads indirectly to the London massacre, unbridled and
ungovernable sovereignty of the sort exercised by the steward, ostensibly on the king’s
behalf, presents the greatest and most immediate threat to public order within the poem.
The examples set by both men tend to reinforce the point, which Bracton also makes, that
execution of the king’s justice is to a large extent dependent upon the knowing and
willing submission of his subjects to the law’s regulatory authority.

My invocation of *Bevis of Hampton* clarifies how the limited or vicarious
sovereignty that a subject exercises within the Bractonian polity differs from the
“inalienable” sovereignty of the subject as conceptualized in modern political theory.
Even the highly individualized freedom of action that Bevis seems to exercise within the
poem is still contained, even if only barely, within a narrative framework that ultimately
mobilizes that agency as a central component of the king’s justice. Personal agency is not
something to be desired or tolerated for its own sake; it is a powerful and dangerous force
that must be channeled in order to be socially productive. Similarly, the purpose of the
judicial system in Bracton is to interpret and implement the law in order to maintain the
stability of the realm, not to protect and preserve the rights of the people. Bracton does
not define any regulatory territory that is “off limits” as far as the law is concerned. The “freedom” granted to every person under natural law might be circumscribed by bondage, political and religious persecution, capital punishment and outlawry, and these limitations would all be seen as acceptable and just as long as they operated in accordance with the law. In addition, even though the stated end of Bractonian law is to preserve “justice,” there are no legal procedures whereby “unjust” laws can be declared as such and nullified.

Nevertheless, as the example of Bevis also confirms, neither is the sovereignty exercised by the Bractonian subject the functionally limited submission to official duties espoused by medieval estates theory in its “traditional” or “ideological” formulation. People within the Bractonian polity are always individuals first and officers or members of a particular estate second, and even the lowly bondsman must in the first instance decide for himself how to strike the balance between personal desire and the limits of his station. If he guesses wrong, he may, of course, be punished, but we should not underestimate how the idea of self-governance closes the loopholes and resolves the uncertainties created by a system of multiple concurrent jurisdictions that often presents difficulties in determining what law can be imposed by what authority against what person. Further, when those who stand beyond the jurisdiction of any court, e.g. the king, fail to live up to the legal standard set for them, individual persons have not only a right, but also a duty to petition them for reform. Participation in the life of the Bractonian polity requires more than just knowing one’s place, it requires an understanding of how
obligations common to all are expressed in the station, or sometimes stations, that one occupies.

Matt Giancarlo and Wendy Scase have both argued that legal or juridical discourses of the fourteenth century exerted substantial influence over English literature produced during the Ricardian and early-Lancastrian period. According to Giancarlo, an “aesthetics of parliamentarianism” pervades the representations of the body politic produced by “authors, clerks and audiences in and around Westminster” during the latter part of the fourteenth century. At the intersection of parliament and poetry, Giancarlo finds “a locus of public discourses artistically representing the conflict over what it meant for a voice to be ‘common’ or public in the first place.”

Although she turns to examine a different forum, Scase seems to be equally interested in how private actors assumed newly constructed or available public personae in both English law and literature during the late-thirteenth through the mid-sixteenth centuries. She describes how increased access to the king’s courts for those who had previously been barred from that forum as well as procedural changes that affected how both criminal and civil cases were prosecuted facilitated an exchange between the legal and literary complaint. Through this exchange, the peasant plaint of the late-thirteenth century evolved into the “clamour literature” of the late-fourteenth and early-fifteenth.

Although I do not take issue with the conclusions drawn by either Scase or Giancarlo, I do think that, by focusing on the particular procedures and places where legal discourse was deployed in the late-medieval period, they have not examined how

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law as an hermeneutic practice evolved and became institutionalized during the same time. As noted above, the late-thirteenth century saw the production of a flurry of legal treatises, all influenced by *De Legibus*, that attempted to collect, organize and define the scope of English law. The first Year Book, a summation of important cases decided annually within the realm, was produced in 1268 and regular installments followed until the last printed Year Book was published in 1535. The king’s jurisdiction did, as Scase notes, expand substantially over the course of the fourteenth century. As a result procedures in the local and manorial courts came into alignment with practice before the king’s bench in London and Westminster. The gradual establishment of the inns of court as a training ground for young lawyers also began around the middle of the fourteenth-century, and the four surviving inns can trace their official history as far back as the first quarter of the fifteenth century. As the most comprehensive and influential law treatise produced in late-medieval England, Bracton’s *De Legibus* inevitably shaped how law was practiced in English courts. Further, as discussed above and as will be discussed in more detail in chapter four, the Bractonian idea of kingship dominated parliamentary discourse regarding the prerogatives and obligations of Edward II and his successors. While I do not think that we can attribute all appearances of the Bractonian polity to an author’s familiarity with Bracton’s text, I do think we need to consider the influence that *De Legibus* arguably exerted over the juridical discourses from which emerging ideas about the polity may have been derived.

Moreover, in thinking about how Middle English authors “borrow” from continental works of political theory, we need to understand the extent to which that appropriation was perhaps motivated and determined by Bractonian notions of sovereignty, self-governance and political organization. Anthony Musson and W. M. Ormrod argue persuasively that the mirrors for princes produced for the ruling English elite, together with formal legal treatises, such as *De Legibus* and *Britton*, that were studied in the universities and inns of court formed a “didactic discourse of justice” that proved highly effective at inculcating in the fourteenth-century ruling elite the norms which it espoused. For English authors who already held in mind the Bractonian polity where self-governance plays such a central role, the distinction that Lynn Staley makes between the two strains of Aristotelian political theory may not have held that much significance. To an extent, the “republican concerns” of Italian authors may already have been on the minds of English writers who were beginning to think of the king as yet another incarnation of a political subject who brings order to the realm by exercising a limited kind of sovereignty in accordance with the law. Similarly, the nascent constitutionalism that James Simpson reads in late-fourteenth and early-fifteenth century literary production may actually be the result of English authors exploring how the individual political subject operates as the site where legal and jurisdictional conflicts--

90 In *Chaucerian Polity: Absolutist Lineages and the Anatomy of Associational Form* (Stanford: Stanford University Press, 1997), David Wallace, to an extent working within the critical paradigm first established by Wilks and which I summarize at the outset of this chapter, has suggested that Chaucer interpreted his Italian source material in light of “the most crucial material and ideological conflict of the Italian Trecento: the conflict between republican libertas and dynastic despotism” (1). I do not dispute that Chaucer’s political theory may have been influenced by his encounter with the political landscape of Renaissance Italy. Nevertheless, my analysis does suggest that Chaucer may have been less interested in political forms than in the political subjects that populated and propagated them.
between natural and positive law, between the church and the crown, between the king and parliament, between public and private--become visible and governable. In the chapter that follows, I will discuss how this articulation of the Bractonian idea of the person as a site of regulatory potential involves a reconfiguration of the traditional forms and conventions that medieval English authors inherited from estates satire.