THY KINGDOM COME: LAW REFORM IN CROMWELLIAN SCOTLAND, C. 1650-1660

By

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Dalhousie University is located in Mi'kma'ki, the ancestral and unceded territory of the Mi'kmaq. We are all treaty people.

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Abstract

In July 1650, Oliver Cromwell and the New Model Army invaded Scotland, mere months after the execution of Charles I. For the next nine years, Scotland would be controlled by the English state through a mixture of martial law and instruments to effect a long-lasting union. Ultimately, the Cromwellian Union used law reform to provide security for England and to republicanize Scotland, in the hopes of creating a republican British state where God would like to dwell. Through the lens of law reform this thesis examines larger questions of subjecthood, naturalization, and remand to determine how the law can be (and was) used as a tool of conquest. The Cromwellian Union, for a short period of time, created a republican British state, but negatively affected Anglo-Scottish relations, increasing the dislike and distrust between England and Scotland and thereby leaving a negative taste of union in its wake.

List of Abbreviations

Collected Works:

RPS	K.M Brown et al. ed., *The Records of the Parliament of Scotland to 1707*. https://www.rps.ac.uk/
CSPD	Mary Anne Everett Green ed., *Calendar of State Papers Domestic 1650-1660* (Burlington: TannerRitchie Publishing & University of St. Andrews, 2009-2010). *MEMSO*
A&O	C. H Firth and R. S Rait eds., *Acts and Ordinances of the Interregnum, 1642-1660* 2 (Burlington: TannerRitchie Publishing & University of St. Andrews, 2005). *MEMSO*
HOC	*Journal of the House of Commons: volume 7, 1651-1660* (London: His Majesty's Stationery Office, 1802). *BHO*
*HOC**	*Journal of the House of Commons: volume 6, 1648-1651* (London: His Majesty's Stationery Office, 1802). *BHO*
Thurloe	Thomas Birch, *A Collection of the State Papers of John Thurloe Esq,* 6 vols (Burlington: TannerRitchie Publishing, 2005-2006). *MEMSO*
Whitelocke	Bulstrode Whitelocke, *Memorials of the English Affairs from the Beginning of the Reign of Charles the First to the Happy Restoration of King Charles the Second* 4 vols (Oxford: Oxford University Press, 1853). *HathiTrust.*

Databases:

SPO	State Papers Online, The Government of Britain, 1509-1714, *Gale*
EEBO	Early English Books Online, *Proquest*.
MEMSO	Medieval and Early Modern Sources Online, *TannerRitchie Publishing*
ECCO	Eighteenth Century Collections Online, *Gale Primary Sources*.
BHO	British History Online, *Institute of Historical Research* https://www.british-history.ac.uk/

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Chapter 1: Introduction

Beginning in the medieval period and extending into the early modern, Scottish people regularly fought against England for their freedom and independence. English attempts to conquer Scotland have been extensively studied by historians of varying specialities largely because Scottish people so often strove for freedom.[1] Over time, English contemporaries became more attuned to Scottish wants and needs, transitioning from conquest to attempts at union. These attempts began in 1603, when England and Scotland were united under one monarch upon the succession of the Scottish King, James VI, to the English throne. This union would remain little more than a union of crowns, as each state retained its own religion, economy, parliament, and laws. James VI/I had hoped to extend the union towards the creation of 'Great Britain.' Unfortunately for James, however, the creation of Great Britain did not occur until 1707 with the Act of Union under Queen Anne. Yet, there was a brief union of England and Scotland from 1651-1660 as a republic during the Interregnum under Oliver Cromwell. This union was unique in that Scotland and England were united under one parliament and attempts at reforming Scottish custom and law occurred throughout. Ultimately, the Cromwellian union directly influenced Anglo-Scottish relations, concepts of law reform, and future

[1] Bruce Webster, *Medieval Scotland: The Making of an Identity* (New York: St. Martin's Press, 1997); Raymond Campbell Paterson, *For the Lion: A History of the Scottish Wars of Independence* (Edinburgh: J. Donald, 1996); Rosalind Mitchison, *A History of Scotland* (New York: Routledge, 2002); Andy King, Claire Etty, *England and Scotland, 1286-1603* (Basingstoke: Palgrave Macmillan, 2016); David Santiuste, *The Hammer of the Scots: Edward I and the Scottish Wars of Independence* (Barnsley: Pen & Sword Military, 2015).

attempts at union through various attempts to introduce legal change and produce a republican Scotland.

In July 1650, the English New Model Army headed by Oliver Cromwell invaded Scotland, culminating in the battle of Dunbar in September of that year. Following Cromwell's victory Scotland remained under English military control until the restoration of monarchy and accession of Charles II in 1660. The 1650s union of England and Scotland into one joint commonwealth created a new 'British' state removed from monarchy, tradition, and custom, and highly reliant upon ideas of republicanism and early understandings of one's liberties and rights as subjects or, in this case, citizens.[2] This thesis will examine Scotland during the 1650s, focusing on the invasion of Scotland and the union of England and Scotland into one commonwealth, to determine how the invasion and subsequent union caused legal changes throughout Scotland. Specifically, this thesis will examine various attempts at law reform in Scotland to answer larger questions about subjecthood, naturalization, the use of law, how the law was and can be used as a tool of conquest, and how the law and the union affected Anglo-Scottish relations. It suggests that attempts at law reform produced a negative memory of the Cromwellian Anglo-Scottish union.

As noted above, the English army invaded Scotland in July 1650 and retained control over Scotland until the restoration of Charles II in 1660. This period of Scottish history is often overlooked within textbooks and large thematic works because it does not

[2] The use of citizen here is not synonymous with the modern use of the word. Rather, citizen is used as a means of referring to both English and Scottish peoples during this decade specifically because 'subject' is no longer a valid term following the dissolution of monarchy.

reflect any other part of Scotland's history. The brief removal of Scottish freedom under Oliver Cromwell has only been studied by a select few historians whose works focus on the political events of the decade, the economy, or the religious upheavals.[3] The most all-encompassing work is that by Frances Dow, *Cromwellian Scotland 1651-1660* (1979), which extensively analyzes the politics, laws, and government during this time, providing a thorough study of Cromwellian Scotland.[4] Other historians, particularly R.S Spurlock and Lesley Smith, have examined the religious and political dimensions as well.[5] Especially important to this project is the literature on law reform in Cromwellian Scotland, which like the amount of literature on Cromwellian Scotland in general, is rather small. Historians Patrick Little, David Smith, and Lesley Smith are the front runners of this area. The works by Patrick Little and David Smith explore the changes in politics and government in Ireland and Scotland following 1652, noting the promise of legal reform in Scotland, as well as the various debates regarding a more complete union.[6] Lesley Smith's article "Sackcloth for the Sinner or Punishment for the Crime? Church and Secular Courts in Cromwellian Scotland" (1982) examines some of the

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[3] See Frances Dow*, Cromwellian Scotland 1651-1660* (Edinburgh: J. Donald, 1979); Derek Hirst, "Security and Reform in England's Other Nations, 1649-1658," in *The Oxford Handbook of the English Revolution*, ed. Michael Braddick (Oxford: Oxford University Press, 2015), 170-85; Danielle McCormack, "Highland Lawlessness and the Cromwellian Regime," in *Scotland in the Age of Two Revolutions*, eds. Sharon Adams and Julian Goodare (Boydell Press, 2014), 115-33; R. S Spurlock, *Cromwell and Scotland: Conquest and Religion, 1650-1660* (Edinburgh: J. Donald, 2007).
[4] Frances Dow, *Cromwellian Scotland 1651-1660* (Edinburgh: J. Donald, 1979).
[5] R. S Spurlock, *Cromwell and Scotland: Conquest and Religion, 1650-1660* (Edinburgh: J. Donald, 2007); Lesley M Smith, "Sackcloth for the Sinner or Punishment for the Crime? Church and Secular Courts in Cromwellian Scotland," in *New Perspectives on the Politics and Culture of Early Modern Scotland*, eds. John Dwyer, Roger A Mason, Alexander Murdoch (n.d[1982]), 116-32.
[6] Patrick Little, David Smith, *Parliament and Politics during the Cromwellian Protectorate* (Cambridge: Cambridge University Press, 2007).

changes made by governmental figures in Scotland following 1652 to settle the state and impose reforms. This examination determined that multiple jurisdictions and courts were abolished but the church courts and the Kirk retained most of their power and were used by local governments to control and punish offenders.[7] The works by Patrick Little, David Smith, and Lesley Smith document the changes that English MPs were attempting to impose on Scotland, whether they were political, legal, economical, or religious.

The changes imposed and attempted in Scotland during the 1650s followed closely to those concurrently attempted in England. The literature on law reform in Cromwellian England is fronted by Nancy Matthews and Donald Veall.[8] Nancy Matthews's work *William Sheppard: Cromwell's Law Reformer* (1984) examines explicitly William Sheppard's role in the law reform movement, the changes he implemented, and how his proposals propelled others to propose their own ideas. Matthew's work also examines the various proposals for law reform in seventeenth century England, such as changes to the legal profession and courts and the use of the vernacular in the legal profession.[9] Donald Veall's book *The Popular Movement for Law*

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[7] Lesley M Smith, "Sackcloth for the Sinner or Punishment for the Crime? Church and Secular Courts in Cromwellian Scotland," in *New Perspectives on the Politics and Culture of Early Modern Scotland*, eds. John Dwyer, Roger A. Mason, Alexander Murdoch (n.d[1982]), 116-32.

[8] Nancy Matthews, *William Sheppard: Cromwell's Law Reformer* (Cambridge: Cambridge University Press, 1984); Donald Veall, *The Popular Movement for Law Reform (*Oxford: Clarendon Press, 1970). See also Stuart Prall, *The Agitation for Law Reform during the Puritan Revolution, 1640-1660* (The Hague: Martinus Nijhoff, 1966); Mary Cotterell, "Interregnum Law Reform: The Hale Commission of 1652," *The English Historical Review* 83, no. 329 (October 1968): 689-704; Barbara Shapiro, "Law Reform in Seventeenth Century England," *The American Journal of Legal History* 19, no. 4 (October 1975): 280-312; Barbara Shapiro, *Political Communication and Political Culture in England, 1558-1688* (Palo Alto: Stanford University Press, 2012).

[9] Nancy Matthews, *William Sheppard: Cromwell's Law Reformer* (Cambridge: Cambridge University Press, 1984).

Reform (1970) analyzes the history of crime and punishment in England beginning in 1600 as well as attempts at law reform during the Interregnum, providing a detailed overview of the various reforms proposed and implemented.[10] Both Nancy Matthews and Donald Veall suggest that the popularity of law reform was due to how the law evolved and was used by the government "which created serious impediments to swift, certain justice."[11] Thus, in the case of England, law reform was an attempt to right the wrongs of the past.

This thesis hopes to use the vast amount of literature on law reform in Cromwellian England to examine law reform in Cromwellian Scotland, specifically what changed, how it changed, and why. Similar to examinations of law reform in England, this thesis uses proposals for change which were presented, but these proposals were not necessarily as explicit. For instance, in England William Sheppard and Matthew Hale were major legal reformers and lawyers who attempted to improve the English laws and courts. Persons who fit into these positions in Scotland were much harder to find at the time, largely because most Scottish peoples were attempting to get the best hand they could while being forced into a largely unwanted union. Furthermore, from 1651-1654 censorship was a major part of English control in Scotland, meaning that most of the press in Scotland was run through English presses and only approved documents were published in Scotland.[12] For the first half of the decade then, the lack of published proposals can largely be attributed to censorship in Scotland. In the second half of the

[10] Donald Veall, *The Popular Movement for Law Reform (*Oxford: Clarendon Press, 1970).
[11] Matthews, *William Sheppard*, 1.
[12] Spurlock*, Cromwell and Scotland*, 72.

decade, those who were prominent enough to produce proposals for change often sat in parliament or on a council and therefore were more inclined to share these proposals directly with their peers, as will be seen within the 1656 union debates.[13] Thus, this thesis examines in detail those changes which occurred in Scotland, as well as noting the proposals put forth in parliamentary meetings.

In terms of legal reform, historian Brian Levack in his book *The Formation of the British State* (1987) compares the Cromwellian Union to the 1603 and 1707 unions, arguing that the Cromwellian Union was a failed union in the sense that it did not create a true legal union.[14] This thesis hopes to engage with this understanding, and perhaps challenge it. Historians often present the Cromwellian union in comparison to those proposals for union by politician Edwin Sandys or James VI/I.[15] Most of these union proposals suggest that although the 1650s union went further to producing a legal union, it still cannot be considered a legal union because one legal code was not created. This thesis argues against this conclusion, suggesting that a legal union was begun but not completed, and therefore should be considered (at least after 1656) a legal union. This thesis agrees that a unified legal code along the lines proposed by early seventeenth-century lawyer and union commissioner Sir Thomas Craig[16] was never completed, but demonstrates the attempts made to assimilate the laws and produce new laws, for

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[13] See chapter 4.
[14] Brian Levack, The *Formation of the British State* (Oxford: Clarendon Press, 1987).
[15] Levack, *The Formation of the British State,* 98.
[16] John W Cairns, "Craig, Thomas (1538?-1608), Lawyer and Jurist," *Oxford Dictionary of National Biography* (23 September 2004). See also John Cairns, T. D. Fergus, Hector MacQueen, "Legal Humanism in Renaissance Scotland," *The Journal of Legal History* 11, no. 1 (1990): 48-52; John Cairns, *Law, Lawyers and Humanism: Selected Essays on the History of Scots Law* 1 (Edinburgh: Edinburgh University Press, 2015), PDF e-book, Chapter 3 pgs. 83-90.

example the Treason Law, application of English judges to the judicial bench, and the installation of Justices of the Peace. A legal union which produced one legal code for England and Scotland did not occur but focus on a unitary code can obscure the assimilative changes and reforms that did.

This thesis uses Scottish law reform as a lens through which to examine and study Cromwellian Scotland and contemporaries' understandings of the law. The changes which occurred in these years were viewed by some contemporaries as drastic and irresponsible, largely because they went against previous Scottish statutes or customs. Other Scots encouraged these changes, though, believing they would improve one's ability to gain justice and decrease the amount of crime present in Scotland. The study of law reform not only allows us to know what changed and how it was changed, but also how contemporaries understood and viewed these changes. Furthermore, it allows us to determine how these changes affected contemporaries' everyday lives, and the ways in which contemporaries used and abused the law. For example, in 1654 servitude and vassalage were abolished through the Ordinance for Union.[17] Arguably this could have improved the livelihood of rural workers and low-income households, while threatening and decreasing the power of landowners and noblemen. English contemporaries acknowledged the general pressure for law reform and adapted this ideology within their governmental policies to control Scottish nobles who held monarchical sympathies; in other words, they abused contemporaries' wishes and the law for their own political motivations. Thus, this study will not only examine law reform but the ways in which it

[17] *An Ordinance for Uniting Scotland into One Commonwealth with England* (London: 1654), 257-59. *EEBO*

influenced contemporaries' understandings of the law. Furthermore, attempts at law reform during the English occupation of Scotland bring to light questions regarding the importance of the law, how the law was used as a tool of conquest, subjecthood, and naturalization. This thesis shows that English MPs used the law as a tool of conquest through the taking of the Scottish registers and the reform of Scottish judicial practices, but it also shows that some Scottish contemporaries embraced the opportunity for at least some law reform, using the opportunity afforded by the Cromwellian conquest to their own ends.

Within this study of law reform, one must also take into account the events and effects of the English invasion of Scotland. The invasion of Scotland is essentially important to this project not only because it directly affected Anglo-Scottish relations and possibly influenced later attempts at union, but it also brought about the ability for law reform and the union to occur. Prior to delving into the invasion of Scotland, we must examine the events leading up to it, such as the civil wars, now referred to as the Wars of the Three Kingdoms, to fully understand the political tensions present in July 1650.[18] The

[18] For a detailed analysis of the revolutions see Allan MacInnes, *The British Revolution, 1629-1660* (New York: Palgrave MacMillan, 2005); Laura Stewart, *Rethinking the Scottish Revolution: Covenanted Scotland, 1637-1651* (Oxford: Oxford University Press, 2016); Stuart Reid, *Crown, Covenant, and Cromwell: The Civil Wars in Scotland, 1639-1651* (London: Frontline, 2012); Trevor Royle, *The British Civil War: The Wars of the Three Kingdoms, 1638-1660* (New York: Palgrave MacMillan, 2004); Laura Stewart, "Scottish Politics 1644-1651," in *The Oxford Handbook of the English Revolution*, ed. Michael Braddick (Oxford: Oxford University Press, 2015), 114-36; David Smith, *Oliver Cromwell: Politics and Religion in the English Revolution 1640-1658* (Cambridge: Cambridge University Press, 1992). These revolutions are referred to as the Wars of the Three Kingdoms following the rise of 'British History' which studies each state's actions independently as well as together, to show that each state affected and was influenced by the actions of the other. For more information on the revolutions through the lens of British History see Kirsteen Mackenzie, *The Solemn League and Covenant of the Three Kingdoms and the Cromwellian Union, 1643-1663* (New York: Routledge, 2018); Derek

Wars of the Three Kingdoms began in Scotland through the Bishops' Wars and signing of the National Covenant, which resulted in the Treaty of Ripon and forced Charles to call the Long Parliament in 1640.[19] The events of the Long Parliament, specifically the debates on royal prerogative, people's rights as subjects, and the Root and Branch Petition, led to the beginning of the English civil war.[20] Throughout the civil war, Scottish Covenanters attempted to extend Scottish Presbyterianism into England through an agreement known as the Solemn League and Covenant. The Covenant was really an idealistic blueprint for union between Ireland, Scotland, and England agreed to by English and Scottish officials. Ultimately, it sought to ensure that the laws, constitutions, and customs of each nation would remain while encouraging religious reform in each kingdom on the Presbyterian model.[21] For Scotland, the Solemn League and Covenant was a means of reforming all of the British Isles and thereby creating a godly island while preserving the Scottish religious reformation.[22] Scottish government officials attempted to further their religious aims in England by proposing various settlements to Charles in 1646 and 1647.[23] Yet, Scottish officials' hopes were uprooted by the Duke of Hamilton's

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Hirst, "The English Republic and the Meaning of Britain," in *The British Problem c. 1534-1707: State Formation in the Atlantic Archipelago*, eds. Brendan Bradshaw and John Morill (New York: St. Martin's Press, 1996), 192-219. For an examination of British History see J. G.A Pocock, "The Atlantic Archipelago and the War of the Three Kingdoms," in *The British Problem c. 1534-1707: State Formation in the Atlantic Archipelago*, eds. Brendan Bradshaw and John Morill (New York: St. Martin's Press, 1996), 172-191; John Morill, "The British Problem c. 1534-1707," in *The British Problem c. 1534-1707: State Formation in the Atlantic Archipelago*, eds. Brendan Bradshaw and John Morill (New York: St. Martin's Press, 1996), 1-38.

[19] Kirsteen Mackenzie, *The Solemn League and Covenant of the Three Kingdoms and the Cromwellian Union, 1643-1663* (New York: Routledge, 2018), 7.

[20] Mackenzie, *Solemn League and Covenant*, 7.

[21] Ibid., 10

[22] Ibid., 11.

[23] Ibid., 66-69.

invasion in 1648, and the execution of Charles I in 1649. The events of the 1640s led to the creation of the Solemn League and Covenant and the understanding that Scotland had the ability to produce an army of formidable size that could wield and influence power across the Isles. Yet, it also allowed for Scottish officials to involve themselves in a war which would affect future Anglo-Scottish relations and threaten Scottish independence.

The Wars of the Three Kingdoms of the 1640s, specifically the English civil war and Scottish involvement within it, directly influenced the invasion of Scotland and were often used as a rationale for the invasion.[24] Within the contemporary records, the English suggested the invasion was a reaction to Scottish aggression and involvement in English affairs, while the majority of the Scots argued that the English were at fault and had no reason to invade them.[25] As is customary within the study of history, historians have disagreed about the interpretation of these sources, culminating in a debate which reflects differences embedded in the sources they studied. Some historians, such as David Stevenson, have suggested that the invasion was not planned and only occurred due to Scottish involvement in English affairs. Along these lines is the argument that the invasion was the result of the culmination of the National Covenant, the Civil Wars, and the Solemn League and Covenant.[26] In this case then, these historians have taken up the side of the English within the primary sources. Meanwhile, historian R.S. Spurlock

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[24] This will be discussed thoroughly in chapter 2.
[25] Anon, *A Declaration of the Army of England Upon Their March into Scotland* (London: 1650). *EEBO;* Anon, *A Declaration of the Committee of Estates of the Parliament of Scotland, in Answer to Some Printed Papers, Intitled the Declaration of the Parliament of England, and the Declaration of the Army of England, Upon Their March into Scotland* (Edinburgh: 1650). *EEBO.*
[26] David Stevenson, "Cromwell, Scotland, and Ireland," in *Cromwell and the Interregnum: The Essential Readings*, ed. David Smith (Malden: Blackwell Pub., 2003), 183-212.

suggests that religion and religious toleration were the fundamental motives for the invasion and conquest of Scotland, thereby suggesting similar motives to those suggested by Blair Worden.[27] Yet, other historians such as Brian Levack and Barry Coward argue that the invasion of Scotland was due to fears for English security and the belief that if they did not invade Scotland then Scotland would invade them.[28] Thus, present day historians have taken varying sides of this debate, depending on the sources studied and the focus of these sources.

To fully understand this debate, one needs to take into account the literature on Cromwellian England, specifically Oliver Cromwell's intentions and policies. The republican English government has been deeply studied by historians such as Patrick Little and David Smith. Little and Smith, amongst others, have extensively examined governmental structures, policies, and parliamentary debates during the Interregnum in England to argue that Cromwell's government and policies were intended to create a nation for the godly, made up of godly personnel.[29] As is obvious by Little and Smith's conclusion, Oliver Cromwell was inherently religious, with most of his political agenda situated within his religious agenda. After the civil war, the majority of parliamentarians

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[27] R. S Spurlock, *Cromwell and Scotland: Conquest and Religion, 1650-1660* (Edinburgh: J. Donald, 2007); Blair Worden, *God's Instruments: Political Conduct in the England of Oliver Cromwell* (Oxford: Oxford University Press, 2012); Blair Worden, "Toleration and the Cromwellian Protectorate," in *Persecution and Toleration: Papers Read at the Twenty-Second Summer Meeting and the Twenty-Third Winter Meeting of the Ecclesiastical History Society*, ed. W.J Sheils (Great Britain: T.J Press Ltd., 1984), 199-233.

[28] Barry Coward, *The Cromwellian Protectorate* (Manchester: Manchester University Press, 2002); Brian Levack, *The Formation of the British State* (Oxford: Clarendon Press, 1987).

[29] Patrick Little and David Smith, *Parliaments and Politics during the Cromwellian Protectorate* (Cambridge: Cambridge University Press, 2007).

adhered to some form of Puritan or Independent religious ideology. Cromwell's own views closely aligned with the 'Independent' ideology, which rejected the idea of religious formalism and a national church.[30] Independents believed that everyone held their own religious connection with God, encouraged public discussions of religious belief and unsanctioned preaching, and encouraged the creation of smaller congregations.[31] Thus, religious practices in England following the overthrow of monarchy drastically changed from those previously practiced, and indirectly affected the placement and roles of church and state.

Historians such as Blair Worden and Barry Coward have studied the religious policies and ecclesiastical reform in Interregnum England to come to quite different conclusions. Blair Worden argues that Cromwell was attempting to transform the British isles into a state in which God would like to dwell, suggesting that Cromwell's religious beliefs were highly influential in his political activities.[32] On the other hand, Barry

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[30] Note, Oliver Cromwell did not keep a journal or diary containing his personal beliefs. Historians have used various other sources and Oliver Cromwell's personal letters to procure an understanding of his religious beliefs. See for instance Colin Davis, "Cromwell's Religion," in *Cromwell and the Interregnum: The Essential Readings*, ed. David Smith (Malden: Blackwell Pub., 2003), 141-66; Bernard Capp, "Cromwell and Religion in a Multi-Faith Society," in *Cromwell's Legacy*, ed. Jane Mills (Manchester: Manchester University Press, 2012), 93-112; Blair Worden, "Toleration and the Cromwellian Protectorate," in *Persecution and Toleration: Papers Read at the Twenty-Second Summer Meeting and the Twenty-Third Winter Meeting of the Ecclesiastical History Society*, ed. W.J Sheils (Great Britain: T. J Press Ltd., Padstow, 1984), 199-233.

[31] See Bernard Capp, "Cromwell and Religion in a Multi-Faith Society," in *Cromwell's Legacy*, ed. Jane Mills (Manchester: Manchester University Press, 2012), 93-112. Many of these practices are apparent in the examples given by Spurlock, *Cromwell and Scotland*, 44-70.

[32] Blair Worden, *God's Instruments: Political Conduct in the England of Oliver Cromwell* (Oxford: Oxford University Press, 2012); Blair Worden, "Toleration and the Cromwellian Protectorate," in *Persecution and Toleration: Papers Read at the Twenty-Second Summer Meeting and the Twenty-Third Winter Meeting of the Ecclesiastical History Society*, ed. W. J Sheils (Great Britain: T. J. Press Ltd. Padstow, 1984), 199-233.

Coward does not see Cromwell's religious ideology interfering with his political actions, suggesting that more than anything, Cromwell attempted to provide peace and resolve the problems created by poor kingship and civil war.[33] As both of these debates focus on Cromwell's intentions in England or Scotland, a clearer understanding of Cromwell's intentions would allow for a better understanding of England's international relations and domestic policies. Although this thesis is not focused on reforms in England, it does take into account Cromwell's political and religious policies in England and elsewhere when analyzing the invasion of Scotland and the Cromwellian union. Thus, this thesis hopes to take into account these debates when studying Cromwellian Scotland to understand English contemporaries' intentions more clearly in Scotland and hopes any conclusions from this project will add to these debates.

Before the English invaded Scotland, they invaded, conquered, and subjugated Ireland. Anglo-Irish relations had been poor for decades, largely due to the differences in religion, culture, and custom. Previous English attempts to conquer and control Ireland furthered this distrust and hatred, which was only increased during the Wars of the Three Kingdoms and the Irish rebellion.[34] The differences between Anglo-Irish relations and

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[33] Barry Coward, *The Cromwellian Protectorate* (Manchester: Manchester University Press, 2002).

[34] For more information on Cromwell's Irish invasion and Anglo-Irish relations see Jennifer Wells, "English Law, Irish Trials and Cromwellian State Building in the 1650s," *Past and Present*, no. 227 (May 2015): 77-117; David Stevenson, "Cromwell, Scotland, and Ireland," in *Cromwell and the Interregnum: The Essential Readings*, ed. David Smith (Malden: Blackwell Pub., 2003), 183-212; T. C. Barnard, *Cromwellian Ireland: English Government and Reform in Ireland,1649–1660* (London: Oxford University Press, 1975); John Cunningham, "Oliver Cromwell and the 'Cromwellian' Settlement of Ireland," *Historical Journal* 53, no. 4 (2010): 919-937; Mary Hickson, *Ireland in the Seventeenth Century: or, the Irish Massacres of 1641-42, Their Causes and Results* 2 vols (Burlington: TannerRitchie Publishing, 2005). *MEMSO;* Patrick Little ed., *Ireland in Crisis: War, Politics and Religion, 1641-50* (Manchester: Manchester University Press,

Anglo-Scottish relations are odd due to the similarities between Irish and Scottish custom. Both cultures are based on Celtic and Gaelic roots, sharing a similar language and for a period of time a similar religion.[35] Yet, Scotland was not treated in the same way as Ireland, entering into a union rather than subjugated to English control.

Why Scotland was treated differently than Ireland has remained an ongoing debate within the literature. David Stevenson suggests that the religious differences between Ireland and England (Catholic vs Protestant), explain the aggressive and violent actions within the conquest of Ireland not present in Scotland.[36] Historian Sarah Barber suggests that Scotland was treated differently than Ireland because "Scotland was a major threat to the peace, security, and republicanness of the new regime."[37] Similarly other historians, particularly Francis Dow, have proposed that Scotland was treated better due to the 1653 Glencairn Rebellion. Specifically, the events of Glencairn's Rebellion, as well as previous shows of military prowess within the Civil War, forced English MPs to approach Scotland differently.[38] Thus, some historians believe the differences in

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2020); Stuart Reid, *Crown, Covenant and Cromwell: The Civil Wars in Scotland, 1639-1651* (London: Frontline Books, 2012); David Heffernan, "Political Discourse and the Nine Years' War in Late Elizabethan Ireland, c. 1593-1603," *Historical Research* 94, no. 264 (2021): 282-302; Robert Armstrong, "The Scots of Ireland and the English Republic, 1649-60," in *The Scots in Early Stuart Ireland: Union and Separation in Two Kingdoms*, eds. Simon Egan and David Edwards (Manchester: Manchester University Press, 2016), 251-78.

[35] Originally Scotland was Catholic, but the reformation changed this. By the 1640's the majority of Scotland was Presbyterian, although the highlands remained largely Catholic. Most seventeenth century Irish people were Catholics while the majority of English people living in Ireland were Anglican.

[36] Stevenson, "Cromwell, Scotland, and Ireland," 183-212.

[37] Sarah Barber, "Scotland and Ireland under the Commonwealth: A Question of Loyalty," in *Conquest and Union: Fashioning a British State, 1485-1725*, eds. Steven G. Ellis and Sarah Barber (New York: Longman Publishing, 1995), 207.

[38] Dow, *Cromwellian Scotland*, 77.

treatment occurred due to religious differences, while others insist on the influence of ongoing political events in Scotland and past experiences. This thesis will examine the invasion of Scotland, the explanations for the invasion, and the events which followed the invasion not only to understand English intentions in Scotland, but also to understand why Scotland was treated differently than Ireland. The examination of the parliamentary debates following the invasion of Scotland suggests that Scotland was originally supposed to be subjugated in the same way as Ireland or Wales, but Oliver Cromwell's involvement within the house led to a transition to union, in the hopes of producing a united British state.

This thesis will examine various legal and judicial reforms attempted in Scotland during the English occupation. It will not, however, examine ecclesiastical reforms. The ecclesiastical reforms produced in Scotland were numerous and wide-ranging and much too large for this project, thus we will briefly outline the major innovations here.[39] The largest ecclesiastical innovation was the introduction of a form of religious toleration

[39] For more information of the ecclesiastical reforms completed in Cromwellian Scotland see Allan Kennedy, "Civility, Order and the Highlands in Cromwellian Britain," *The Innes Review* 69, no.1 (2018): 49-69; Blair Worden, "Toleration and the Cromwellian Protectorate," in *Persecution and Toleration: Papers Read at the Twenty Second Summer Meeting and the Twenty-Third Winter Meeting of the Ecclesiastical History Society*, ed. W. J Sheils (Great Britain: T. J Press Ltd. Padstow, 1984), 199-233; Crawford Gribben, "Polemic and Apocalyptic in the Cromwellian Invasion of Scotland," *Literature and History* 23, no. 1 (Spring, 2014): 1-18; Ryan Burns, "Unrepented Papists: Catholic Responses to Cromwellian Toleration in Interregnum Scotland," *History* 103, no. 355 (2018): 243-61; R. S Spurlock, *Cromwell and Scotland: Conquest and Religion, 1650-1660* (Edinburgh: J. Donald, 2007); Trevor Royle, *The British Civil War: The Wars of the Three Kingdoms, 1638-1660* (New York: Palgrave MacMillan, 2004); Lesley M Smith, "Sackcloth for the Sinner or Punishment for the Crime? Church and Secular Courts in Cromwellian Scotland," in *New Perspectives on the Politics and Culture of Early Modern Scotland*, eds. John Dwyer, Roger A. Mason, Alexander Murdoch (n.d[1982]), 116-32.

known as liberty of conscience, asserting that Christians aside from Papists were able to practice their faith openly without punishment. This form of toleration did not grant toleration to every faith nor did it apply the modern definition of religious toleration. Rather, liberty of conscience asserts that people had the right to follow their own faith, as religious practice was a personal agreement with God and therefore people should be able to practice according to their own conscience.[40] The introduction of liberty of conscience also allowed for the second major change pursued by the English: the decrease of Kirk power. English Independents disagreed with the idea of a national church and religious formalism, believing that not everyone needed to belong to one specific church. Thus, the Scottish Kirk was forced to allow the practice of other religious beliefs, and restricted from excommunicating members of the community who chose to practice their faith somewhat differently.[41] Other reforms related to the religious life of the country included allowing public preaching and religious discussion, imposing strict moral policies, expanding religious instruction into the highlands, banning witch hunts and burnings, and reforming the universities.[42] Through these methods, Cromwell and English MPs hoped to create a united British republican state in which God would like to dwell.

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[40] Blair Worden, "Toleration and the Cromwellian Protectorate," in *Persecution and Toleration: Papers Read at the Twenty Second Summer Meeting and the Twenty-Third Winter Meeting of the Ecclesiastical History Society*, ed. W. J Sheils (Great Britain: T. J Press Ltd. Padstow, 1984), 208-9.

[41] Crawford Gribben, "Polemic and Apocalyptic in the Cromwellian Invasion of Scotland," *Literature and History* 23, no. 1 (Spring, 2014): 5.

[42] Trevor Royle, *The British Civil War: The Wars of the Three Kingdoms, 1638-1660* (New York: Palgrave MacMillan, 2004); Lesley M Smith, "Sackcloth for the Sinner or Punishment for the Crime? Church and Secular Courts in Cromwellian Scotland," in *New Perspectives on the Politics and Culture of Early Modern Scotland*, eds. John Dwyer, Roger A. Mason, Alexander Murdoch (n.d[1982]), 116-132; Allan Kennedy, "Civility, Order and the Highlands in Cromwellian Britain," *The Innes Review* 69, no.1 (2018): 49-

The Cromwellian Union was not the first attempt at uniting England and Scotland into a more complete union. Following the union of the crowns of England and Scotland in 1603, James VI/I had hoped for a complete union which would unite England and Scotland in law, economy, religion, and parliament. Historians Brian Levack, Keith Brown, and Bruce Galloway have examined the 1603-1607 union debates extensively and suggest that those contemporaries who opposed a complete union offered arguments focused on subjects' rights and liberties.[43] Specifically, the English and Scottish peoples feared for the safety of their constitution and the loss of their laws and customs. English contemporaries often argued that the differences between Scots law and English common law, specifically the criminal law, were too great to assimilate into one legal code. Furthermore, they argued that a union of parliaments would increase the royal prerogative, lessening the power of parliament.[44] Scottish contemporaries, on the other hand, feared they would be incorporated into England in much the same way as Wales had.[45] Thus, the major fears centered on the loss of one's constitution and rights as subjects.

The extensive proposals for legal union put together to support the union suggest that a complete legal union could not occur without a complete overhaul of the laws of

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69; R. S Spurlock, *Cromwell and Scotland: Conquest and Religion, 1650-1660* (Edinburgh: J. Donald, 2007).

[43] See Brian Levack, *The Formation of the British state* (Oxford: Clarendon Press, 1987); Keith Brown, *Kingdom or Province?: Scotland and the Regal Union, 1603-1715* (New York: St. Martin's Press, 1992); Bruce Galloway, *The Union of England and Scotland, 1603-1608* (Edinburgh: J. Donald, 1986); Brian Levack, "English Law, Scots law, and the Union, 1603-1707," in *Law-making and Lawmakers in British history*, ed. Alan Harding (1980): 105-19.

[44] Levack, *The Formation of the British State*, 32-38.

[45] Ibid., 34.

both realms. Prominent lawyers such as Sir Thomas Craig argued that a completely new legal code could be created if one ignored all of English common law and built on the European civil law.[46] Other proposals, such as that presented by Edwin Sandys in 1607, suggested a 'perfect union' where Scotland was subjected to English statutory law and the English parliament.[47] Neither of these proposals were successful as Scottish delegates refused an assimilation into English customs and English delegates feared the European civil law.[48] This thesis hopes to use these early proposals for union to understand contemporaries' fears of union within the 1650s. Other historians, such as P.W.J. Riley and William Ferguson, have approached the proposals for union to determine how they affected Anglo-Scottish relations over time. Ultimately, both historians found that the attempts at and proposals for union negatively affected Anglo-Scottish relations.[49] Thus, this thesis examines the changes made in Scotland during the Cromwellian Union to determine how they affected Anglo-Scottish relations.

This thesis will examine the various legal changes and reforms in Scotland during this period to argue that the changes imposed by English MPs in Scotland were largely an attempt to create a united British *republican* state. Chapter 2 will examine the invasion of Scotland and methods and motivations for the invasion, to find that English and Scottish contemporaries blamed each other for the military intervention based on past events and used the printing press as a means of propaganda within the invasion. This chapter will

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[46] Levack, *The Formation of the British State* 78.
[47] Ibid., 41.
[48] Ibid., 41; 78.
[49] William Ferguson, *Scotland's Relations with England: A Survey to 1707* (Edinburgh: J. Donald, 1977); P.W.J Riley, *The Union of England and Scotland: A Study in Anglo-Scottish Politics of the Eighteenth Century* (Manchester: Manchester University Press, 1978).

also consider why English MPs decided to unite with Scotland rather than subjugate it in a similar fashion to Ireland and Wales, and suggests a union occurred due to specific players within the political realm of England. This chapter also examines the debates regarding union in 1651-1653 between English commissioners and Scottish delegates to bring about a peaceful union, finding that many Scottish communities agreed to the union to protect their rights and liberties. Finally, this chapter considers how the law was used as a tool of conquest through the removal of the Scottish registers, suggesting that by taking the Scottish registers English officials were needed by Scots to govern and provide judicial administration.

Chapters 3 and 4 will both examine attempts to reform the laws in Scotland, with chapter 3 focusing primarily on 1651-1654 and chapter 4 on 1655-1659.These chapters will examine changes to the laws, judicial policies, and court proceedings, among others. Chapter 3 examines changes such as the abolition of the office of King, the creation of a new Treason law, and the ending of vassalage and servitude in Scotland. These changes suggest that English MPs in the early years of Cromwellian interventions in Scotland were focused on transforming Scotland into a state worthy of being a part of the union, thus a republican state. The changes discussed in Chapter 4- the installation of Justices of the Peace, changes to the Border laws, and increased use of transportation- suggest that the years following Glencairn's Rising (1653-55) focused mainly on providing security for England within the union. Chapter 4 will also consider new acts produced in 1657 in reference to subjecthood, arguing that these acts were widely seen to go against peoples' rights and liberties as members of the commonwealth, suggesting that English MPs used contemporaries' want for law reform for their own ends. Ultimately, this thesis will

suggest that Oliver Cromwell and English MPs attempted to create a united British republic by using the law as a tool of conquest, inadvertently negatively affecting Anglo-Scottish relations and leaving a negative taste of union in both English and Scottish contemporaries' mouths.

Chapter 2: The Conquest of Scotland: Invasion, Subjugation, and Union

On 30 January 1649, Charles I was executed by English Parliamentarians. Charles's execution was a shock to many contemporaries in Scotland and Ireland who had hoped for a more conservative punishment for his crimes. Ultimately, Charles I's execution led some to rise up in arms, while others (specifically people in Scotland) questioned their existing allegiances.[1] Yet, what was to happen in the following decade could not have been imagined by any Scots at that time. On the 22 July 1650, the New Model Army led by Oliver Cromwell invaded Scotland, and would conquer the majority of Scotland in just over a year.[2] From September 1650 to 1660 Scotland would remain under English control, through a mixture of martial law and instruments to effect a more peaceable, long-lasting union.[3] This chapter will examine the motivations and methods for the invasion of Scotland and examine the proposals and debates surrounding union to fully understand why English MPs transitioned from subjugation to union. Furthermore, this chapter will also consider aspects of naturalization, conquest, and subjecthood to argue that the law was used as a tool of conquest within the transition from subjugation to union.

In July 1650, Oliver Cromwell and the New Model Army invaded Scotland, yet for months prior the question of invasion had been whispered. In April 1650, the English

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[1] Allan MacInnes*, The British Revolution, 1629-1660* (New York: Palgrave MacMillan, 2005), 189.
[2] Dow, *Cromwellian Scotland*, 8.
[3] Dow, *Cromwellian Scotland*, 14-257; Derek Hirst, "Security and Reform in England's Other Nations, 1649-1658," in *The Oxford Handbook of the English Revolution,* ed. Michael Braddick (Oxford: Oxford University Press, 2015), 178.

Council of State began discussing a future invasion of Scotland, with many members arguing on behalf of the invasion because they feared another Scottish invasion of England.[4] One writer later recalled having considered the current state of the English commonwealth at risk if the army did not move against Scotland, writing:

> but if ever we suffer the Scots (out of what pretence forever) to bring in a King on their backs to England, we may never expect to know what English names or freedoms were, but may write out names before-hand in brass, and lay them in some dark and stinking Vaults; for, no other memory of our names, or persons, or priviledges in like to be preserved with honour and respect.[5]

Thus, if the English parliament did not order the army to invade Scotland, monarchy would be forced upon them yet again, and all English subjects would pay the price through a loss of their liberties.

Over the next two months, English MPs continued to be fearful of a Scottish invasion, culminating in an order by the Council of State to move the army to the border of Scotland on 26 June 1650.[6] The order was made as a precaution but for some MPs it was not a matter of if the Scots would invade but when. The House of Commons Journals specifically noted that "it is the Opinion of this Council, that they cannot prevent an Invasion from Scotland, but by the marching of an army into that kingdom."[7]

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[4] *CSPD* 1650, 89.
[5] *The False Brother, or, a New Map of Scotland, Drawn by an English Pencil; Being a Short History of the Political and Civil Transactions Between these Two Nations Since Their First Friendship: Wherein the Many Secret Designs, and Dangerous Aspects and Influences of that Nation on England are Discovered; with the Juggling's of Their Commissioners with the Late King, Parliament, and City* (London: R.W, 1651), 64. *EEBO.*
[6] *CSPD* 1650, 210; 217; *HOC** 26 June 1650.
[7] *HOC** 26 June 1650.

Furthermore, historian Thomas Carlyle summarizes the House of Commons further discussion on the need for an invasion of Scotland as:

> The Scotch also have got forces ready; will either invade us, or (which we decide to be preferable) be invaded by us.[8]

Cromwell himself asserted that "they [Scotland] also took liberty to stir up the people to blood and arms and would have brought a war upon England."[9] Parliamentarians also pointed to Scots' previous meddling in English affairs, citing their actions within the civil wars and the Duke of Hamilton's invasion in 1648:

> Whereas the parliament and Kingdom of Scotland have by their late perfidious and hostile invasion under the late Duke Hamilton, and other their manifold practices and designs really evidenced to be still continued against this state, broken, and annulled the solemn league and treaties made betwixt them and this nation; and thereby, and by a wilful rejection of all peaceable overtures for a fitting accommodation of differences, after their many insufferable Wrongs and Provocations, have rendred it just and necessary for this commonwealth to send an army into that kingdom.[10]

A further publication entitled *The English Banner of Truth Displayed* (1650) suggests that Scotland moved against England directly by siding with Charles Stuart and allowing Irish Catholics within their armies: "they have joyned with all the old enemies of England. Papists and Malignants; with the rebels in Ireland whom they entertain in their armies as officers and souldiers."[11] The anonymous author also notes that Scottish

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[8] Thomas Carlyle, *Letters and Speeches of Oliver Cromwell* 2, ed. S.C Lomas (London: 1904), 64. *HathiTrust.* This block of text comes from Carlyle's version of the *Letters and Speeches of Oliver Cromwell*, which he took from the House of Common's Journals on the 26 June 1650.

[9] Wilbur C. Abbott, ed., *The Writing and Speeches of Oliver Cromwell* 2 (Cambridge: Harvard University Press, 1939), 337-338. https://archive.org/details/in.ernet.dli.2015.172680/page/n3/mode/2up

[10] *A&O*, 406.

[11] *The English Banner of Truth Displayed or, the State of this Present Engagement Against Scotland* (London: 1650), 2. *EEBO*

opinions of Charles I and the legality of his death changed over time, prompting concerns over Scottish intentions: "And when some of us being unsatisfied whether we should kill the King if we met them in a charge, and went to many of you to be resolved; did not you tell us that we might lawfully kill him? How comes now your judgement to be altered?"[12] Those who were not in support of the invasion often pointed to the Solemn League and Covenant and their vow to uphold it.[13] To this, those in favour of the invasion argued that Scotland had already broken the Solemn League and Covenant by their meddling and thus the English were no longer bound to uphold it.[14] Ultimately then, a preponderance of English MPs felt they were justified in their suggestion of the invasion due to the wrongs they deemed Scotland had committed against them.

On 22 July 1650, what was originally meant as a precaution became an offensive invasion into Scotland backed by a declaration from the Council of State entitled *A Declaration of the Army of England Upon Their March into Scotland* (1650). The declaration outlined those reasonings listed by English MPs as the motivations for the invasion supported with religious ideology.[15] Specifically, the author argued that the New Model Army was acting on behalf of God, in retaliation for the Scots' previous meddling in English affairs.[16] The English insisted that the invasion was an attempt to 'save' the godly according to God's plan, arguing against Scottish Presbyterian restrictions and limitations imposed by the Scottish kirk which did not allow the Scots to reach their

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[12] *The English Banner of Truth Displayed*, 7.
[13] *Whitelocke* 3, 208.
[14] *A Declaration of the Army of England Upon Their March into Scotland*, 5; *Whitelocke* 3, 208.
[15] *A Declaration of the Army of England Upon Their March into Scotland*, 3-9.
[16] Ibid., 8-10.

destiny.[17] The insistence that the fault of the invasion should be laid on the Scottish parliament and Kirk is also present in the parliamentary acts, particularly that of 2 August 1650 entitled *An Act to Prohibit all Commerce and Traffique Between England and Scotland, and Enjoyning the Departure of Scots, out of this Commonwealth*.[18] The act states that any Scottish person residing in England must return to Scotland or else be declared an enemy of the commonwealth, and declares anyone who communicates, interacts, or helps a Scottish person, a traitor to the commonwealth.[19] Through this act, the English MPs were directly targeting wealthy Scottish landowners who often resided in England. Thus, the English parliament sought to blame the Scottish leaders, both religious and political, for the invasion based on previous events.[20]

Just as the English were debating and later publishing their reasons for the invasion, the Scottish parliament and Kirk were attempting to shape Scottish opinion by refuting English claims through wide-scale publications in Scottish cities and towns.[21] In much the same fashion as the English publications, the Scottish versions focused on religious ideology, the evils of toleration, and the Solemn League and Covenant.[22] The

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[17] Abbott, *Writings and Speeches of Oliver Cromwell*, 337-38; Crawford Gribben, "The Church of Scotland and the English Apocalyptic Imagination, 1630 to 1650," *The Scottish Historical Review* 88, no. 225 (April 2009): 55; Spurlock, *Cromwell and Scotland,* 19-35; Little and Smith, *Parliaments and Politics during the Cromwellian Protectorate*, 110.
[18] *A&O*, 406-9.
[19] *A&O*, 406-9.
[20] Dow, *Cromwellian Scotland*, 32.
[21] Spurlock, *Cromwell and Scotland*, 17.
[22] See for instance *A Declaration of the Committee of Estates of the Parliament of Scotland, in Answer to Some Printed Papers, Entitled the Declaration of the Parliament of England, and the Declaration of the Army of England, Upon Their March into Scotland* (Edinburgh: 1650). *EEBO*; *The Scots Declaration Against the Toleration of Sects and Sectaries, and the Liberty of Conscience* (London: 1647). *EEBO*; *A Solemn*

Scottish publication *A Declaration of the Committee of Estates of the Parliament of Scotland, in Answer to Some Printed Papers* (1650) insisted the English had broken the Solemn League and Covenant through Charles's execution; however, they still believed themselves to be upholding the covenant.[23] Other publications such as *The Scots Declaration Against the Toleration of Sects and Sectaries, and the Liberty of Conscience* (1647) and *A Solemn Testimony Against Toleration and the Present Proceedings of Sectaries and their Abettors in England, in Reference to Religion and Government* (1649) argued against liberty of conscience, insisting that it would bring forth heresies and revoke any progress made during the Scottish Reformation.[24] Historian Scott Spurlock argues that the Scottish Kirk insisted their actions were taken on God's behalf as the "champion of reformed religion" who protected Protestantism against the Independents and promoters of freedom of conscience who overtook the English church.[25] Ultimately, the English and Scottish publications were direct propaganda to support their claims, as both insisted the other broke the Covenant and had lost God's trust.

On 3 September 1650, Cromwell and the New Model Army met David Leslie and the Scottish army at the Battle of Dunbar. Sadly for the Scots, Dunbar became an English

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Testimony Against Toleration and the Present Proceedings of Sectaries and Their Abettors in England, in Reference to Religion and Government (Edinburgh: 1649). *EEBO*

[23] Anon, *A Declaration of the Committee of Estates of the Parliament of Scotland*, 23; Kirsteen M. Mackenzie, "A Contented Space: Demonstrative Action and the Politics of Transitional Authority in Glasgow 1650-1653," in *Medieval and Early Modern Representations of Authority in Scotland and the British Isles*, eds. Kate Buchanan, Lucinda H.S Dean, and Michael Penman (London: Routledge, 2016), 74; MacInnes, *British Revolution, 1629-1660*, 189.

[24] *The Scots Declaration Against the Toleration of Sects and Sectaries, and the Liberty of Conscience* (London: 1647), 1-5. *EEBO*; *A Solemn Testimony Against Toleration and the Present Proceedings of Sectaries and Their Abettors in England, in Reference to Religion and Government* (Edinburgh: 1649), 1-14. *EEBO*

[25] Spurlock, *Cromwell and Scotland*, 13.

victory with Cromwell reporting the Scottish dead at nearly three thousand, with ten thousand prisoners.[26] As the remaining Scots fled, the victory granted the English a straight path into Edinburgh and thus a multitude of resources. Over the next year, the English army would continue to invade further into Scotland, capturing St. Andrews, Aberdeen, Dundee, and Glasgow as they moved north and west. By the end of Summer 1651, the English had captured most of Scotland with the exception of a few strongholds in the Highlands.[27] In a last attempt to beat the English Parliamentarians, the English and Scottish royalists captured Worcester and engaged with the New Model army on 3 September 1651. Yet, this was a failed attempt, for the Royalist army was overcome as the Earl of Middleton and Charles II fled into exile, diminishing any remaining hopes for monarchy and granting the English almost full control of Scotland.[28]

Following the battle of Worcester, Scotland became a conquered state under English military control and martial law, with many people at risk of arrest and imprisonment and their lands and estates subject to forfeiture.[29] In an attempt to provide more 'even-handed justice' and control, the English army established multiple garrisons, both in the lowlands and the highlands, while forcing Scottish communities to provide food, housing, and maintenance for the army free of charge.[30] Thus, a primary intention of the English army's actions was to secure the conquest and punish those who had opposed the commonwealth.

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[26] Carlyle*, Letters and Papers* 2, 115.
[27] Dow, *Cromwellian Scotland*, 14-17.
[28] Ibid., 14-17.
[29] *HOC*, 9 September 1651.
[30] Dow, *Cromwellian Scotland*, 23.

Between September and December 1651, the English parliament debated intensely what to do with the Scots- to treat them as conquered peoples or inquire into a union. In the beginning it seemed as if Scotland would remain a conquered kingdom, with the defeat of Charles Stuart becoming a day of public thanksgiving and 3 September becoming a commemoration of Cromwell's military victories.[31] In parliamentary discussions, some members pushed for Scotland to become absorbed into the English commonwealth like Ireland or Wales, replacing Scottish law, custom, and religious innovations with their English counterparts.[32] Along these lines, the House began producing a bill entitled *for asserting the right of the commonwealth to so much of Scotland as is now under the power of the forces of this commonwealth*, but the bill was only read once before it was dropped in favour of proposals for moderate forms of union.[33]

The question of what led to this relatively quick change from subjugation to union has puzzled historians for years. Some historians, such as Frances Dow, suggest the transition only occurred after Cromwell joined the debate so the reason for union must lie within Cromwell himself.[34] This is interesting when we consider when Cromwell became a prominent figure head for the commonwealth- right before the invasion. Originally, Lord Fairfax was appointed to lead the New Model Army but his personal beliefs on the

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[31] C. S Terry, ed., *The Cromwellian Union: Papers Relating to the Negotiations for an Incorporating Union Between England and Scotland 1651-1652* (Edinburgh: T. A Constable, 1902), xvii. *HathiTrust*; Dow, *Cromwellian Scotland*, 30.
[32] Hirst, "Security and Reform," 177.
[33] Dow, *Cromwellian Scotland*, 30; William Ferguson, *Scotland's Relations with England*, 136.
[34] Dow, *Cromwellian Scotland,* 31-33.

invasion forced him to step down, eventually being replaced by Cromwell.[35] Although Cromwell continually noted in his letters that the invasion was God's will, his role within the invasion and the switch from subjugation to union after his return to the political field suggests that while he believed invasion necessary, he saw it as a prelude to something other than subjugation.

On 22 October 1651, the English parliament ordered eight English commissioners to enter Scotland to discuss with Scottish communities proposals for union. The commissioners were known as the *commissioners of the parliament of the commonwealth of England, for ordering and managing affairs in Scotland* and included Major General John Lambert, Major General Richard Deane, Lieutenant General George Monck, Chief-Justice Oliver St. John, Sir Henry Vane, Colonel George Fenwick, Major Richard Salwey, and Alderman Robert Tichburne.[36] All of the commissioners were either military personnel or politicians: Lambert, Deane, Fenwick, and Monck had all fought on behalf of the parliamentarians during the civil war, and Vane was a administrator and politician highly involved in the management of Cromwell's Irish and Scottish Campaigns.[37]

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[35] Fairfax believed it wrong to invade Scotland, arguing that the Scottish people were their brothers in arms, *Whitelocke* 3, 209-10. For more information on the New Model Army, see C. H Firth*, Cromwell's Army* (London: 1902); Ronald Hutton, *The British Republic 1649-60* (Basingstoke: 2000).

[36] John Lamont, *The Chronicle of Fife: Being the Diary of John Lamont of Newton, from 1649 to 1672* (Edinburgh: A Constable, 1810), 45. *HathiTrust*; C. H Firth, ed., *Scotland and the Commonwealth: Letters and Papers Relating to the Military Government of Scotland, from August 1651 to December 1653* (Edinburgh: Edinburgh University Press, 1895), 32.

[37] D.N. Farr, "Lambert [Lambart], John (bap. 1619, d. 1684), parliamentary soldier and politician," *Oxford Dictionary of National Biography*, 23 September 2004; J. K. Laughton, Michael Baumber, "Deane, Richard (bap. 1610, d. 1653), army and naval officer and regicide," *Oxford Dictionary of National Biography*, 23 September 2004; Walter W. Woodward, "Fenwick, George (c. 1603-1657), colonist in America, army officer, and politician, *Oxford Dictionary of National Biography*, 23 September 2004;

Tichburne, Salwey, and St. John were more involved in a civil political sense, as Tichburne was a commissioner in the High Courts of Justice, Salwey was a member of parliament, and St. John had been an ambassador at the Hague prior to his appointment.[38] Thus, all eight commissioners held previous experience in politics, government, or international diplomacy.

The Council of State gave the commissioners direct orders to repair to places of Scotland as they wished, along with specific instructions for those areas of government needing immediate attention. The commissioners were ordered to "dispose the people there to a compliance with the resolutions of the parliament in their declaration expressed. And to [put in] to effect such of the particulars therein as upon the place you shall find cause to be put in execution."[39] To further these ends, commissioners were ordered to promote public preaching, to reform the universities, colleges, and schools in Scotland to advance the 'true religion,' to ensure that freedom of conscience was enforced, to alter or abolish statutes, orders, or customs not in the best interests of the commonwealth, to commit to prison or restrain anyone who acted against the

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Ronald Hutton, "Monck [Monk], George, first duke of Albemarle (1608-1670), army officer and naval officer," *Oxford Dictionary of National Biography*, 23 September 2004; Ruth E. Mayers, "Vane, Sir Henry, the younger (1613-1662), politician and author," *Oxford Dictionary of National Biography*, 23 September 2004.

[38] William Palmer, "St John, Oliver (c. 1598-1673), lawyer and politician," *Oxford Dictionary of National Biography*, 23 September 2004; Keith Lindley, "Tichborne, Robert, appointed Lord Tichburne under the protectorate (1610/11-1682), politician and regicide," *Oxford Dictionary of National Biography*, 23 September 2004; C. H. Firth, Sean Kelsey, "Salwey, Richard (bap. 1615, d. 1686), politician," *Oxford Dictionary of National Biography*, 23 September 2004.

[39] C. H Firth, ed., *Scotland and the Protectorate: Letters and Papers Relating to the Military Government of Scotland from January 1654 to June 1659* (Edinburgh: T. A Constable, 1899), 393. *HeinOnline*; Terry, *Cromwellian Union*, xviii-xx; *A Declaration of the Parliament of the Commonwealth of England Concerning the Settlement of Scotland* (London: 1652), 6-8. *EEBO.*

commonwealth or authority of the parliament, and to confiscate all lands and estates belonging to those who had moved against England, whether that be taking up arms or aiding Charles Stuart.[40] They were also to re-establish the civil government in Scotland through the erection of appropriate tribunals, removing persons deemed unworthy or unqualified from office, and appointing and authorizing worthy personnel as judges to ensure "that justice be done to all people in Scotland" and that the laws of England were followed in governmental matters.[41] Thus, the commissioners were to ensure that England and the army had full control over Scotland and its civil government, that a successful union could be completed without extensive appeals or promises, and that the Scottish state would be run through governmental procedures deemed appropriate by English officials.

The commissioners arrived in Dalkeith on 25 January 1652, later moving to Edinburgh, to begin fulfilling their responsibilities. A letter written in December 1651 from the commissioners to parliament asserted that the Scottish "people are generally willing to be brought into order, and rather part with King, Lords, and all, than undergo the miseries of a new Warr."[42] Contemporary Edmund Ludlow suggested that "the proposition of union was cheerfully accepted by the most judicious amongst the Scots, who well understood how great a condescension it was in the parliament of England, to

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[40] *A Declaration of the Parliament of the Commonwealth of England Concerning the Settlement of Scotland*, 6-7; *Whitelocke* 3, 392-93.
[41] John Nicoll, *A Diary of Public Transactions and Other Occurrences: Chiefly in Scotland, from January 1650 to June 1667*, ed. T. Constable (Bannatyne club, 1836), 80. https://archive.org/details/b22014822; W. Dunn McCray, ed., *Calendar of Clarendon State Papers* 2 (Burlington: TannerRitchie Publishing, 2010), 120-21. *MEMSO*.
[42] Terry, *Cromwellian Union*, 2.

permit a people they had conquered, to have a part in the legislative power."[43] Thus, it would seem that at least some of the Scots were willing to negotiate. That same month the commissioners publicly announced that their goal was to bring Scotland into a happy and lasting peace with England through a united commonwealth. Their terms included: that the government of England exist in Scotland through reforms and the commissioners, that Scots live peacefully and obediently under the parliament of England, and that each community will in turn help bring about the union.[44] The majority of the Scottish shires and burghs agreed to the union, but their positive promotion of the union was conditional on religious, legal, judicial, governmental, and economic needs being met.

Almost all the communities demanded church governance and procedure to follow Scottish Presbyterian models. Some communities, such as Dumfriesshire, asserted that they would not agree to religious extremists being present or unpunished.[45] This became problematic for English MPs who were bound by their own laws to promote religious toleration. The insistence on Scottish Presbyterianism and refusal of religious toleration was so strong that some communities, particularly Glasgow and Kirkcudbrightshire, refused to agree to the commissioners' terms.[46] Glasgow's representatives argued that they would not change their government or church, and could not trust English MPs to not force changes which would reverse everything completed during the reformation. Furthermore, they argued that the commissioners' terms meant

[43] C.H Firth, ed., *The Memoirs of Edmund Ludlow* 1 (Oxford: Clarendon Press, 1894), 298-99. *HathiTrust*
[44] Terry, *Cromwellian Union*, 14-15.
[45] Ibid., 39-40.
[46] Ibid., 34-35, 118-20.

they "would establish vast and boundless tolerations of all sorts of errors and heresies."[47] Along the same lines were the reasons for the dissent of Kirkcudbrightshire, whose representatives argued that the reformed Presbyterian religion needed to be protected from religious toleration and other heresies, and that the English commonwealth government included too many superstitions, heresies, and profanities to be considered a better means of administration.[48] Ultimately then, Scottish communities demanded an assurance that Scottish Presbyterianism and the Scottish Kirk would remain untouched before they agreed to the union.

From an economic standpoint, Scottish communities announced proposals regarding trade and the number of soldiers stationed in Scotland. Places like Edinburgh, which was invaded first, declared the need for free trade and a decrease in the military presence. The city's inhabitants had been overrun by the presence of the soldiers who relied on them for food and housing.[49] The community of Stirlingshire even suggested that either the number of soldiers be decreased or the militia be made to pay for their needs.[50] Some communities also asked for a revival of the mint and help in increasing the fisheries in Scotland to allow for economic prosperity.[51]

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[47] Terry, *Cromwellian Union,* 34-35. Ultimately, Glasgow's dissent did not last long, as a quick occupation by the English army lead to a forced act of acceptance. For more information on the dissent and overthrow of Glasgow see Kirsteen Mackenzie, "A Contested Space: Demonstrative Action and the Politics of Transitional Authority in Glasgow 1650-1653," in *Medieval and Early Modern Representations of Authority in Scotland and the British Isles*, eds. Kate Buchanan, Lucinda H.S Dean, and Michael Penman (London: Routledge, 2016), 68-82.
[48] Terry, *Cromwellian Union*, 118-20.
[49] Ibid., 54.
[50] Ibid., 82.
[51] Ibid., 54.

In terms of government and law, the proposals were quite straightforward: the Scots wanted to be active in government, to hold an equal representation in parliament, and to be governed according to their own laws. Some communities argued that governmental offices should remain in Scottish hands, while others proposed that elections to these offices should be managed by English commissioners to allow for minimal bias.[52] Ultimately, the desire to be governed and to have justice served based on Scottish laws became problematic when incorporating possible English judicial personnel. English MPs cited previous problems when attempting to assimilate the laws of England and Scotland in earlier discussions of union, noting the differences amongst the law codes, such as the influence of Roman Canon Law on Scots law.[53] Ultimately, the English lawyers in these debates often found themselves fearful of losing their rights if Scots law was incorporated rather than replaced, and vice versa for the Scottish lawyers.[54] Thus, the question of which system of laws to enforce in Scotland became an ongoing point of debate.

Other proposals from Scottish communities included the return of courts which previously existed in Scotland such as Baron Courts, and a greater focus on preventing and punishing crime.[55] Many border communities needed assurance that crime along the borders would be dealt with, whether by governmental acts or the installation of judicial

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[52] For instance the city of Stirling wanted Scots to retain these offices, while several persons in Edinburgh and Nairnshire felt that the English commissioners should be responsible for appointing people to these offices, as long as they remained governed by Scottish law. Terry, *Cromwellian Union*, 57-58, 79, 102.
[53] This is prevalent in the 1656 discussions of union. J.T Rutt, ed., *Diary of Thomas Burton Esq*. 1 (London: H. Colburn, 1828), 13-16. *HathiTrust.*
[54] Levack, *The Formation of the British State*, 32-33, 35-37.
[55] Terry, *Cromwellian Union*, 81-82.

officers.[56] As we shall see, communities also proposed both the continuance and dismissal of heritable privileges, the need for better maintenance of the poor, and the return of the Scottish registers. Specifically, Dumfriesshire's representatives argued for the continuation of heritable privileges while Selkirk proposed community elections for these positions.[57] The representatives for Edinburgh declared that an act of oblivion had to be granted before they would help in producing a union.[58] This act of oblivion would allow for Scottish prisoners to be released and the punishment of forfeiture dropped.[59] Overall, the proposals put forth by Scottish communities centered around their political and legal rights as Scots, the ability to be self-sufficient, and the ability to follow and protect the Scottish religion.

In response to the multitude of proposals, English commissioners assured parliament that a union would be possible, although some appeasement would be needed. The commissioners felt the proposals regarding government and law were the most important, suggesting that parliament address these directly. The commissioners also suggested that English officials take over judicial administration, and that laws and oaths surrounding the office of King be abolished to secure the English position in Scotland and a lasting union.[60] In response, on 25 March 1652 the English parliament put forth *A Declaration of the Parliament of England in Order to the Uniting of Scotland into one*

[56] Terry, *Cromwellian Union*, 60-62.
[57] Ibid., 39-41; 108; 82.
[58] Edinburgh argued that an act of oblivion was needed meanwhile Perthshire, Orkney, and Shetland all demanded the release of prisoners and an act of grace and favour. Terry, *Cromwellian Union*, 53, 123-26; 127-29.
[59] Stirling and Stirlingshire demanded forfeitures be ended, as well as the registers returned. Terry, *Cromwellian Union*, 78-80, 81-83.
[60] Terry, *Cromwellian Union*, 98-99.

Commonwealth with England which outlined the various procedures and proposals which would be put into effect.[61] Included in this declaration was the incorporation of Scotland into a single commonwealth with England, under which Scotland and England would be represented by one joint parliament made up of both Scottish and English representatives.[62] To further promote a successful union, parliament ordered each Scottish shire and burgh (who agreed to the union) to elect one representative for a meeting in Edinburgh where elections for parliamentary representatives would be held.[63] Following the Edinburgh elections, Scotland was granted 21 representatives in parliament: 14 for the shires and 7 for the burghs.[64] It was also determined that Scotland would be ruled according to its own laws "until a known law be established for governing Scotland and England united into one commonwealth."[65]

Following the Scottish meetings, discussions of union continued within the English Council of State and parliament, and among the commissioners in Scotland. From 1653-1654 parliament put forth multiple changes to promote and secure a complete union. On 16 December 1653, parliament enacted a declaration entitled *The Government of the Commonwealth of England, Scotland, and Ireland, and the Dominions thereunto belonging* which outlined governmental aspects of the united commonwealth.[66] These included: that the majority of the power within the commonwealth was to reside in one person (Oliver Cromwell) and parliament, that the Christian religion was recommended

[61] Terry, *Cromwellian Union*, 140-44.
[62] Ibid., 140-44.
[63] Ibid., 141-42
[64] Ibid., 141-42.
[65] *CSPD* 1653-1654, 269.
[66] *A&O*, 813-22.

as the profession of the nations although the present means of teaching would remain until a new method could be developed, and "that all laws, statutes, and ordinances, and clauses in any law, statute, or ordinance to the contrary of the aforesaid liberty, shall be esteemed as null and void."[67] Following this ordinance, parliament also declared that the name used in proceedings of law, justice, and equity would be changed from "the Keepers of the liberty of England" to "The Lord Protector of the commonwealth of England, Scotland, and Ireland, and the dominion thereto belonging."[68] Thus, by the end of 1653 a union was well underway with Oliver Cromwell at its head.

On 12 April 1654, union was proclaimed through *An Ordinance for Uniting Scotland into one Commonwealth with England*.[69] The ordinance declared that both Scotland and England would be ruled under one government, that Scotland would gain 30 seats in parliament, that all fealties, homage, service, and allegiance to the late King were undone, that kingship was abolished, that the estates of Scotland were abolished, that free trade would exist between England and Scotland, that all superiorities, lordships, and jurisdictions in Scotland were abolished, and that all kingly courts and offices were abolished.[70] Thus, through a more complete union, Cromwell and parliament abolished kingship and created a united British state, at least for the time being.

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[67] *A&O*, 822.
[68] *A&O*, 813.
[69] *A&O*, 871-75; *An Ordinance for Uniting Scotland*, 253-60.
[70] *A&O*, 871-75. Scotland was granted 30 seats, but after the first election only 22 of those seats remained, 9 of which were filled by English politicians. A Mark Godfrey, Parliament and the Law" in *The History of the Scottish Parliament- Parliament in Context, 1235-1707* 3, eds. Keith Brown & Alan MacDonald (Edinburgh: Edinburgh University Press, 2010), 183.

So why union? Why not subjugation? Why did Scotland agree? Historian David Stevenson suggests that if Scotland did not want to be subjugated to England in much the same way as Wales they had to agree to the union, even though either option was a threat to Scottish independence, government, and Kirk.[71] Yet, it is entirely possible that the Scottish communities accepted their fate within the commonwealth and decided that it was better to have a small say than no say at all, as noted by Ludlow.[72] Historian Sarah Barber suggests that the union was meant to be a quicker method of controlling Scotland from London, increasing highland clearances while spreading protestant ideologies. Ultimately then, Barber insists that union was used to quicken England's control over Scotland and Ireland.[73] Historian Brian Levack suggests that the change to union was an act of expanding England across the Isles to create a state where God would like to dwell, rather than a British state similar to that wanted by James VI/I. [74] Thus, Levack suggests the union was an act of state-building rather than nation-building, as the union attempted to create a state where God would like to dwell not a nation.

Brian Levack's argument that the English sought state-building rather than nation-building becomes interesting when put together with concerns regarding subjecthood and naturalization. For instance, reconsider the parliamentary act to prohibit all commerce and traffic between England and Scotland, enacted on 2 August 1650.[75] The second part of the act orders all Scottish persons living in England to return to Scotland, deeming

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[71] Stevenson, "Cromwell, Scotland, and Ireland," 199. This argument is also commonly asserted by Barry Coward in Barry Coward, *The Cromwellian Protectorate* (Manchester: Manchester University Press, 2002), 35.
[72] Firth, *Ludlow*, 298-99.
[73] Barber, "Scotland and Ireland under the Commonwealth," 220.
[74] Levack, *The Formation of the British State*, 202.
[75] *A&O*, 406-09.

them guilty of treason if they failed to do so.[76] It is possible that parliament added this part because they were concerned about Scottish sympathies. Yet, when we take into account that James VI/I named all Scottish persons born after 1603 subjects of both England and Scotland, the forceful removal of Scots raises questions regarding naturalization and subjecthood, particularly to whom allegiance was owed.[77] This area of concern has been much discussed within the framework of 'Calvin's Case,' a prominent case of subjecthood and alienation following the 1603 union.[78] This case was the first to focus on the King's prerogative, interrogating "whether James Stuart's accession to the English crown altered the scope of 'allegiance' so that birth in Scotland became from then on birth 'within the allegiance'."[79] Thus, it debated whether subjecthood and allegiance referred to the King's politic or natural body.[80] Ultimately, the judges found that Robert Calvin, Scottish-born, was to be a subject in England, not an alien, because the allegiance of his birth was to the King's natural body, and outside the bounds of the

[76] *A&O*, 407-09.
[77] Sir Edward Coke, "Calvin's Case," in *The Reports of Sir Edward Coke, Knt. in English, in Thirteen Parts Complete; with References to all the Ancient and Modern Books of the Law* 4, ed. George Wilson (London: 1777), 1-28. *ECCO.*
[78] For more information on this case see Anon, "The Case of the Post Nati," in *Cobbett's Complete Collection of State Trials 1603-1627* 2 (Burlington: TannerRitchie Publishing, 2018), 559-698; Keechang Kim, "Calvin's Case (1608) and the Law of Alien Status," *The Journal of Legal history* 17, no. 2 (1996): 155-71; Keechang Kim*, Aliens in Medieval Law: The Origins of Modern Citizenship* (2000).
[79] Kim, "Calvin's Case," 156.
[80] King's politic body refers to the King's Prerogative based on the laws of that nation, whereas the King's natural body refers to the King's Prerogative based on the laws of nature. In this case, Calvin was not technically a subject of England according to the laws of England, however, he was a subject of England according to the laws of nature because the King had a right to protect all his subjects no matter what state they were in.

English kingdom.[81] Thus, King James's Scottish subjects were granted greater rights and freedoms, at least for the time being.

The naturalization of Scottish subjects into both English and Scottish subjects was made null and void following the execution of Charles I, for without a king you cannot have a kingdom. Although Scotland declared Charles II King in 1650, and named him King of Scotland, England, and Ireland, their subjecthood relied on his office of King, which was non-existent in England. With this understanding, English MPs then were only attempting to remove Scottish people who represented a threat to the state and were not technically subjects of England (or in this case citizens of England). Referring back to Brian Levack's argument of state-building, the removal of Scots protected the English state but also meant that Scots would need to agree to English terms to access the rights and liberties which they once held under James VI/I. Thus, the removal of Scots and conquering of Scotland allowed for an extension of English power. Arguably however, the union did act as a form of nation-building, although I will suggest it did not mean to. Cromwell was attempting to complete a form of state-building as outlined by Brian Levack but the transition to union unintentionally took this one step farther uniting the British isles into a nation where God would like to dwell.

As noted above, this union was different from those previously attempted by James VI/I. King James wanted a perfect union, also referred to as a 'union of love,' which would fully assimilate the legal, cultural, religious, political, and economic

[81] Coke, "Calvin's Case," 1-28*;* Kim, "Calvin's Case," 160.

practices of England and Scotland to create the 'Kingdom of Great Britain.'[82] These changes would have meant a drastic overhaul of everything contemporaries knew and understood, ultimately influencing the decision to forgo a complete union in 1607.[83] Yet, in 1650 the Scots had lost their constitutional rights as Scottish subjects by the very nature of the invasion, so the complete and perfect union previously wanted by James could have been attempted. The failed attempt to take advantage of the opportunity for a 'perfect' union suggests that complete dominance over the British Isles was more important than a fully integrated union between England and Scotland. This is expressed through the taking of the registers of Scotland in 1651. The Scottish registers were taken and transported back to England upon the invasion of Stirling, where they were taken from Stirling Castle and transported to the Tower of London.[84] Ultimately, one could consider this to be a power move often associated with invasions, for a state cannot govern itself without its respective papers, regulations, legislation, or archive. This action can also be considered an attempt to gain further control over Scotland in an

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[82] James had wanted a union which would allow for the combination of England and Scotland in all forms (government, law, trade, economy, religion) which would create 'the Kingdom of Great Britain.' This 'perfect union' as contemporaries called it was coined by Brian Levack as a union of love. Levack, *The Formation of the British State*, 4.
[83] *RPS*, 1604/4/20. Following James's ascent to the English throne the specific laws, customs, and treaties of the border lands were abolished in favour of the current practices within the rest of England and Scotland. *RPS* 1607/3/12. For an extensive discussion of both the Scottish and English arguments against union see Levack, *The Formation of the British State*, 31-101; Bruce Galloway, *The Union of England and Scotland, 1603-1608* (Edinburgh: J. Donald, 1986).
[84] *CSPD* 1651, 373; *HOC,* 27 August 1651. The records were kept at the Tower because this was the site of the Record Keeper. For more information on the Tower of London see Nigel Jones, *Tower: An Epic History of the Tower of London* (London: Hutchinson, 2011); Peter Cunningham, *Handbook of London* (London: John Murray, 1850); Philip Thomas, "Tower of London's Royal Menagerie," *History Today* 46, no. 8 (August 1996): 29-35; Jeremy Ashbee "Torture at the Tower," *History Today* 53, no. 5 (May 2003): 8-9.

administrative and civil fashion, rather than a militarized one. The removal of the registers acts within an administrative fashion because it limits the extent of government in Scotland and only allows those governmental branches which English MPs deemed necessary and useful. The removal of the registers also acts on a political level by removing items which symbolically represent sovereignty. Thus, the garrison commanders and army officers used multiple techniques to further their control in Scotland.

In some cases, though, the removal of the registers from Scotland also caused problems for the commissioners attempting to re-start Scottish civil government. Specifically, this affected the judges hearing cases relating to property and forfeiture for they did not know who owned which land or the rights of persons in that state. As early as January 1652, Scottish commissioners demanded the return of the registers to Scotland to allow for civil government and justice to be exercised correctly.[85] Yet, it was not until 1653 that the records were returned. The council of state record for the 5 October 1653 notes that the registers (at least those dealing with 'private persons' rights'):

> be forthwith sent back to Scotland, to be disposed of as the commissioners for administration of justice there shall find expedient for the good of that service. And that it be referred to the committee of Irish and Scottish affaires to take care of sending the said registers into Scotland accordingly. And also to give order to Mr. Rylie, with all convenient speed to sort and separate the rest of the said private registers and warrants thereof, and private securities which are not already separated from those of publique government that the same may be also accordingly returned in due time.[86]

Ultimately, only those which were needed for civil government and personal justice were ordered to be sent back to Scotland in 1653, with the remainder being kept in the Tower.

[85] *HOC*, 2 January 1652.
[86] SP 25/71, p.47 (5 October 1653). *SPO.*

The full register was returned to Scotland in 1657, at least those papers which had not 'disappeared.'[87] Thus, the removal of the registers to London was an attempt to curb the Scottish government, limiting the control of nobles and government officials in Scotland until English commissioners were able to reshape the civil government there.

The years 1650-1654 produced multiple changes in both England and Scotland through the English invasion of Scotland, subjugation of Scotland, and then union of Scotland and England into one commonwealth. The invasion of Scotland by the English army was supported by many English MPs for a wide range of motivations, whether that be personal, objective, or fearful. Yet, the consequences of the invasion led to a union which was quite different from any previously attempted and would not be attempted again until 1707. Ultimately, the possibilities for why English MPs chose to create a union of Scotland and England instead of subjugating Scotland are numerous including theories of state-building, nation-building, empirical control, or just a means to an end. Nevertheless, by 1652 English officials were beginning to see and move towards a greater long-term goal. The invasion and conquest of Scotland, and removal of the Scottish registers allows historians to see how the law was used by English contemporaries as a tool of conquest. The removal of the registers not only forced all law courts to close and lawyers to pause their practices but forced an acceptance of English control over Scotland from Scottish communities. Further attempts to use the law as a tool of conquest will be seen in the following chapters within the discussions of law reform and changes to the law. The following chapters will further attempt to examine

[87] Lamont, *The Chronicle of Fife*, 36.

how English MPs used the law for their own ends by examining changes and reforms in law, justice, and court structures and systems.

Chapter 3: Republicanizing Scotland, c. 1651-1654.

Following the overthrow of Charles I and the removal of the House of Lords, what remained of the English parliament declared themselves a republican commonwealth, free from the grasp of monarchy. A principal part of this transition was the insistence on one's liberties and rights as citizens of the state, an ideology which grew out of the Renaissance and Reformation and was partially responsible for the loss of Charles' head. Glenn Burgess has argued that English republicanism was largely based on Machiavellian ideas of good governance promoted by Marchamont Nedham, a seventeenth-century journalist and pamphleteer, through a policy of "equability of condition."[1] This did not mean equality between social classes, but composure within the social classes and limited attempts to further one's own position. Ultimately, Nedham argued that English nobles were given more power than was acceptable for a commonwealth.[2] Thus, many of the changes which existed within England's interregnum and republican government revolved around the distribution and extent of power. The changes the English sought to secure in Scotland emerged from the same republican assumptions and aspirations.

Historian G. B Nourse notes that many English contemporaries saw the law as "torturous and unjust," that the law was difficult to access and use successfully, and had

[1] Glenn Burgess, *British Political Thought, 1500-1660: The Politics of the Post-Reformation* (New York: Palgrave MacMillan, 1992), 345; Joad Raymond, "Nedham [Needham], Marchamont (bap. 1620, d. 1678), journalist and pamphleteer," *Oxford Dictionary of National Biography*, 23 September 2004.
[2] Burgess, *British Political Thought*, 345.

become a badge of slavery, particularly to the common people.[3] This is just one of the reasons why the 1650s saw many English reforms which caused changes to the law and justice. Each proposal put forth was unique, as each English politician held a different idea of republicanism. For example, some revolutionaries wanted the English Common law removed altogether and the whole justiciary overthrown, while others preferred smaller changes such as the use of the vernacular in law.[4] A good many of the proposals put forth between 1649-1660 were enacted, many of these during the Barebones parliament or under the direction of William Sheppard. In England, a particularly important proposal and enactment was the creation of county courts following the suggestion that rural communities held limited access to the law due to the distance between themselves and the centralized courts at Westminster. The reformer proposed the creation of county court circuits which would allow common people greater access to the law and limit the number of cases heard at Westminster.[5] Other changes include the replacement of ecclesiastical law with the English common law, the loss of special privileges, the creation of the High Court of Justiciary, a reduction of crimes which were considered 'capital crimes,' and the removal of peine forte et dure.[6] Scotland was no

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[3] G.B. Nourse, "Law Reform Under the Commonwealth and Protectorate," in *Law Quarterly Review* 75 (1959): 512.

[4] For an examination of the reforms proposed by English revolutionaries see Nancy Matthews, *William Sheppard: Cromwell's Law Reformer* (Cambridge: Cambridge University Press, 1984); Donald Veall, *The Popular Movement for Law Reform* (Oxford: Clarendon Press, 1970); Stuart Prall, *The Agitation for Law Reform during the Puritan Revolution, 1640-1660* (The Hague: Martinus Nijhoff, 1966).

[5] Stuart Prall, *The Agitation for Law Reform during the Puritan Revolution, 1640-1660* (The Hague: Martinus Nijhoff, 1966), 55.

[6] See Barbara Shapiro, "Law reform in Seventeenth Century England," *The American Journal of Legal History* 19, no. 4 (October 1975): 280-312; Nancy Matthews, *William Sheppard: Cromwell's Law Reformer* (Cambridge: Cambridge University Press, 1984); Donald Veall, *The Popular Movement for Law Reform* (Oxford: Clarendon Press, 1970);

different in that there existed multiple personnel who proposed changes to the law and administration of justice which they believed had become corrupt or unusable. Many reformers hoped for changes similar to those in England, as can be seen in chapter one with the requests and proposals at Dalkeith.[7] Thus, the invasion in 1650 granted reformers the chance to propose their ideas to men who were already used to legal reform and possibly more openminded to their ambitions.

Historian A. Mark Godfrey argues that English rule in Scotland and the associated Cromwellian Union were more focused on governance and the exercise of jurisdiction than reforms to the contents of the law.[8] A quick examination of governmental practices during this period proves that the Union and English rule were focused on governance and jurisdiction due to the transition from subjugation to union. Yet, an examination of the legal reforms completed in Cromwellian Scotland suggests the changes Godfrey presented as secondary warrant more attention in their own right. Why then were Cromwell and English parliamentarians focused on reforming Scotland? Historians of Scotland, such as Brian Levack, suggest the reforms were to provide security for England but an examination of the changes which occurred shows there is more to this story.[9] Ultimately, the changes made in Scotland by the English parliament held a two-fold purpose: to provide security for England and to create a republicanized Scotland. This chapter will examine the reforms occurring during the years of 1651-1654 in Scotland to

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Stuart Prall*, The Agitation for Law Reform during the Puritan Revolution, 1640-1660* (The Hague: Martinus Nijhoff, 1966); Mary Cotterell, "Interregnum Law Reform: The Hale Commission of 1652," *The English Historical Review* 83, no. 329 (October 1968): 689-704.

[7] See both chapter 2 and Terry, *The Cromwellian Union,* 42; 44; 61; 71; 79; 82; 108.

[8] Godfrey, "Parliament and the Law," 181.

[9] Levack*, The Formation of the British State*, 202.

show that English changes were in part an attempt to create a republicanized Scotland as much as they were creating a republicanized England, just through Scots law and Scottish customs.[10]

From September 1650 to September 1651, the New Model Army occupied most of lowland Scotland, erecting military garrisons in important towns and cities, thus becoming responsible for ensuring peaceful conduct within the area and curbing resistance to English occupation. It set up garrisons in Leith, Edinburgh, Aberdeen, and Stirling.[11] Contemporary John Nicoll described religion and justice as the two pillars of Scotland.[12] Yet, in the conquest of Scotland both these pillars were destroyed, replaced by republican English versions. In his explanation of justice he states, "there was none in the land," as all courts were closed, all records and registers carried to London, and the people made to withstand the justice of English commanders and governors.[13] Thus, no Scottish courts were allowed to sit, no Scottish judges were allowed to practice, and the larger cities- Leith, Aberdeen, Dundee, and Edinburgh- held court martials to deal with matters of justice within the army as well as some civil matters.[14]

An examination of the court martial records for Dundee in 1651 shows the majority of cases were between Scottish people and English soldiers within a wide range of crime and punishment. The majority of cases focused on moral discipline, thievery, or

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[10] Obviously this chapter cannot examine every reform which occurred. Particularly, the ecclesiastical reforms are not discussed here.
[11] Dow, *Cromwellian Scotland*, 23.
[12] Nicoll, *A Diary of Public Transactions*, 65.
[13] Ibid., 65.
[14] The Scottish courts would remain shut until May 1652. Lamont, *The Chronicle of Fife*, 45; Firth, *Scotland and the Commonwealth*, 15; Dow, *Cromwellian Scotland*, 23-26.

murder, while punishments often ranged from lashes to riding the wooden horse for soldiers and whipping for local Scots.[15] For example, Bulstrode Whitelocke records "that an English soldier for lying with a Scots woman, was, by sentence of the court-martial, together with the woman, whipped through Edinburgh,"[16] while another soldier was ducked three times in water at high tide, whipped, and forced out of the town for whoredom.[17] The majority of cases which focused on moral cleanliness suggests a emphasis on moral integrity customary to other historians' findings on religious reform in England and Cromwellian reformers' obsessions with purity.[18] Yet, it also suggests that moral integrity was becoming an important aspect of English republicanism which the English thought necessary to ingrain in Scotland.

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[15] Davies Godfrey ed., "Dundee Court Martial Records 1651," in *Miscellany III* 19, series 2 (Scottish History Society: 1919), 9-67. *National Library of Scotland.*
[16] *Whitelocke* 3, 360.
[17] *Whitelocke* 3, 380.
[18] For more information on ecclesiastical reforms and moral integrity see Barry Coward, *The Cromwellian Protectorate* (Manchester: Manchester University Press, 2002); Nancy Matthews, *William Sheppard: Cromwell's Law Reformer* (Cambridge: Cambridge University Press, 1984); Donald Veall, *The Popular Movement for Law Reform* (Oxford: Clarendon Press, 1970*)*; Blair Worden, "Toleration and the Cromwellian Protectorate;" in *Persecution and Toleration: Papers Read at the Twenty Second Summer Meeting and the Twenty-Third Winter Meeting of the Ecclesiastical History Society,* ed. W.J Sheils (Great Britain: T.J Press Ltd. Padstow, 1984), 199-233; Blair Worden, *The Rump Parliament, 1648-1653* (Cambridge: Cambridge University Press, 1974); Blair Worden, *God's Instruments: Political Conduct in the England of Oliver Cromwell* (Oxford: Oxford University Press, 2012); Lesley Smith, "Sackcloth for the Sinner or Punishment for the Crime? Church and Secular Courts in Cromwellian Scotland," in *New Perspectives on the Politics and Culture of Early Modern Scotland,* eds. John Dwyer, Roger A. Mason, Alexander Murdoch (n.d[1982]), 116-32; Alastair Mann, "The Law of the Person: Parliament and Social Control," in *The History of the Scottish Parliament- Parliament in Context, 1235-1707* 3, eds. Keith Brown & Alan MacDonald (Edinburgh: Edinburgh University Press, 2010), 186-215.

The Dundee court martial records also contained multiple cases of murder and thievery. Let us examine a case against a Mr. Robert Bell.[19] Robert Bell was accused of robbery, with evidence suggesting that Bell had demanded money from the locals on the fake orders of the Lieutenant General. When the person in question could not pay the debt, Bell threatened and robbed them.[20] Later within the case a Mr. James Battray came forward to state:

> on Sunday last in the morning being in Cowper in the chamber with Robert Bell, this deponent amongst other discourse heard the said Bell say, that last winter hee went out of his quarters into the west with 3 or 4 more with him, and kill'd 7 Englishmen, that after they had cutt 5 of their throates, two of them crying for mercy, hee bid them kill them.[21]

Following this release of information, the members of the bench debated whether he was to be charged for treason as a spy, or for theft and robbery. In the end, Robert Bell was found guilty of all charges and hanged at the marketplace, as was customary for treason.[22] Historian Godfrey Davies described English court martial justice as seeking "to gain the acquiescence of the Scots by the impartial administration of justice and to secure their own supremacy by the maintenance of strict discipline."[23] As can be seen by this example, the English judges treated harshly those guilty of murder, especially when aspects of treason or unethical behaviour were suggested, no matter the ethnicity of those

[19] There is no record outlining whether Mr. Robert Bell was Scottish or English. An informed guess would suggest he was English, as he was supposedly acting on the orders of the Lieutenant General. This is also from a court-martial record led by English soldiers and the majority of cases were in regard to the actions of English soldiers.
[20] Godfrey, "Dundee Court Martial Records 1651," 41.
[21] Ibid., 41.
[22] Ibid., 42.
[23] Ibid., 6.

involved. The Dundee court martial records show that justice, at least in some capacity, was taking place in Scotland within the restraints of martial law.

Scotland could not become a republic within the grasp of martial law and courts martials alone, however. Following the Dalkeith meetings, English commissioners tried to republicanize Scotland beginning with erecting appropriate courts of justice. A proclamation by English commissioners in 1651 identified the need for courts of judicatory within Scotland but noted that it would take some time to set up courts which would be effective in the future.[24] This was particularly important because the court of session had not sat since February 1650.[25] An anonymous proposal in 1659 stressed the need for judicatories in Scotland, arguing that the sheriffs were corrupt, those arrested were unable to defend themselves, people were either imprisoned or escaped justice, and many who relied on the courts for money were without.[26] Although this proposal was published in 1659, the continual desire for 'appropriate' judicatories suggests that those effective courts, which the English so desired, may not have existed. Nevertheless, until 'effective' courts could be erected, the commissioners were to authorize others for the administration of justice who would take over the responsibilities of the court of session.[27]

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[24] *By the Commissioners of the Parliament of the Commonwealth of England for Ordering and Managing Affairs in Scotland* (Leith 1651). *EEBO*
[25] Dow, *Cromwellian Scotland,* 25.
[26] Robert Pittilloh, *Scotland Mourning or a Short Discovery of the Sad Consequences which Accompanies the Delay of the Settling Judicatories in that Nation* (London: 1659), 3-8. *EEBO*
[27] *By the Commissioners of the Parliament of the Commonwealth of England for Ordering and Managing Affairs in Scotland*, 1; Nicoll, *A Diary of Public Transactions*, 80.

Seven persons were appointed by the English commissioners in charge of Scottish affairs for ensuring fair justice within Scotland, three Scottish and four English: Sir John Hope of Craighall, John Swinton, and William Lockhart; Edward Moseley, George Smith, Andrew Owen, and Richard Marsh.[28] They would be known as the Commissioners for administration of justice in Scotland.[29] Both John Swinton and William Lockhart held previous sympathies for Charles II: Swinton was a member of the Scottish parliament, a Lord of Session before the 1650 invasion, and trained as a lawyer. Lockhart was educated on the continent, knighted by Charles I, and participated in Hamilton's invasion in 1648. Yet, both transferred their loyalties and were able to acquire prominent positions sitting in the Commonwealth parliament and the negotiations for union.[30] John Hope of Craighall was also an influential member of society who was educated in law and held a thriving practice prior to the 1650 invasion.[31] Not much is known about the appointed English judges, but one can assume that they were well versed in politics and English law from their later positions on the Council of State.

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[28] Terry, *Cromwellian Union*, 174-75; *CSPD* 1651-1652, 210. On the 15 October 1653, both Andrew Owen and Richard Marsh were dismissed as commissioners of justice in Scotland as they took up new commissions on the council of state in England. They were replaced by two English men: Mr. Lawrence and Mr. Hopkins. Unfortunately, these are the only names by which they are referred to within the state records. At this time, parliament also commissioned a Mr. Alexander Pearson of Southhall as a judge in Scotland. *CSPD* 1653-1654, 202-3; Nicoll, *A Diary of Public Transactions*, 115; Lamont, *The Chronicle of Fife*, 51.

[29] *CSPD* 1651-1652, 210.

[30] John Coffey, "Swinton, John (c. 1620-1679), politician," *Oxford Dictionary of National Biography*, 23 September 2004; Timothy Venning, "Lockhart, William [created Sir William Lockhart under the protectorate] (1621?-1673), diplomat and army officer," *Oxford Dictionary of National Biography*, 23 September 2004.

[31] Vaughan T. Wells, "Hope, Sir John, Lord Craighall (1603x5-1654), advocate," *Oxford Dictionary of National Biography*, 23 September 2004.

Ultimately, all seven judges were well suited for such commissions, with the Scottish judges well versed in Scots law while the English were practiced in English common law.

The most important reforms to the court of session were the implementation of both English and Scottish judges on the bench and a transfer of authority. The court of session, which arose out of the King's Council, was erected in 1532 following the establishment of the college of justice. The Court of Session took on the judicial role in Scotland, which during the Medieval Period was left on the shoulders of parliament.[32] The court was traditionally made up of fifteen judges and the chancellor or president. Evidence was collected by either a judge or someone in their employment to be presented in writing to the judges on the bench, who would vote collectively regarding the outcome.[33] Prior to the civil war, the court of session took its authority from the Scottish estates and the King's privy council.[34] After the execution of Charles I and the English invasion, the court could not credit its authority from the Scottish estates as they were no longer a credible governing body. Thus, the court of session would need to claim authority from the English parliament.[35] This change in basis of authority was also ongoing in England, with court judges being appointed by parliament rather than the

[32] Godfrey, "Parliament and the Law," 160; Cairns, *Law, Lawyers, and Humanism*, chap. 7 pg. 203. Godfrey also suggests that the primary role of parliament during the medieval period was to dispense justice, but after the creation of the court of session they were limited to a legislative function. Godfrey, "Parliament and the Law," 60; 161.
[33] A. M. Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (Leiden: Brill, 2009), 173; 185-89. For a detailed history of the court of session see William Forbes, "Introduction," in *A Journal of the Session* (Edinburgh, 1714), i-lii. *ECCO*
[34] Godfrey, *Civil Justice*, 142-45.
[35] A. R. G MacMillan, "The Judicial System of the Commonwealth of Scotland," *Juridical Review* 49, no. 3 (1937): 233.

monarch or privy council.[36] Thus, the people who created the new court of session hoped not only to change the makeup of the bench but also the basis of authority from which the court derived power and privilege.

The 'new' court of session was similar to the previous model but in smaller form. As noted above the English commissioners appointed only seven judges rather than the previous 15, largely because this was meant to be a tentative form of civil justice. In later years, the court of session would return to 11 judges on the bench for civil matters, who were appointed by the deputies of Scotland.[37] Furthermore, not all of the judges were granted the same responsibilities, as each judge held a separate commission, with the English judges being largely responsible for criminal matters while the Scottish judges were responsible for civil issues.[38] The insistence upon Scottish judges to hear civil cases is most likely because the English judges lacked the knowledge to hear these cases, as English common law was quite different from Scots law. The restrictions placed on criminal cases could also be due to a lack of trust in the Scottish judges, for one of the many reasons for revamping the court of session was complaints regarding bribery and unrepublican practices. For example, A.J.G Mackay noted that "the Court of Session had never been popular. Its judges were accused with good cause of arbitrariness, partiality, and bribery, and crimes of a deeper dye had in some cases disgraced the judicial

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[36] Veall, *The Popular Movement for Law Reform*, 226.
[37] Other changes include differences to the procedure of the inner and outer houses. *Thurloe* 6, 372. For a detailed description of the procedure within the court of session see *Orders to be Observed Hereafter in the Court of Justice* (Leith, 1653); Firth, *Scotland and the Protectorate*, 385.
[38] Terry, *Cromwellian Union*, 174-175*; By the Commissioners of the Parliament of the Commonwealth of England for Ordering and Managing Affairs in Scotland*, 1; Dow, *Cromwellian Scotland*, 55.

office."[39] Thus, it is possible English MPs did not trust Scottish judges because of the complaints made against their predecessors, especially as these were accusations previously made against English judges and part of England's ongoing republican revolution.[40] Nevertheless, these restrictions did not last long for by 31 October 1653 parliament had agreed that all judges should receive commissions for both civil and criminal matters.[41]

The English parliament was not the only untrusting party, however, as many Scots were untrusting and unsure of the justice which they would receive from English judges. For example, a letter from the Earls of Crawford, Earls of Lauderdale, and Lord Sinclair states "the few applications be made to the new judges and the less employment they or the commissioners have, it will be the better."[42] This letter also notes that it would be much better for the country if there was union amongst the people of Scotland rather than union between England and Scotland.[43] Needless to say, some Scottish people were hesitant to rely on English judges, who outnumbered the Scottish judges on the civil bench, and were the only judges on the criminal bench. These views would change as the balance of the bench fluctuated throughout the following years leaning more towards the Scottish by 1655 but would improve exponentially as the commissioners proved their

[39] MacMillan, "Judicial System of Scotland," 234. The quote comes from A.J.G Mackay's introduction to his edition of the *Memoir of the First Viscount Stair* (1873). MacMillan also argues that Mackay's views align with William Forbes which can be found in William Forbes, *A Journal of the Session* (Edinburgh: 1714).
[40] Matthews, *William Sheppard*, 156.
[41] *HOC*, 31 October 1653.
[42] Osmund Airy ed., *The Lauderdale Papers vol 1: 1639-1667* (Burlington: TannerRitchie Publishing, 2015), 9. *MEMSO*
[43] Airy, *Lauderdale Papers*, 9.

unbiased justice.[44] The changes to the court of session are important for multiple reasons: first the English parliament now retained control over the Scottish courts directly, even more so because they held their records. Second, these changes allowed for the closure of most burgh courts, which often only heard civil cases punished with fines or banishment, who held authority through special privileges from the crown.[45] Thus, the changes to the court of session were an attempt to limit the amount of corruption present and provide more justice, allowing for a republicanized judicial system.

In September 1652, the English commissioners set out on circuit to hear criminal cases, holding assize courts in similar fashion to those in England in the larger towns and cities.[46] According to testimony of Bulstrode Whitelocke, the English judges were kept quite busy issuing orders against heresies and adjusting court procedure.[47] Throughout the circuits, Whitelocke notes that the majority of the cases were against both men and women for charges of witchcraft, adultery, and incest.[48] The injustice previously discussed by contemporaries is apparent in Whitelocke's notes as cases were brought before the judges regarding crimes committed almost 20 years past. Furthermore, the English insistence on evidence other than witness testimonies meant that more cases were thrown out for lack of proof than would have been prior.[49] As the circuits continued,

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[44] This will be further discussed in chapter 4. MacMillan, "Judicial System of Scotland," 10.
[45] George S. Pryde, "The Burgh Courts and Allied Jurisdictions," in *An Introduction to Scottish Legal History* 20 (Stair Society, 1958), 384-89.
[46] Dow, *Cromwellian Scotland*, 56-58; Nicoll, *A Diary of Public Transactions*, 102.
[47] *Whitelocke* 3, 419, 425; Lamont, *The Chronicle of Fife*, 58.
[48] *Whitelocke* 3, 458, 465-66.
[49] *Whitelocke* 3, 458; 465-66. The amount of proof required for sentences to be determined is a common difference between Scots law and English common law. For more information on the basis of proof see John Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* (Chicago: University of Chicago Press,

Scottish opinion of the English judges seemed to improve. Specifically, some contemporaries quite liked that Scottish nobles were being punished for their actions through means of fines and forfeiture. John Nicoll was quite happy with their punishments, suggesting that it was a good bit of comeuppance:

> so it was sene that our nobles of Scotland, gentrie, barrones, burgessis, ministrie, and commounes wer forcit to attend the Englishe commanderis and judges at thair courtes in Scotland, and awayt at the dures of thair justice courtes as pedeyis, and solist thame in thair effaires and actiounes as commoun men. In this Godis justice wes sene.[50]

Furthermore, Nicoll was one of the first Scottish men to argue on behalf of the English judges:

> And, to speik treuth, the Englisches wer moir indulgent and mercifull to the Scottis, nor wes the Scottis to their awin cuntriemen and nychtbouris, as wes too evident, and thair justice exceidit the Scottis in mony things, as wes reportit. They also filled up the roumes of justice courtes with very honest clerkis and memberis of that judicatory; bot sum of thame wer deposed thaireftir.[51]

Whether Nicoll clearly believed the English's justice was 'just' in a legal sense we cannot know, but it is clear that he preferred the English judges to the previous Scottish ones. It should be noted that some people may have felt more comfortable coming forward to the English judges once under English occupation, believing that they would get the full benefit of impartial justice. Yet, the question of impartial justice would continue to occur in the coming years.

Although more Scots were actively participating in judicial activities and the new judges were presenting what appeared to be adequate justice, areas for improvement on

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1977); James Heath, *Torture and English law: An Administrative and Legal History from the Plantagenets to the Stuarts* (Westport: Greenwood Press, 1982).
[50] Nicoll, *A Diary of Public Transactions*, 103-4.
[51] Ibid., 104.

the bench remained. A proposal made by the commissioners in Scotland on 10 August 1653 to the council of state shows that men "of good conscience to judge according to the laws of Scotland" were still needed.[52] Whether this is asking for more Scottish or English men on the bench is not clarified nor is it overly important. What is important, however, is the continual need for men 'of good conscience' thereby hinting that issues of partiality on the bench remained.[53] Whether the English judges actually provided decisions which were unbiased in favour of the wealthy and did not take into account past associations or community opinion is unclear, but it is possible that the change in judges and the access to travelling courts improved people's opinions of the English occupation. The records of John Nicoll, at least, suggest that some segments of Scottish popular opinion were beginning to change as reforms based on republican ideals began.

If English judges were less biased, or at least differently biased, than the previous Scottish judges, one could assume that this was because the English legal system was substantially better than the Scots; or at least that was the English train of thought. The English viewed the Scottish law as a flawed law code because of its use of roman-canon law, which was prevalent in the Court of Session procedure.[54] By the seventeenth century, Scots law was heavily influenced by English common law and had become a mixture of parliamentary statutes and Scottish custom (especially for land disputes), but if these failed Scots turned to roman-canon law.[55] Thus, when discussions of reforms

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[52] *HOC*, 10 August 1653.
[53] It is possible that this was also due to a shortage of English judges on the bench as the majority were called back to England following the dissolution of the Rump parliament. Firth, *Scotland and the Protectorate*, 214.
[54] Cairns, *Law, Lawyers, and Humanism*, chap. 3 pg. 76.
[55] Cairns, *Law, Lawyers, and Humanism*, chap. 7 pg. 203; David Sellar, "Customs in Scots Law," in *La Coutume, Deuxième Partie: Europe Occidentale Médéivale et Modern*

began, parliamentarians first pointed to the assimilation of English common law and Scots law, as they believed that the end goal was to create a union of the two states with one code of law between them- much like the hopes of James VI/I.[56] Discussions such as these can be found within the meetings at Dalkeith and the Scottish proposals, but many Scottish people found it unacceptable and a removal of their liberties if they were placed under English law.[57] In the end the deputies at Dalkeith agreed that Scotland would need to be ruled according to its own laws, until an assimilation of English and Scots law could occur.[58] Yet some laws were changed, particularly those with the most adverse differences to its English counterpart. Arguably, the most important of these was the change to the treason law, a law which had prevented any firm legal union in 1603 and following the restoration would continue to cause problems in Anglo Scottish relations until the Treason Act of 1708.

Within the Scots law, treason was originally defined as "causing the death of the King and promoting sedition within the realm."[59] In 1449 and 1455 it was adapted to

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52, ed. Recueils de la Société Jean Bodin (Brussel: Société Jean Bodin pour l'histoire comparative des institutions, 1990), 411. For more information on the development of Scots law see John Cairns, *Law, Lawyers and Humanism: Selected Essays on the History of Scots Law* 1 (Edinburgh: Edinburgh University Press, 2015); David Sellar, "Customs in Scots Law," in *La Coutume, Deuxième Partie: Europe Occidentale Médéivale et Modern* 52, *ed. Recueils de la Société Jean Bodin*(Brussel: Société Jean Bodin pour l'histoire comparative des institutions, 1990).

[56] *Thurloe* 4, 106.

[57] For instance, see the multitude of proposals by Scottish communities prior to the union in C. S Terry, ed., *Cromwellian Union*: *Papers Relating to the Negotiations for an Incorporating Union Between England and Scotland 1651-1652* (Edinburgh: T. A Constable, 1902). *HathiTrust.*

[58] *CSPD* 1653-1654, 269.

[59] J. Irvine Smith and Ian MacDonald, "Criminal law," in *An Introduction to Scottish Legal History* 20 (Stair Society, 1958), 283. Note, the treason law as is discussed here is specific to high treason, not petty treason.

include any act against the King's person both before and after his coming of age. Thus, any harm done to the King physically or verbally was to be considered treason. On 19 January 1653/54 the parliament of the 'Commonwealth of England, Scotland, and Ireland' passed an act regarding the law of high treason to outline treason as any attempt, consideration, or imagination of the death of the Lord Protector, any public refusal or argument that the supreme authority did not lay within the Lord Protector and parliament, any declaration that the government was tyrannical or unlawful, any attempt to assist international forces in overthrowing the present government, any attempt to assist or interact with Charles Stuart, and the act of counterfeiting money.[60] Thus, in 1654 any negative act against Oliver Cromwell or parliament was potentially deemed treasonous and punishable by death.

To modern viewers now, this may not seem like much of a change, but to contemporaries it certainly was. The ordinance outlined the reason for the change to be "by reason that the nation of Scotland is reduced unto and brought under this government which must necessarily occasion an alteration of some laws formerly in force."[61] At first this statement suggests that the change was due to the union of England and Scotland, which was now a republic. This treason law was different from both the treason law under James VI/I and the treason law in Scotland under Charles II. As outlined by Sir Edward Coke, high treason during the reign of James VI/I was any attempt to kill or imagine the death of the King or his family, to engage in war against the King, to help

[60] *A&O*, 831-35.
[61] *A&O*, 832.

enemies of the state, to kill a royal officer, or to counterfeit money.[62] Meanwhile, the treason law under Charles II defined treason as violence against the king or his person, any attempt to decline the King's authority or prerogative, any attempt to conceal an act of treason, or any attempt to deny the power of the King to dissolve parliament.[63] The treason laws outlined by Edward Coke and George Mackenzie are obviously different in some aspects, yet overall the focus of the law is the protection of the King.

Returning to the treason law proclaimed in 1654 previously defined, the substantial differences between Coke and Mackenzie's definitions and the Commonwealth definition are obvious, with the 1654 treason law more generally focused on the safety of the state rather than the monarch. More importantly, however, the greatest difference was that the 1654 treason law was the first attempt to enact a uniform treason law in both England and Scotland. Following the union of the crowns, James VI/I had hoped to produce a uniform legal code for England and Scotland but this was discarded by English parliamentarians. The English feared that the English Common law would be replaced with Scots law, which they saw as less civilized due to roman-canon aspects of Scots law such as the ability to use torture for judicial purposes.[64] Meanwhile, Scottish parliamentarians argued that a united law code would remove some Scottish liberties and change their native constitution.[65] Even in 1707, when England and Scotland

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[62] Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: 1797), 2-3. *ECCO*
[63] George Mackenzie, *The Laws and Customs of Scotland, in Matters Criminal* (Edinburgh: James Glen, 1678), 37-50. *EEBO*
[64] Galloway, *The Union of England and Scotland*, 30-137; Levack, *The Formation of the British State*, 4-28.
[65] Levack, *The Formation of the British State,* 32; Galloway, *The Union of England and Scotland,* 30-137.

were completely united, the union stressed the continuance of individual legal codes in each state.[66] It was only in 1708 that the Scottish treason law was changed to mirror the English treason law, arguably because the ability to use torture in Scotland still remained.[67] Thus, the 1654 treason law was unique in that it produced a uniform law for both England and Scotland previously attempted by James VI/I, and produced a new law which was inherently very republican and only appropriate for a republican government.

The punishment for treason also changed based on the specific treason law. In 1654, any act deemed high treason was punishable by death, while in the 1660s the punishment was determined based on the severity of treason. For example, Sir George Mackenzie states that either banishment or death would occur based on whether the government was wronged generally or in consequence of the act.[68] Interestingly, many of the reformers in England at this time cautioned against the use of capital punishment, citing the cruel nature of capital punishment and arguing for its abolition.[69] The continuance of capital punishment for treason during a period of law reform raised questions regarding the tyranny of the government and its opinion on law reform.[70] Was the change to the treason law really any attempt to improve the rights and liberties of the state, thereby republicanizing England and Scotland? Or was it an attempt to gain more control over England and Scotland, limiting the extent to which anyone spoke out against

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[66] Levack, *The Formation of the British State,* 85.
[67] Ibid., 99.
[68] Mackenzie, *The Laws and Customs of Scotland*, 39.
[69] Veall, *The Popular Movement for Law Reform*, 130; Matthews, *William Sheppard*, 169-71.
[70] For instance, in early 1654 General George Monck requested a change to the articles of war to allow for greater punishments for continual rebels. Firth, *Scotland and the Protectorate*, 200. A contemporary's complaints of Cromwell acting as a tyrant can be found in *Thurloe* 5, 419-20.

the commonwealth? Arguably the answer is both: England parliamentarians were attempting to make it harder for their enemies to use English subjects against the state while also transitioning aspects of Scots Law and English law deemed barbaric or unnecessary into a more acceptable form. Ultimately then, the treason law of 1654 was an ongoing change in both England and Scotland only appropriate within a republic and which furthered the authority of parliament and the Lord Protector.

The largest threat to the hoped-for Scottish republic, from the perspective of the English republicans, was the existing aspects of monarchy present in Scotland. As noted in chapter one, Scotland's crowning of Charles II following the death of Charles I influenced the English invasion and furthered English distrust in the Scottish government. This can be seen in the declaration by parliament after the execution of Charles I: "the office of a King in this nation is unnecessary, burdensome, and dangerous to the liberty, safety, and public interest of the people."[71] Furthermore, the English believed the Scots were not to be trusted due to their sympathies for monarchy, especially in the highlands where the wish for a Stuart King remained high.[72] English concerns about monarchical sympathy were not specific to Scotland, as Cromwell and his government made changes to the voting rights in England, limiting those who could vote and be voted into parliament, thereby making it unlikely for someone to vote in favour of a royalist MP.[73] Interestingly, upon first arrival of the English advisors in Scotland, communities which

[71] Rutt, *Diary of Thomas Burton Esq*. 2, 38.
[72] Although the lack of trust is often what occurs following a conquest, hindsight shows us that the English were probably right to not trust the Scottish highlands, as the desire for a Stuart King would later be the main cause for the rebellions in the early eighteenth-century.
[73] *A&O*, 24, 620, points XIV-XVII pg. 817 which outlines who can be voted into parliament and can vote in parliament as part of the Instrument of Government.

quickly accepted English control and agreed to the English union without force brought against them were given the option to elect magistrates to work alongside the commissioners.[74] These magistrates remained operating until 1655 when free elections were proclaimed, producing a double standard in election systems in England and Scotland.[75] Nevertheless, the Scottish public opinion of monarchy and more importantly the noble opinion of monarchy, meant that monarchy would need to be annihilated root and branch if Scotland was to become part of a grand republic and provide security for England.

The discussions to remove monarchy began on 2 April 1652 as can be seen in the journals of the house of commons.[76] The house agreed to make null and void the previous declaration of Charles II as King of Scotland, Ireland, and England, as well as abolish the office of 'king.'[77] The ordinance entitled *An Ordinance for Uniting Scotland into One Commonwealth with England* was proclaimed on 12 April 1654 and eliminated the office of King, those offices connected to the King, and specialty courts.[78] Thus, the ability to become King no longer existed, the office of 'King' no longer existed, and the special gains involved with the office of the King- prerogative, taxes, forests, grounds- no longer existed in law.[79] Any previous gains to the crown from forfeiture, sequestration, and bastards would fall to the commonwealth and more specifically the lord protector.[80]

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[74] Firth, *Scotland and the Commonwealth*, 39.
[75] This will be greater discussed in chapter 4. Nicoll, *A Diary of Public Transactions,* 161.
[76] *HOC*, 2 April 1652.
[77] *HOC,* 2 April 1652.
[78] *A&O*, 871-75; *An Ordinance for Uniting Scotland,* 259-60*; CSPD* 1653-1654, 392; *CSPD* 1654, 90-91.
[79] *An Ordinance for Uniting Scotland*, 259.
[80] Ibid., 260.

Ultimately, MPs hoped by this measure to block the way for Charles II to reclaim the Scottish throne since it technically no longer existed. Yet, the removal of the kingly office did not block other wealthy men's attempts to usurp the government; this was done through other reforms.

Scottish nobles and lords became such because they were granted the title and privileges either from the crown or through hereditary right. Like the changes in England in 1640, with the dissolution of the Star Chamber and the special powers of the privy council, those Scottish offices and 'privileges' connected to the King or granted by the King became null and void following the ordinance for union in 1654.[81] This section of the ordinance was focused on removing privileges within the superior courts of justiciary which acted upon royal commissions such as the court of regality, court of stewartry, court of barony, and bailiery courts. To further understand the importance of these changes, let us examine the courts of regality and the stewartry courts.

The commission for the court of regality was granted to lords as part of the King's prerogative. These lords were often seen as little kings which oversaw a portion of the kingdom and could try cases of all natures besides treason.[82] Stewartry courts were led by an officer of the King, known as the Stewart, who was responsible for overseeing the King's lands and held the same jurisdiction as the lords of regality.[83] Both these positions

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[81] *An Ordinance for Uniting Scotland,* 259.
[82] This included the four pleas of the crown- rape, murder, arson, robbery. Peter McIntyre, "The Franchise Courts," in *An Introduction to Scottish Legal History* 20 (Stair Society, 1958), 378-80; Mackenzie, *Laws and Customs in Scotland*, 401-11.
[83] George Mackenzie, *The Institutions of the Law of Scotland* (Edinburgh: John Reid, 1684), 30-31. *EEBO*; McIntyre, "The Franchise Courts," 381-82.

were hereditary and thus remained in the same families for extended periods of time.[84] In a proposal to the council of state by the commissioners in August 1653, they proposed that those who held lordship court positions, such as the lord of regality or the Stewart, would be allowed to retain their positions until their claims came before a judge and the charters were examined.[85] Obviously, those who held these positions understood that their positions would be no-longer once the office of king was abolished, and attempted to save their offices. These courts were too closely aligned with monarchy and the office of the king to remain and thus those who held these positions were removed through the ordinance for union.

Aside from the superior courts of justiciary, other offices were also abolished, some because they were deemed unsuitable for a republic, others because of their hereditary nature. One of particular importance was the office of the sheriff who previously dealt with disputes over ownership of land, appeals for seigniorial courts, and cases of theft and slaughter.[86] The office of sheriff is particularly interesting because it was a hereditary office in Scotland, meaning that the office would be passed down

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[84] The Lord of regality was originally a position deemed to be 'indestructible' as they were granted the whole authority from the crown for that area. In the fifteenth century the lord became a delegate bringing back the power to the crown. McIntyre, "The Franchise Courts," 380; 382.

[85] *HOC,* 10 August 1653.

[86] *An Ordinance for Uniting Scotland*, 259; Alexander Grant, "Franchises North of the Border: Baronies and Regalities in Medieval Scotland," in *Liberties and Identities in the Medieval British Isles 10*, ed. Michael Prestwich (Woodbridge: The Boydell Press, 2008), 156-57. Manslaughter or slaughter was often considered to be the unlawful killing of another but without malice, whereas murder was the killing of someone with intent to kill. For a more detailed definition of manslaughter see Mackenzie*, Laws and Customs in Scotland*, 116-22. Theft is considered to be the taking of an object, concealment of an object, or use of an object without the owner's consent. Mackenzie, *Laws and Customs in Scotland*, 191.

through the males of the family.[87] A quick glance at the ordinance for union would suggest that the office of sheriff was abolished completely but this is not the case. The office of sheriff remained and continued on within the structures outlined by the court of session and the English commissioners, but the office was no longer heritable. Instead, prominent members of each community would agree on and appoint their respective sheriffs.[88] Furthermore, those holding the office of sheriff had to swear an oath to the commonwealth and agree to the Engagement before they were allowed to continue in this position.[89] Thus, the office itself was retained, but would become an appointed position rather than a hereditary one.

As much as the abolition of superior courts of justiciary was to annihilate the monarchical aspects of the Scottish judicial system unacceptable for a republic, it was also an attempt to curb the power of Scottish nobles and lords. Particularly, it limited the Scottish nobles and lords' power over their respective communities because they no longer held judicial positions granted by the crown. This was further done by the abolition of lingering aspects of medieval feudalism within Scotland through the abolition of servitude and vassalage with the ordinance of union.[90]

The system of government present in Scotland prior to the fifteenth century allowed feudalism to flourish, as lords and earls held land from the crown by providing

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[87] Grant, "Franchises North of the Border," 175.
[88] *An Ordinance for Uniting Scotland*, 259; Firth, *Scotland and the Commonwealth*, 39. This had already begun in 1652 in those communities which accepted the union. Terry, *Cromwellian Union,* 164.
[89] All members of local government had to agree to take the Engagement as noted in Terry, *Cromwellian Union*, 64, 164; *HOC,* 14 May 1652.
[90] *An Ordinance for Uniting Scotland*, 257.

fealty and military assistance, while serfs and vassals owed military assistance to their lord.[91] Changes to this feudal aspect began in January 1653 with discussions between the commissioners of the managing of affairs in Scotland and the previously elected Scottish deputies. Ultimately, the commissioners wanted to understand the nature of all feudal duties in Scotland, the nature of vassalage and bondage tenures in Scotland, and most importantly the dependence of vassals and tenants on their superiors.[92] What transpired in these discussions is not recorded within the State Papers but one could guess it suited the commissioners' needs. On 12 April 1654, as part of the *Ordinance for Uniting Scotland into One Commonwealth with England* servitude and vassalage were abolished in Scotland.[93] Landowners were no longer to hold land from their local lord, but by deed, charter, or patent, and all vassals were no longer obliged to perform military services or wardships.[94] In the republican, rather than hereditary, nature that England was trying to create in Scotland, each charter, deed, or patent was to be renewed at the death of the owner and fines "were not to exceed one year's value."[95] Thus, aspects of servitude and vassalage were removed, promoting the lower classes and limiting the nobles.

Changes to land law were also ongoing in England. In 1646, proposals were made for the abolition of military tenures- the owing of military assistance to the crown- as well as all copyhold and base tenures. Interestingly, only military tenures in England

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[91] For a detailed examination of feudal Scotland see Alexander Grant, "Franchises North of the Border: Baronies and Regalities in Medieval Scotland," in *Liberties and Identities in the Medieval British isles 10*, ed. Michael Prestwich (Woodbridge: The Boydell Press, 2008), 155-99; James Ferguson, "Barony in Scotland," *Juridical Review* 24, no. 2 (1912-1913): 99-121.
[92] *CSPD* 1652-1653, 131-32.
[93] *An Ordinance for Uniting Scotland*, 253-60; *CSPD* 1654, 91; *A&O,* 871-75.
[94] *Thurloe* 6, 499; *An Ordinance for Uniting Scotland*, 258.
[95] *CSPD* 1654, 91; *An Ordinance for Uniting Scotland*, 258; *Thurloe* 6, 499.

were abolished in 1646, with the act abolishing these tenures re-confirmed by parliament in 1656, while in Scotland all aspects of Scottish vassalage and servitude were abolished. Historian Donald Veall suggests this is because the government wanted to break the Scottish landowners' control over the surrounding communities.[96] As many English nobles who did not conform to the republican ideals outlined through the revolution and reforming period were considered Royalists and thus were no longer able to hold prominent offices in England, English MPs believed they had already dealt with the problem of nobles in their own state. Certainly, the difference in reforms and focus on nobility supports this and Veall's conclusion.

Military obligations and wardships were abolished within the 1654 ordinance of union but nothing put in its place. A proposal by William Lockhart in December 1654 hoped to change this. He proposed that a bill be made for "taking away the tenure of wards of knights-service in Scotland and for changing the same into free blanch."[97] Basically, he proposed that military obligations and wardships be changed to allow tenants to hold their land in the form of a 'freehold.' Ultimately, Lockhart was proposing a form of Scottish land tenure not as closely connected to feudal society, and more reflective of the ongoing changes to land tenure occurring in England. Nothing appears to have come of this until September 1656 when parliament ordered a committee of four English men to put together a bill for the removal of wardships and tenures in Scotland, England, and Ireland.[98] The order was passed through the house to the Lord Protector on

[96] Veall, *The Popular Movement for Law Reform,* 213-16.
[97] *HOC,* 22 December 1654. Free blanch refers to a form of Scottish land tenure commonly called blanch tenure or blanch fee.
[98] *HOC,* 23 September 1656.

22 November 1656.[99] An interesting example of this is the case of Janet Johnstone, Lady Wamphray whose father died with Janet as his only living child.[100] Prior to the 1654 ordinance, the lands would have been held in wardship by another man, normally the feudal superior, until the child came of age, thus this would have been the Earl of Annandale.[101] However, Janet argued that by the 1654 ordinance the Earl of Annandale held no feudal obligations over her and thus had no right to the wardship.[102] The removal of wardships affected Scottish clan culture in the sense that clan leaders would no longer hold power over underage children or female orphans in general, allowing girls and children some aspect of independence in a society which did not allow much.

Ultimately, an early modern state could not be a republic as long as there remained medieval societal notions of men's liberties which opposed republican ideals. Why then did it take so long for a new system to be put in place and enforced? The bill for the effective removal of wardships and tenures took roughly two years to be made largely because these changes were occurring both north and south of the border. In this case, it was not as easy as simply placing an English example in Scotland and enforcing its practice. Rather, discussions had to occur, committees had to be made, lawyers had to be consulted, and a clearly improved republican model needed to be had before it could be proclaimed. As can be seen within the changes to the treason law, those changes which were entirely new to both England and Scotland took longer to publish and were created specifically for a republican state. Thus, the removal of feudal aspects like

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[99] *HOC,* 22 November 1656.
[100] Andrew Simpson and Adelyn Wilson, *Scottish Legal History* 1 (Edinburgh: Edinburgh University Press, 2017), 258.
[101] See Mackenzie, *Institutions of the Law*, 109.
[102] Simpson and Wilson, *Scottish Legal History*, 261.

servitude, vassalage, and wardships were an attempt to curb noble power and republicanize Scottish society.

To ensure that feudal aspects were completely removed but also ensure that justice was provided and the ability to use the law was within reach, parliament needed to ensure that rural areas had access to a court which specialized in rural society. Thus, an ordinance for erecting courts baron in Scotland was established on 12 April 1654.[103] Courts baron were not new to Scotland as indicated earlier, for they were considered a special court which held authority from the crown. Previously, they were presided over by the local baron or bailie, and cases were heard by members of the local area as a form of jury, with the baron acting as judge.[104] Baron courts could hear both civil and criminal cases, including petty debt, actions of breach of arrestment, bloodwite, deforcement, 'red-handed' theft and slaughter, and cases relating to the 'keeping of good neighbourhood.'[105] In many areas the baron courts were limited to cases of good neighbourhood, as the civil and criminal cases were often taken before the court of session or justice general.[106] This form of courts baron was abolished with the 1654 ordinance and replaced with a model similar to its English counterpart- manor courts.

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[103] *A&O*, 883-84; *CSPD 1653-1654*, 369; 392; *CSPD* 1654, 90; *An Ordinance for Erecting Courts Baron in Scotland* (London: 1654), 265-66. *EEBO*

[104] Clement Gunn, ed., *Records of the Baron Court of Stitchill 1655-1807* 50, series 1, trans. Reverend George Gunn (Edinburgh: T & A Constable, 1905), 1. *National Library of Scotland*; McIntyre, "The Franchise Courts," 374-77.

[105] 'Red-handed' theft and slaughter refers to when the criminal must be caught in the act of murder, the act of theft, or with the stolen items on their person. Cases of good neighbourhood included disputes between tenants, rights of pasture, as well as straying of cattle among others. *Records of the Baron Court of Stitchill*, xi-xii.

[106] McIntyre, "The Franchise Courts," 377.

Specifically, the 1654 ordinance for erecting courts baron in Scotland states "in every place or circuit of land which is or hath commonly been called, known, or reputed to be a manor within the nation of Scotland, there shall be one court, which shall be in the nature of a court baron, or court of manor here in England."[107] These court barons were to have power, order, and jurisdiction over all contracts, debts, and trespasses within their jurisdiction within the value of 40 shillings sterling, as long as the title of the land was not questioned when discussing trespass. Each court was to be held every three weeks, cases were to be judged by a jury of suitors who were able to make by-laws, and the baron would preside over it.[108] In practice, these 'new' baron courts actually reflected the style of manorial courts proper in England which were most common for dealing with issues and management of common land as well as lawsuits to the value of 40 shillings.[109] Thus, baron courts were transformed to reflect a court system which in the English opinion worked well for rural society and the republic in general.

An examination of the baron court of Stitchill's records shows the majority of the cases focused on issues with crops, sins, violence, and harvest fees.[110] The majority of the sins involved excessive drunkenness, mocking of piety, and "other heinous and god-provoking sins."[111] Thus, the baron court records show a good reflection of a rural community's issues: moral uncleanliness and harvest concerns. Interestingly, moral uncleanliness was the largest concern within the Dundee court martial records examined

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[107] *An Ordinance for Erecting Courts Baron,* 265. Discussions for the erection of courts baron in Scotland began on 26 January 1654. *CSPD* 1653-1654, 369.
[108] *An Ordinance for Erecting Courts Baron,* 265-66.
[109] Jonathan Healey, "The Northern Manor and the Politics of Neighbourhood: Dilston, Northumberland, 1558-1640," *Northern History* 51, no. 2 (2014): 221.
[110] *Records of the Baron Court of Stitchill*, 4.
[111] Ibid., 4.

previously. This can be seen in Edinburgh as well, where multiple proclamations were concerned with ensuring enough light on the streets through the hanging of lanterns and candles at windows and doors.[112] Concerns for 'cleanliness' extended beyond purely moral matters, too: the streets and windows were to be cleaned every fourteen days, and anyone caught throwing filth from the windows was fined four shillings sterling.[113] This itself suggests that moral integrity was a pillar of the republic in both England and Scotland, perhaps even a pillar of a British republic.

The creation of a republic that united England and Scotland was something that had not been done before. Monarchy had always been the form of governance present in these states. Yet, the 1650s show that the commonwealth could survive and do well for itself, producing effective reforms and republicanizing the British Isles. The reforms discussed in this chapter- court of session, the judicial bench, treason law, dissolution of monarchy and its connected offices, abolition of vassalage and servitude, court barons- prove two things: that the commonwealth was providing security for itself from monarchy and more importantly that the commonwealth was attempting to change Scotland into a republic. One can certainly see how Scotland was becoming less monarchical throughout these years with the abolition of the office of king and the removal of speciality courts. Furthermore, these examinations show that the English were not attempting to just impose their own practices on Scotland but were using Scottish custom and law to transform Scotland into a republic as seen through the use of Scots law and the inclusion of Scottish judges. Furthermore, the examinations of the treason law

[112] Firth, *Scotland and the Commonwealth,* 347-48.
[113] Ibid., 347-48.

and abolition of tenures show that reforms were occurring concurrently in both England and Scotland, which would better allow for a republican union. Yet some of these reforms would cause as many problems as they solved, especially if what was removed was never replaced. Nevertheless, the reforms themselves and their implications would strongly influence the later half of the decade and Anglo-Scottish relations well past the Restoration.

Chapter 4: English Security, A United Peace, and Legal Reform in Scotland.

The English parliament attempted and secured many changes through 1651-1654. The appointment of both English and Scottish judges led to the re-opening of legal courts and application of Scots law according to English standards. The abolition of the office of the king, its associated offices, specialty courts, and vassalage and servitude in Scotland furthered English attempts to remove lingering monarchical aspects. Through these changes parliamentarians hoped to create a republican Scotland, thereby creating a united republican British state. As much as the English were attempting to, and in some cases did, create a republican British state, there remained issues and tensions between the two nations. The remaining royalist sympathies posed a great problem for English parliamentarians who hoped to further the union from a general political union to a complete or 'perfect' union. The question of Scottish loyalty and the security of England from its northern neighbour thus became parliamentarians' two main concerns.

Multiple historians, such as Brian Levack and David Stevenson, have argued that the English invasion and conquest of Scotland was primarily to ensure protection for England from its northern neighbour.[1] Obviously as was outlined in Chapter 2, many contemporaries used the assurance of safety as a reason for supporting the invasion. In contrast, the years following the invasion, as noted in chapter 3, were very much focused on republicanizing Scotland. Yet, the need to provide security for England did not go away; if anything following 1653 the need to provide security from Scotland grew

[1] Stevenson, "Cromwell, Scotland, and Ireland," 185; Levack, *The Formation of the British State*, 202.

exponentially. The various attempts at republicanizing Scotland did not transform Scotland into a state which did not pose problems for its southern neighbour and certainly did not squash all monarchical sympathies.

English efforts in the remaining years of the 1650s- 1655-1659- focused on providing protection for the English from rising tensions and monarchical sympathies in Scotland. Yet, the problems north of the Tweed were not the only security issues posing challenges to political leaders south of Scotland; internal eruptions and affairs within English government structures, such as a lack of quorum or dissolution of parliament, also raised concerns regarding security in England. These triggers and influences from England should not be overlooked just because they originated in England but should be considered as influencing issues in Scotland. Ultimately, two ongoing trends dominated English parliamentarians' actions and law reform throughout the 1650s: attempts to republicanize Scotland to create a republican British state and attempts to provide security for England from Scotland. The previous chapter examined the first half of the decade which is characteristically more focused on republicanism. This chapter will examine reforms in Cromwellian Scotland, such as the installation of JPs, reforms to border laws, the new council of state, and the Highland Campaign, with a greater focus on 1655-59, to argue that aside from republicanizing Scotland, English reforms were meant to ensure security for England.

The invasion of Scotland and 1654 ordinance for union sought to ensure that Scotland would be a controlled and secure state under the watchful eyes of English government officials. Yet, there remained one area of Scotland, the Highlands, which had yet to be pacified and continued to pose problems for England. After September 1651, the

English government created 'The Highland Campaign' to control the Highlands and decrease monarchical sympathies. Begun in March 1652 by Colonel Lilburne and continued by General George Monck from 1654-55, the campaign was "to take into consideration what is fit to be done in relation to the highlands in Scotland, and or settling the same to the best advantage, and security of this commonwealth."[2] This was to be completed in two parts: the creation of citadels and establishments of garrisons in troublesome areas, and the 'civilizing' of the Scottish highlands through an increase of law, order, and 'proper' religion.[3] The successful completion of these criteria were thought to produce a peaceful, less violent, and more economically self-sufficient northern Scotland.

English garrisons were erected in Scotland during the invasion of Scotland as soldiers were left to fortify cities and towns, with the hope that they could control the community.[4] Following September 1651, the army began establishing garrisons and citadels in cities and towns of substance or those deemed rebellious such as Ayr, Perth, Inverlochy, Inverness, and Leith.[5] These garrisons were expensive to maintain and staff, as can be seen within multiple requests for more soldiers and money by the regiment commanders. For example, on the 30 March 1652 Colonel Lilburne requested a larger infantry in Scotland amounting to 15000.[6] He argued that to establish the security of

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[2] *HOC*, 26 March 1652; On 2 June 1652, the House of Commons journals also notes that the highlands were to be speedily reduced as necessary for the greatest security to the commonwealth.
[3] For an analysis of the ecclesiastical reforms attempted in the highlands see Allan Kennedy, "Civility, Order, and the Highlands in Cromwellian Britain," *The Innes review* 69, no. 1 (2018): 49-69.
[4] Dow, *Cromwellian Scotland*, 67.
[5] Ibid., 64.
[6] *CSPD* 1651-1652, 200.

Scotland, more soldiers were needed to settle the garrisons.[7] Furthermore, in September 1655 General Monck stated:

> wee must bee forc't to quit some of our H[ighland] guarrisons, which will open a gapp for these people to breake out againe, and for the Lowland people to repayre to them, whereas now they are soe curbed by our guarrisons, that wee have as much command of the Hills and Highlanders (nay more) then ever any Scotts or English had before, and as long as yow inable us to keepe those guarrisons there is little doubt but Scotland wilbee kept in peace.[8]

Thus, in the eyes of English army officials, the garrisons and presence of the English army in Scotland were responsible for keeping the peace, providing security for England and reforming Scotland.

The second part of the Highland Campaign was meant to transform the people of northern Scotland into 'civilized' members of society through changes to the existing practices of law, order, and religion. Unfortunately for English officials this part of the campaign was put off until late 1654 due to Glencairn's Rising, a failed rebellion of English Royalists and Scottish highlanders spurred by Charles II.[9] Although the rising delayed the legal portion of the Highland Campaign, it forced English officials to focus specifically on clan culture and to re-examine some of their previous ideas. Much of the

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[7] *CSPD* 1651-1652, 200.
[8] Firth, *Scotland and the Protectorate*, 304.
[9] For an overview of Glencairn's Rising see Frances Dow, *Cromwellian Scotland 1651-1660* (Edinburgh: J. Donald, 1979), 80-98; 123-32; Danielle McCormack, "Highland Lawlessness and the Cromwellian Regime," in *Scotland in the Age of Two Revolutions*, eds. Sharon Adams, Julian Goodare (Boydell Press, 2014), 116-24; Sharon Adams and Julian Goodare, ed., *Scotland in the Age of Two Revolutions* (Boydell Press, 2014); Kirsteen Mackenzie, "The Condundrum of Marginality: Mercurius Politicus, Order and the Politics of Glencairn's Rising," *Journal of Irish and Scottish Studies* 6, no. 2 (2013): 93-113. For an interesting look into the Royalists' side of Glencairn's Rising see W. Dunn McCray, ed., *Calendar of Clarendon State Papers* 2 (Burlington: TannerRitchie Publishing, 2010); Lord Lindsay, *Lives of the Lindsays; Or, A Memoir of the Houses of Crawford and Balcarres* 2, 2nd ed. (London: John Murray, 1858). *National Library of Scotland*.

'civilizing' portion of the campaign was headed by General Monck through various manipulations of clan culture to enforce appropriate methods of law and order. In 1652-1653 many of the Scottish clans had signed peace treaties with the English parliament, which promised the clans the ability to live peacefully and avoid forfeiture in exchange for the laying down of arms and paying an assess.[10] Monck used these agreements to enforce good behaviour and decrease criminal activity of the clans. For example, in 1655, Monck made it the responsibility of a clan chief to capture and punish any member of his clan for breaking the law.[11] This manipulation of clan leadership sought to ensure that violence would be easily suppressed in the hopes that clan leaders could force their clan members to act according to English standards.

General Monck also used a mixture of Scots law and martial law to enforce English views of law and order in the highlands. Using Scots law, Monck ordered the arrest and imprisonment of Scottish rebels' families. Specifically, Monck drew upon the option of 'sureties' within Scots law, where persons could be arrested and held to ensure the good behaviour of others. The use of sureties in this example gave Monck the ability to force rebels to turn themselves in in exchange for the release of their respective family members. Monck also forced parents, tutors, and parishes to pay fines if they were involved with a suspected rebel.[12] By using martial law Monck was able to request a change to the articles of war on the assumption that it would be "of great consequence both to the affrighting of those that are in arms to come in, and of those that are now

[10] Firth, *Scotland and the Commonwealth*, 55-57; Lamont, *The Chronicle of Fife*, 71.
[11] McCormack, "Highland Lawlessness," 126; Dow, *Cromwellian Scotland*, 140.
[12] *CSPD* 1654, 147; SP 25/75, pg. 268 (3 May 1654); *By the Commander in Chief of all Forces in Scotland* (Dalkeith: 1654), 1. *EEBO*; McCormack, "Highland Lawlessness," 128.

peaceable from going into arms."[13] The request outlined that anyone caught committing their second offense of treason would be executed without mercy, rather than receiving a trial as outlined by Scots law.[14] Furthermore, in the spring of 1654 English soldiers pillaged and burned many Northern towns and villages to force the rebels and clans to desist.[15] Thus, through methods of Scots law and martial law, Monck was able to enforce practices of law and order which English MPs deemed 'civil' and of good behaviour. Ultimately, the Highland Campaign forcefully manipulated clan culture by forcing clan leaders to be responsible for their members' actions and destroying the land, slowly breaking down highland culture to decrease the possibility of future uprisings and monarchical sympathies.

From 1655-1659, English MPs attempted to ensure the safety of England by reforming various legal branches in Scotland. Throughout 1651-1654, English MPs attempted to reform Scottish governance and judicial administration by the creation of a new judicial bench and placement of English commissioners.[16] Yet, these members often sat on various political committees in England or in Parliament and were not always in Scotland when needed. To fix this problem, the Council of State decided to create a new governmental body in Scotland, which would supplement the already existing judicial bench, as noted by Secretary Clarke: "It's talked of here, that a president and council are

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[13] Firth*, Scotland and the Protectorate*, 200; Dow, *Cromwellian Scotland*, 135.
[14] Dow, *Cromwellian Scotland,* 135.
[15] Allan MacInnes, "The Impact of the Civil Wars and Interregnum: Political Disruption and Social Change within Scottish Gaeldom," in *Economy and Society in Scotland and Ireland 1500-1939*, eds. Rosalind Mitchison & Peter Roebuck (Edinburgh: J. Donald, 1988), 60.
[16] See chapter 3.

to be appointed for Scotland, that the Lord Broghill is to be president."[17] Thus, in late 1655 the Council of State established a new governmental body known as the Council of Scotland who would sit in Edinburgh and take on a portion of the responsibilities of the Council of State and the commissioners for the affairs of Scotland.[18]

The Council of Scotland would be made up of Irish, English, and Scottish representatives: General George Monck, Roger Boyle Lord of Broghill, Samuel Disbrowe, Cols. Charles Howard, Adrian Scroope, Thomas Cooper, Nathaniel Whetham, John Swinton, and William Lockhart.[19] Of the nine members, John Swinton and William Lockhart were Scots who also sat on the judicial bench, and one, Roger Boyle, was Irish.[20] Boyle was an educated Irish noble with a military background who participated in the civil wars and the Ireland Campaign on behalf of the Parliamentarians.[21] The remaining members were English by birth and either military men or politicians: Samuel Disbrowe (Desborough) was an English politician and administrator who acted as a magistrate in New Haven from 1646-1649 before returning to England, Charles Howard was an Englishman who held the office of high sheriff in Cumberland and was an MP in

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[17] C. H Firth, ed., *The Clarke Papers: Selections from the Papers of William Clarke* 3 (Burlington: TannerRitchie publishing, 2015), 31-32. *MEMSO*
[18] Dow, *Cromwellian Scotland*, 165-68.
[19] Lamont, *The Chronicle of Fife*, 115; *Thurloe* 3, 711; Dow, *Cromwellian Scotland*, 165; Patrick Little, "The Irish and Scottish Councils and the Dislocation of the Protectoral Union," in *The Cromwellian Protectorate*, ed. Patrick Little (Woodbridge: The Boydell Press, 2007), 135-36. For information on General George Monck see Ronald Hutton, "Monck [Monk], George, first duke of Albemarle (1608-1670), army officer and naval officer," *Oxford Dictionary of National Biography*, 23 September 2004.
[20] John Coffey, "Swinton, John (c. 1620-1679), politician," *Oxford Dictionary of National Biography*, 23 September 2004; Timothy Venning, "Lockhart, William [created Sir William Lockhart under the protectorate] (1621?-1673), diplomat and army officer," *Oxford Dictionary of National Biography*, 23 September 2004.
[21] Toby Barnard, "Boyle, Roger, first earl of Orrery (1621-1679), politician and writer," *Oxford Dictionary of National Biography*, 23 September 2004.

the Barebone's parliament, and Adrian Scroope was an educated Englishman who fought on behalf of the parliamentarians and was governor of Bristol Castle before being appointed to the council of Scotland.[22] Thus, those appointed to this council were qualified in their appointments through either a military or political background.

The instructions for the council were threefold- to preserve the union, promote the preaching of the gospel, and maintain the peace. They were also to produce and enforce appropriate measures for the collection of money in Scotland and ensure that existing court proceedings followed the laws of England and the laws of Scotland.[23] The council was put in charge of choosing all judges and other governmental officials, reforming and operating the exchequer, and ending the ongoing feud within Scottish religious groups.[24] Thus, the council was involved in all matters of Scottish custom and practice, thereby ensuring correct practices, which were believed to ensure peace and prosperity, were being followed.

Aside from those orders directly given, the Council was also meant to produce an assimilated law code which would allow for a more complete union to be had. The

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[22] Stephen Wright, "Desborough [Disbrowe], Samuel (1619-1690), politician and administrator," *Oxford Dictionary of National Biography*, 23 September 2004; Gordon Goodwin, Sean Kelsey, "Howard, Charles first earl of Carlisle (1628-1685), army officer and politician," *Oxford Dictionary of National Biography*, 23 September 2004; John Wroughton, "Scrope, Adrian (1601-1660), army officer and regicide," *Oxford Dictionary of National Biography*, 23 September 2004. There is no record of either Thomas Cooper or Nathaniel Whetham on the Oxford Dictionary of National Biographies.

[23] *Thurloe* 3, 497; *Thurloe* 4, 56-57; Dow, *Cromwellian Scotland*, 166.

[24] Broghill was especially focused on the ending of religious factions and the issues between remonstrators and resolutioners. His main focus was the ecclesiastical changes and accommodations. For a detailed analysis of Broghill's innovations in Ireland and Scotland see Patrick Little, *Lord Broghill and the Cromwellian Union with Ireland and Scotland* (Boydell Press, 2004).

instruction to 'preserve the union' suggests that Council was to make changes to the laws in Scotland, as this was believed by English parliamentarians to be the only way to create a long-lasting union. Following the establishment of the council of Scotland, Lord Broghill attempted to appoint more English judges to the bench, so that the English judges would outnumber the Scottish. In some cases, its most likely Broghill wanted more English judges because they tended to use equity and 'good conscience' when trying cases whereas Scottish judges continually noted the need to follow the laws and statutes of Scotland.[25] The instructions to preserve the union and Broghill's desire for English judges also suggests another motivation, particularly the plan to assimilate the laws or establish a new legal code in Scotland. Unfortunately for Broghill, English judges did not find the position opportune, even though they received almost double the amount of pay. In a letter to Secretary Thurloe, Broghill notes that if they are unable to get English judges "we shall continue Scotch," thus implying that there will be no way to assimilate the laws without a full bench of English judges.[26] Although the bench was largely made up of Scots, whether the laws of Scotland were being explicitly followed is far from obvious. In June 1658, the Earl of Lothian petitioned the Council of Scotland regarding a legal case brought against him by the shires and burghs of Scotland on unpaid debts. According to the petition, the Earl admits he and others borrowed money against their personal sureties for public use and lost their fortunes attempting to repay their debts. The new laws surrounding the relief of debtors, according to the Earl, state that the shires and burghs should be held responsible for these debts. Instead, the shires and

[25] *Thurloe* 4, 324. Dow, *Cromwellian Scotland*, 177.
[26] *Thurloe* 4, 57. Even the English salaries remained higher as an attempt to acquire English judges.

burghs had begun a legal suit "before the judges in Scotland in the ordinary way."[27] Obviously the Earl did not believe the judges were adhering to the laws of Scotland, nor were they adhering to commissioners' declarations which insisted that Scots be judged according to the laws of Scotland. Yet, if this case suggests anything, it is that the laws of Scotland were not strictly being followed, and thus some form of legal reform must have been quietly occurring which was not necessarily popular with Scottish locals.

The Council's attempts to produce a new legal code in Scotland, whether that was a legal code specific for Scotland or one that assimilated both the laws of England and Scotland, were further disheartened by the need to fill the outer house of the court of session, a position which needed at least one judge who was well versed in Scottish law and procedure- thus a Scot. Broghill was forced to appoint James Learmoth of Balcomy and Andrew Kerr to fill this position, each taking bi-weekly circuits within the house.[28] By the end of 1655, the majority of judges on the bench were Scottish, ultimately causing a loss of hope for producing a complete overhaul of Scottish law.[29]

The judicial bench of Scotland may have remained highly Scottish, but that did not mean the English MPs were going to rid any ideas of assimilating the laws. The continual discussions for union from 1656-1658 often discussed the differences between the law codes and the consequences of assimilating them. In one parliamentary meeting which focused specifically on a new union between England and Scotland, some

[27] SP 18/181 f. 161, pg. 62 (15 June 1658). *SPO*.
[28] Dow, *Cromwellian Scotland*, 176.
[29] *Thurloe* 4, 324.

contemporaries felt Scotland was being granted too much. A Captain Baynes is recorded stating:

> You have confirmed their laws, now you are confirming the privileges of their boroughs, which you know not. I doubt if, instead of an union, you make not a disunion. There may be a law amongst them to hang all Englishmen, and to banish them out of their boroughs, though they have settled themselves there to trade, or the like. I would have you not confirm any thing till you know it.[30]

A Colonel Sydenham was also concerned with the way the discussion was moving, stating "we know that very dangerous laws are amongst them. It was once death for an Englishman to marry a Scotchwoman, and so for a Scotchman to marry an Englishwoman. Would have you lay it aside, for I do not understand it."[31] Along this line of thinking, others noted that the law and custom of torture was still technically allowed in Scotland and would become an English problem if a greater union occurred.[32] As can be seen from these examples, those against assimilating the laws of Scotland and England were fearful of laws and privileges existing in Scotland, especially if they were to be blending their laws with those of the Scots.

Although English MPs thought the new Council of Scotland would 'preserve the union' and hopefully make multiple changes to Scottish law and religion, an ongoing problem was the fact that many contemporaries did not view the council as 'new.' Many contemporaries, specifically Burnet, viewed the council as a new Privy Council due to the similarity in responsibilities and privileges, in much the same way that they viewed

[30] Rutt, *Diary of Thomas Burton Esq*. 1, 12.
[31] Ibid., 13.
[32] Ibid., 16.

the English Council of State as a Privy Council.[33] All three of these councils- the Council of Scotland, the Council of State, and the previous Privy Councils- were not above the law, but certainly held a large portion of power and weight amongst the parliamentarians. Interestingly enough, however, is that the Privy Councils were ultimately dismantled in the 1640s because of their 'special privileges' which allowed them to overlook some subjects' rights and liberties. The Council of State also closely resembled the Medieval Scottish parliament in that it held both a legislative and judicial function.[34] The fact that English reformists ultimately created councils of a different name but that reflected Privy Councils and early forms of parliament in almost every other way shows that reformists were unable to produce a council without privileges.

The lost chance to produce a new form of Scottish law did not mean that all hopes of law reform were finished in 1655. Rather, it seems the council fell back on their roots and attempted to impose existing judicial practices in England in Scotland. A particularly important change was the creation of Justices of the Peace. Justices of the Peace (JPs) were established throughout Scottish towns and border lands in a similar fashion to officers in England within the framework of the Scottish law.[35] JPs were often propertied

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[33] Airy Osmund, ed., *Burnet's History of my Own Time Part 1 vol 1* (Burlington: TannerRitchie Publishing, 2016): 112-20. *MEMSO*. For a description of the Scottish Privy Council after 1660 see Mackenzie*, Institutes of the Law*, 22-23.

[34] For more information on the Scottish Parliament see especially Keith Brown, A.J Mann, Alan MacDonald, Ronald Tanner, eds., *The History of the Scottish Parliament- Parliament and Politics in Scotland, 1235-1560* 1 (Edinburgh: Edinburgh University Press, 2004); Keith Brown, A.J Mann, Alan MacDonald, Ronald Tanner, eds., *The History of the Scottish Parliament- Parliament and Politics in Scotland, 1567 to 1707* 2 (Edinburgh: Edinburgh University Press, 2005); Keith Brown & Alan MacDonald, eds., *The History of the Scottish Parliament- Parliament in Context, 1235-1707* 3 (Edinburgh: Edinburgh University Press, 2010).

[35] *Thurloe* 4, 57; Dow, *Cromwellian Scotland*, 178. For an explanation of JP's roles in Cromwellian Scotland see *By his Highness Council in Scotland for Instructions for the*

men and properly educated so that they could be moulded into "trustworthy magistrates."[36] A publication entitled *Instructions for the Justices of Peace in Scotland* (1655) outlines JPs' respective duties and responsibilities, and notes that all JPs were to pledge to uphold the peace within Scotland and do right for both the rich and poor.[37] In terms of public law, JPs had the ability to punish and fine offenders for all civil crimes or disturbances of the peace according to the crime and the estate of the offender. Specifically, JPs were to enforce rules surrounding beggars, vagabonds, and idle men, maintain the upkeep of prisons and gaols, and ensure that the Protector's forests were upheld and poaching strictly prohibited.[38] JPs were also important for the just and fair running of market places, ensuring that all standards for measures and weights were followed and that the quality of the product represented the price.[39] The establishment of JPs in Scottish communities allowed for effective oversight of local transactions, marketplaces, and peacekeeping.

JPs were also responsible for upholding the criminal law, and could arrest anyone for treason, murder, blasphemy, incest, or other felonies, committing them to prison or allowing bail (if applicable) until such time that they could be tried.[40] JPs were also to act

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Justices of Peace in Scotland (1655). For an explanation of JP's roles in the 1660s see Mackenzie, *Laws and Customs of Matters Criminal*, 420-22; Mackenzie, *Institutes of the Law*, 31-33.

[36] Kennedy, "Civility, Order, and the Highlands," 61.

[37] *By his Highness Council in Scotland for Instructions for the Justices of Peace in Scotland*, A2.

[38] William Caldwell, *At a Quarter-Session, Held at Air, the 5th day of February, 1657. By his Highness Oliver Lord Protector his Justices, Assigned to Keep the Publick-Peace in the Shire of Air* (Edinburgh: Christopher Higgins, 1657), 1. *EEBO*

[39] Caldwell, *At a Quarter-Session*, 1.

[40] *By his Highness Council in Scotland*, 14. Mackenzie, *Laws and Customs of Scotland*, 420-22.

as commissioners for the assessments in their respective counties.[41] An interesting example of JPs' duties was to ensure that no women were allowed to travel with men, unless it was their father, a respectable family member, or their husband. Couples had to show their marriage certificate if questioned to avoid being fined or imprisoned.[42] JPs were also an integral part of the council's attempts to reform the communities along the border of England and Scotland, believed to follow violent cultural customs. Since December 1652, English MPs had been discussing establishing an act for preventing theft and robbery along the borders yet no official act was proclaimed until 1656.[43] *An Act for the Better Suppressing of Theft upon the Borders of England and Scotland* was begun on 17 September 1656 but not printed in Edinburgh until 1657.[44] The act instructed all JPs in border communities to examine the members of their communities through private meetings, where proof of one's wealth and self-sustainability were collected to determine their daily movements and interactions.[45] Any persons suspected of committing crimes for profit or indecent behaviour were required to obtain further proof of their interactions or possibly be charged with treason, murder, robbery, or other misdemeanours and transported to America.[46] Thus, JPs held important roles in both public and criminal law through methods of law reform in the border areas and attempts to minimize unpunished crime.

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[41] *Thurloe* 4, 342.
[42] Caldwell, *At a Quarter-Session*, 1.
[43] *HOC*, 23 December 1652; Nicoll, *A Diary of Public Transactions*, 91.
[44] *An Act for the Better Suppressing of Theft Upon the Borders of England and Scotland, and for Discovery of Highway-Men, and other Felons* (Edinburgh: 1657), 1-9. *EEBO*; *CSPD* 1657-58, 15.
[45] *An Act for the Better Suppressing of Theft Upon the Borders of England and Scotland*, 1-4.
[46] Ibid., 4-6.

The Justices established in Scotland were built upon the framework of JPs in England which had become key components of English government.[47] A pamphlet in 1650 entitled *The Peace of Justice or the Authoritie of a Justice of Peace* outlines the responsibilities of English JPs. It states "justices (are) to inquire by the oaths of honest and lawful men, of the said liberties, by whom the trust of the matter may be known, of all, and all manner of felonies, witchcrafts, enchantments, sortileges, art-magick, trespasses, fore-stallers, regrators, engrossers, and extortions whatsoever."[48] Thus, the responsibilities of JPs in England and Scotland during the 1650s were virtually the same. In comparison to the JPs established in Restoration Scotland, only who had the power to appoint JPs had changed. In 1660, George Mackenzie outlined a JP's responsibilities as keeping the peace, apprehending rebels, thieves, beggars, drunkards, Egyptians, and any other troublesome persons, thus quite similar to those throughout the 1650s.[49] Yet, JPs in 1660 were appointed by the King or Privy Council, rather than parliament like in 1650.[50] Thus, the role and responsibility of JPs in the 1650s in Scotland was quite similar to its English counterpart and its counterpart in Restoration Scotland.

Previous attempts at establishing Justices of the Peace in Scotland had occurred but none lasted. In a letter to Secretary Thurloe, Broghill explains that the council found there had been previous attempts at establishing JPs in the form of bailies but suggested these were allowed to fade out by local lords because they took away from their own

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[47] Matthews, *William Sheppard,* 160.
[48] John Jones, *The Peace of Justice, or, the Authoritie of a Justice of Peace: Anciently Established Amongst the First Principles of the Fundamental Laws of England, Under the Names of Conservators* (London: 1650), 8. *EEBO*
[49] Mackenzie, *Laws and Customs of Scotland*, 420-21.
[50] Ibid., 420-21.

personal jurisdiction.[51] Furthermore, in 1660 George Mackenzie noted that JPs were established by James VI but that the importance of the office of JP declined shortly after and was only revived by Charles II.[52] In 1654, General Monck suggested the appointment of JPs and constables in Scotland to help settle the nation, with a specific emphasis on the highlands, arguing that the JPs would counteract the power of clan chiefs, "which would probably keep them in awe or divide them."[53] Following this request, Monck appointed Colonel Fitch and Colonel Brayne to prominent positions in garrisons in Inverness and Inverlochy respectively, in a governmental role similar to JPs. Both men were ordered to arrest problematic persons, including vagabonds, thieves, murderers, and papists, in much the same way as JPs.[54] Thus, the Council of Scotland were not the first men to implement JPs in Scotland, but they may have been the first men to successfully integrate them and rely on them for effective governance.

Alongside the establishment of JPs and constables, the Council of Scotland also appointed Magistrates. Magistrates had been appointed in 1652 in some areas as noted in Chapter 3, but not all communities had the opportunity to appoint magistrates.[55] On 24 September 1655, the Council of Scotland removed all prohibitions regarding magistrates, insisting that they wanted to give Scottish people the right to elect magistrates as it was a

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[51] *Thurloe* 4, 57.
[52] Mackenzie, *Institutes of the Law*, 31. Note that Mackenzie could not have denoted the importance of Cromwellian Scotland having JPs due to his role in Charles II's monarchical government. Furthermore, many of the changes which were made in Cromwellian Scotland are not considered to be important by lawyers, modern and contemporary, because they were annulled after the restoration.
[53] Firth, *Scotland and the Protectorate*, 99.
[54] Dow, *Cromwellian Scotland*, 144-45.
[55] Firth, *Scotland and the Commonwealth*, 139; Nicoll, *A Diary of Public Transactions*, 161.

part of their liberties as free people within the commonwealth.[56] Following the declaration, President Broghill noted in a letter to Secretary Thurloe that the elections were to help overcome the lack of centralized government within the towns as magistrates had not been elected in three years.[57] Thus, the council determined that each town or city was to meet and elect one person of substantial quality according to the laws and customs of Scotland.[58] Furthermore, the elections for magistrates were to occur annually, thereby ensuring fair justice.[59] Although the allowance of Scottish elections seems an improvement in terms of Anglo-Scottish relations and the union, the extent to which this action was meant for the benefit of the Scots should be questioned. Specifically, the council could very much be completing this change in the hopes that it would improve Scots' feelings toward the council. Another possibility is that the council was merely attempting to produce legal reform as they were instructed without considering the outcome after. Finally, if we take into consideration Monck's suggestions for establishing JPs in northern Scotland, which was suggested with the hope of controlling the Scottish clans, the possibility of a dual motive becomes more likely. The need to control Scotland, most specifically the northern Highlands, and English MPs' insistence on a republican Scotland fit for a joint commonwealth, suggests that these elections were another means of 'republicanizing' or 'civilizing' Scotland as well as forcing Scots to be responsible for their countrymen's actions. Ultimately, the council could have a large list of intentions with this change; what their true intention was is

[56] *Thurloe* 4, 52-53.
[57] *Thurloe* 4, 57.
[58] Nicoll, *A Diary of Public Transactions*, 161.
[59] *Thurloe* 4, 57.

another question itself. Nevertheless, the establishment of Scottish elections where Scots could elect their own men to governmental offices was very much a legal change and helped to secure peace within Scotland for the remainder of the decade.

Let us return to the act for suppressing robbery and theft along the borders, and instead of focusing on crime and good behaviour, focus on the interesting addition of trial locations for specific crimes. The act notes that a person who commits petty treason, murder, manslaughter, felonious burning of houses, burglary, robbery, theft, or rape according to the laws of England in Scotland or the laws of Scotland in England, and fled to the opposite state and was apprehended in the border communities, could be transferred back to the respective state for trial by the local JP.[60] Thus, if someone committed a felony in England and fled to Scotland and was captured in a Scottish border community, they would be returned to England and vice versa if they committed the crime in Scotland. A quick comparison of these crimes according to the laws of England and the laws of Scotland finds that by definition they are relatively the same.[61] The only major difference in the definition and punishment of these crimes was that robbery and theft in England were punishable by death without clergy, while this crime was punishable by hanging, hanging in chains, and banishment in Scotland.[62] Ultimately then,

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[60] *An Act for the Better Suppressing of Theft Upon the Borders of England and Scotland*, 6-9.

[61] Mackenzie, *Laws and Customs of Scotland*, 37-63; 109-38; 163-68; 190-210; 319-30; *A Briefe Summary of the Lawes and Statutes of England, so far Forth as the Same do Concerne the Office of Justices of the Peace, Sheriffs, Baliffs, Constables, Churchwardens, and other Officers and Ministers of the Commonwealth* (London: 1655), 94; 116; 126; 137-38. *EEBO*

[62] Oddly enough, the English retained capital punishment for robbery and theft while Scotland did not. *A Brief Summary of the Laws*, 126; Mackenzie, *Laws and Customs of Scotland*, 197.

the definition and punishment of these crimes were relatively similar, so why then was it important enough to declare that each person suspected of the crime be returned to the country in which the crime was committed?

The act of extradition, or remand as it was commonly known in this period, was and remains a contentious political and international legal practice. Remand was commonly used throughout the medieval era between England and Scotland to regulate cross-border crimes along the march lands. Principally, remand was mainly used to curb the effects of cattle-raiding and thievery present in the march lands, as outlined by the 1174 Treaty of Falaise, which forced both nations to hand over each other's fugitive felons.[63] By the sixteenth century, remand was considered a custom of the borders and thus part of border law.[64] Troubles regarding remand raised their ugly head during James VI/I's reign as James attempted to legalize remand as part of the Instrument of Union. At this time remand was allowed but only for special cases, and not as part of the Instrument of Union. Unfortunately for James, remand was dissolved in 1607 following allegations of excessive severity in Scottish courts, and the argument that the differences in the definitions of felonies, and the procedures and laws in both nations were too different. Thus in 1607 remand was forbidden until a perfect and complete union of the laws of

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[63] C.J. Neville, *Violence, Custom, and Law: The Anglo-Scottish Border Lands in the later Medieval Ages* (Edinburgh: Edinburgh University Press, 1998), 3; Krista Kesselring, "Marks of Division: Cross-Border Remand after 1603 and the Case of Lord Sanquhar," in *Crossing Borders: Boundaries and Margins in Medieval and Early Modern Britain: Essays in Honour of Cynthia J. Neville*, eds. Sara M. Butler and Krista J. Kesselring (Boston: Brill, 2018), 259-60. For more information on Anglo-Scottish border law and remand see C. J., *Violence, Custom, and Law: The Anglo-Scottish Border Lands in the later Medieval Ages* (Edinburgh: Edinburgh University Press, 1998); Catherine Ferguson, "Law and Order on the Anglo-Scottish Border, 1603-1707" (PhD Diss., St. Andrews University, 1981).

[64] Kesselring, "Cross-Border Remand," 260.

both nations could be had, forcing James to use the royal prerogative in such cases.[65] Changes were made in 1610 and 1612 by the English parliament and Scottish parliament respectively to allow remand for offenders caught in the border communities, but only when their respective neighbours made the same changes.[66] Remand remained then only able through the royal prerogative, until 1617 where English and Scottish councils released a directive for the governing of the marches which outlined that "any such [person] who commit felonies or other heinous offences punishable by the laws of England and of Scotland and fly into England shalbe apprehended and remanded to the place where the fact was committed and likewise in Scotland."[67] Thus, any fugitive offender who committed a felony in either England or Scotland and was apprehended in the border regions was to be remanded back to the place where the offence was committed.

Reverting to the 1657 act, the act itself is almost identical to the 1617 directive. Due to this, we can not necessarily consider the 1657 act a new change but rather an ongoing enforcement which would have been temporarily stalled in the first half of the decade. Like the 1617 directive, the 1657 act attempted to use remand to limit the amount of crime in the border areas and show complete punishment for thievery and felons in the hopes that it would deter others. Thus, the 1657 act was meant to provide greater security for England while decreasing crime in the border areas.

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[65] Kesselring, "Cross-Border Remand," 262-66; Galloway, *The Union of England and Scotland*, 122-23.
[66] Galloway, *The Union of England and Scotland*, 142-43; Kesselring, "Cross-Border Remand," 267-68; 275-76.
[67] Kesselring, "Cross-Border Remand," 276.

Although the 1657 act continued previous practices of remand, seventeenth-century contemporaries would have argued that remand went against their constitutional rights and liberties. For instance, the 1657 act does not outline which body of law offenders were to be tried by. Thus fugitives tried in England or Scotland, no matter their nationality, would have been charged according to the laws of the respective nation. Similar concerns were raised in the 1604-1607 discussions of remand. 1604 Commissioners argued that if offenders were tried by their own countrymen, they would not receive the full punishment for their crime, thus they should be sent back to the offended country where they could be tried as severely as possible. By 1607, however, parliamentarians argued that Englishmen needed to be tried according to English laws as the laws of Scotland were far more severe. Following these discussions, parliament put forth a declaration insisting that subjects had to be tried according to their own laws, in their own state, and by their own peers.[68] Furthermore, the commissioners for the administration of justice also declared that Scottish persons needed to be tried according to their own laws until a new legal code could be produced.[69] Due to these governmental clauses and constitutional rights, many contemporaries would have considered remand to go against their rights and liberties as members of the commonwealth.

Other contemporaries in 1657 would have also pointed to the differences in court procedure between English common law and Scots law. Firstly, Scots law did not always use the trial by jury method in cases of civil law like in England, although they normally did for criminal procedures. Secondly, English common law required physical evidence

[68] *RPS,* 1607/3/12.
[69] See chapter 2.

and witness testimonies to convict someone and could not rely on circumstantial evidence. Scots law on the other hand did not need as much proof to convict. Thirdly, English common law required a unanimous vote to convict someone whereas Scots law only required a majority vote. Thus, Scottish people would have had a harder time using the English law for their benefit because of the amount of proof required and the need for a unanimous conviction. Fourthly, in some cases torture could still be used in Scotland for judicial purposes following the 1640s and was used in Scotland following the 1660s.[70] Those English citizens who committed crimes during this period in Scotland and were forced to receive trial in Scotland theoretically could have been tortured for information and could have been convicted on a stance less than what their liberties as English persons required. Just on these differences alone it is apparent that Scottish judges and juries had greater freedom in interpreting the law and deciding what the law was.

Other differences in court proceeding included the use of a presenting jury and state custom. Scots law placed more value on written depositions than pre-trial examinations and they did not use a presenting jury unlike England.[71] This jury did not exist in Scotland meaning that it was easier for Scottish legal officials to initiate prosecutions. In some ways Scottish judges also had greater freedom in reaching decisions because they could cite old acts of parliament, civil law, Scottish laws, and unrepealed statutes which were no longer used.[72] Legal historian Brian Levack even argues that "judges in Scotland had so much latitude that they in fact determined the

[70] Levack, *The Formation of the British State*, 93-94; Mann, "Parliament and Social Control," 202.
[71] Levack, *The Formation of a British State*, 94.
[72] Ibid., 94-95.

nature of Scottish 'custom'."[73] Ultimately then, there remained exceptional differences in the use of juries, the amount of evidence needed to convict, and the legal proceedings which contemporaries would have viewed as going against their rights and freedoms.

Like the 1607 discussions of remand, the 1657 act raises concerns regarding subjects' rights and liberties as members of the commonwealth and the manipulation of the law. Remand allowed people to be tried by people other than their own peers and left room for increased false convictions based on ethnic differences. Thus, the allowance of remand through this act could seem to some contemporaries as using the law as a tool of conquest to control the border regions and assert the English army's control over Scotland. Furthermore, others could argue that the commonwealth leaders were attempting to impose questionable legal allowances under the disguise of legal reform for their own gain, although the 1657 remand act was quite similar to the 1617 directive. In some ways though, the 1657 act did produce some changes only acceptable within a union. For one it created a legal means to allow for two different systems of law to be incorporated. The union also allowed for a mixed judicial bench in Scotland. Those offenders remanded to Scotland for trial then would have faced a bench of both English and Scottish judges, arguably providing a more equal and fair ruling. The union also allowed for judicial officials on both sides of the borders to work closely together, allowing for effective justice and the assurance that pregnant proofs existed.[74] Thus, the 1657 act itself allowed remand in much the same way as the 1617 directive to ensure security for England and limit the amount of crime in the border regions, while moving

[73] Levack, *The Formation of a British State,* 95.
[74] Catherine Ferguson, "Law and Order on the Anglo-Scottish Border, 1603-1707" (PhD Diss., St. Andrews University, 1981), 155-56.

contemporaries to raise concerns regarding their rights and liberties similar to those raised in 1607. Yet, the union between England and Scotland also produced changes to the procedures of remand which were only capable within a union.

A major method of controlling Scotland and ensuring security in Scotland was the use of forfeiture- the loss of one's property, estate, and goods. Forfeiture had been a common practice in English and Scottish law for quite some time, becoming especially prevalent in the early modern period for crimes of treason.[75] Within the 1650s though, English MPs used forfeiture to control and manipulate Scottish nobles, threatening those Scottish nobles with monarchical sympathies. For example, 23 March 1651 the English parliament ordered for a bill to be brought in regarding whose estates, out of the remaining Scottish prisoners, would be forfeited and who would be pardoned.[76] Yet, nothing came of this bill until 1654, when on 12 April 1654 parliament announced *An Ordinance of Pardon and Grace to the People of Scotland*.[77] This ordinance removed almost everyone who participated in the Wars of the Three Kingdoms, the 1650 invasion, and the ongoing rising in Scotland from all pains of forfeiture, penalties, restraints, and imprisonments.[78] Yet, this ordinance not only exempted a select number of nobles in Scotland but also imposed heavy fines on those not exempt if they wanted to keep their

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[75] For more information on felony forfeiture in England see K.J Kesselring, "Felony Forfeiture in England, c. 1170-1870," *The Journal of Legal History* 30, no. 3 (2009): 201-26; K.J Kesselring, "Felony Forfeiture and the Profits of Crime in Early Modern England," *The Historical Journal* 53, no. 2 (2010): 271-88.
[76] *HOC*, 23 March 1651.
[77] *A&O*, 875-83.
[78] All were exempt except for James Duke of Hamilton, John Earl of Crawford-Lindsey, James Earl of Calendar, Earl Marshal, Earl of Kelley, John Earl of Lauderdale, John Earl of Lowdown, the Earl of Seaforth, John Middleton, and James Viscount Newburgh. *A&O,* 876-77; *HOC*, 11 September 1651. The ordinance did not extent to the freeing or discharging of any prisoner or prisoners of war. Dow*, Cromwellian Scotland*, 113.

estates.[79] Those who lived on these estates had to make claims with the present commissioners for the administration of justice as to why they should be allowed to keep their estate.[80] For example, the Duke of Hamilton's estates were forfeited by this act and only left a small amount of money for his two daughters.[81] Thus, English MPs used forfeiture to ensure Scottish nobles would behave accordingly and not attempt to usurp the commonwealth, ensuring security for England.

Forfeiture was also practiced in Ireland following the civil wars although these practices were quite different from those in Scotland. Like Scotland, Ireland was granted an *Act of Pardon and Grace* but the quantity of lands and people which this act protected was limited. The first draft of this act named nine Irish lords whose lands would be forfeited and who would receive the severest punishment but the published act listed 104.[82] This transition was largely due to English soldiers, who were apart or held control over members within the Barebones parliament, who wanted the land for themselves and the removal of Irish Catholics.[83] Ultimately, English officials attempted to remove suspected Irish Catholics from their lands quite similarly to previous methods of colonial plantations in Ireland. In the early stages of this project, it was even proposed that some

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[79] William Fraser, *The Annandale Family Book of the Johnstones, Earls, and Marquises of Annandale 1: Memoirs and Charters* (Burlington, TannerRitchie Publishing, 2009), 273. *MEMSO*
[80] *A&O*, 878.
[81] John Anderson, *Historical and Genealogical Memoirs of the House of Hamilton with Genealogical Memoirs of the Several Branches of the Family* (Edinburgh: 1825), 143. *National Library of Scotland.*
[82] Barber, "Scotland and Ireland under the Commonwealth," 215.
[83] Ibid., 215.

Scots be given land in Ireland.[84] The clearly distinctive difference in treatment of Scots vs Irish present through the examination of forfeiture and the Act of Pardon and Grace suggests that English officials were attempting to provide security for England, but their attempts suggest a clear shift in ideologies within the commonwealth government.[85]

Although the use of forfeiture and fines may not seem peaceful, an examination of discussions prior to the publication of the ordinance suggests this was the more peaceful route. Prior to the rising, Lilburne suggested that the number of estates being sequestered was too high and parliament was ultimately increasing Scottish resentment of the coming union.[86] In a letter from Colonel Lilburne to the Lord Protector, Lilburne suggested the ordinance be used as a means to appease the highlanders:

> the state havinge sequestred theire estates, the creditours callinge on them for theire debts, they beinge in noe condicion able to give satisfaction and unavoydablie driven upon desperate courses, for they have not bread otherways to put in theeire mouthes; and one did affirme to mee this day, that theare was noe lesse then 44000 captions issued forth in those 2 last sessions, and most of these people are fled to the Hills or to England. I am confident this [is] one principall ground of these disturbances, and I wish a remedy might bee considered off.[87]

Lilburne suggested that the number of estates forfeited only amount to 5 or 6, providing an example for the Scots but not punishing them too harshly to create another war. Thus, in an attempt to appease the Scottish people the ordinance of pardon and grace was adopted. In truth, the actual ordination of pardon and grace was less harsh than Lilburne had suggested, although more nobles' estates were forfeited.[88] Ultimately then, the

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[84] Robert Armstrong, "The Scots of Ireland and the English Republic, 1649-60," in *The Scots in Early Stuart Ireland: Union and Separation in Two Kingdoms*, eds. Simon Egan and David Edwards (Manchester: Manchester University Press, 2016), 261-2.
[85] Barber, "Scotland and Ireland under the Commonwealth," 216.
[86] Firth, *Scotland and the Protectorate,* 15.
[87] Ibid., 15.
[88] Dow, *Cromwellian Scotland,* 113; Coward, *The Cromwellian Protectorate*, 148.

English parliament adapted its initial policies in Scotland to appeal to those rebels still at large, yet the policies enforced still kept a firm grasp on Scottish nobles, thereby allowing for further aspirations of peace in Scotland.

Another legal change put forth by English MPs was an increase in transportation as a punishment for crime and rebellious actions. In the mid seventeenth century, transportation was not much used in comparison to the English government's use of it in the eighteenth century, but that does not mean it was not used.[89] For example, idle persons, vagabonds, troublesome children, and costly prisoners were sometimes sent to American or Caribbean colonies as indentured servants, thereby ridding England of its problems.[90] In the 1650s, English MPs hoped to use transportation to deal with Scottish rebels and Scottish communities in general. On 18 January 1653 the Committee for Irish and Scottish Affairs was ordered to confer with Major General Deane concerning "the settling of places of strength and all other things which may relate to the settling of the peace and safetie of that Country."[91] Furthermore, in a letter to the Lord Protector (1654), General Monck suggested "the next commander or officer your highness gives license to for the transporting of men for the service of any foreign prince or state in amity with the commonwealth, he may be first supplied out of Scotland; the people here being generally

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[89] For more information on transportation see Gwenda Morgan and Peter Rushton, *Eighteenth-Century Criminal Transportation: The Formation of the Criminal Atlantic* (New York: Palgrave Macmillan, 2004); Hamish Maxwell-Stewart, "Convict Transportation from Britain and Ireland 1615-1870," *History Compass* 8, no. 11 (2010): 1221-42; Gwenda Morgan and Peter Rushton, *Banishment in the Early Atlantic World: Convicts, Rebels, and Slaves* (London: Bloomsbury, 2013); Hilary Carey, *Empire of Hell: Religion and the Campaign to End Convict Transportation in the British Empire, 1788-1875* (Cambridge: Cambridge University Press, 2019).
[90] McCormack, "Highland Lawlessness," 130.
[91] SP 25/38 f. 23v (18 January 1652/53) *SPO*; *By the Commander in Chief of all Forces in Scotland*, 1.

so poor and idle that they cannot live unless they be in arms, so that the transporting of 5 or 6000 of them would tend much to the settling the country."[92] Monck further suggested the transportation of troublesome Scots to other states stating, "It would prevent their raising new troubles in this nation, and they would be able to do us less harm there then here."[93] Thus, Monck believed that transportation would increase the livelihood of Scottish men, producing a life away from violent customs while also decreasing the amount of violence in Scotland. Other contemporaries, such as John Nicoll, also recorded the use of transportation, noting that Scottish prisoners were taken to Barbados instead of imprisoned or executed in England.[94] Based on these examples it is evident that English officials throughout the 1650s used transportation to rid the mother nations of prisoners captured during the Irish and Scottish campaigns.

Although the council and particularly General Monck made extensive headway into providing security for England by transforming a supposed violent culture through legal, judicial, and governmental reforms, there remained issues unforeseen by officials at the time. Particularly, the problems in both England and Scottish civil government directly and indirectly affected the running of Scotland and the security of England. The first major problem began shortly after the announcement of the council of Scotland, as members did not receive their commissions for over three months. Thus, the members of the council were in Scotland but could not conduct any business until their commissions arrived.[95] In 1657, commissioners were once again sent to Scotland for the council

[92] Firth, *Scotland and the Protectorate*, 99-100.
[93] Ibid., 222.
[94] Nicoll, *A Diary of Public Transactions*, 146.
[95] *Thurloe* 6, 631.

without their commissions. These issues are constantly noted to Secretary Thurloe in letters from Samuel Disbrowe who pushed for Thurloe to contact the Lord Protector, suggesting the council was in a good deal of danger in Scotland without their commissions.[96] Members of the bench also seemed to have problems receiving their commission from England, as noted in a letter from Monck to Thurloe stating that a Judge Ker did not receive a commission from parliament.[97] The civil government in Scotland also had a problem keeping living judges for the judicial bench. In 1654 Sir John Hope of Craighall died, leaving his seat on the bench open which was later filled by Alexander Pearson of Southhall.[98] Unfortunately, Southhall died in May 1657 followed by the death of Learmouth, making the council one less than quorum with only one judge in the outer house.[99] Furthermore, in the fall of 1658 Goodyear fell ill and Smith died.[100] Thus, attempts to improve Scottish custom and law through the creation of the Council of Scotland led to poor communication, a lack of governmental proceedings in Scotland, and unforeseen complications.

The council members also continuously had a problem reaching quorum. Particularly, from September 1656 to March 1657 the council did not sit because they could not reach quorum, leaving Monck in charge of the civil government of Scotland.[101] In 1657, following many pleas from Monck, parliament sent Colonel Scroope back to Scotland, allowing for quorum to be reached and business to be discussed. Obviously the

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[96] *Thurloe* 6, 516-17
[97] *Thurloe* 6, 631.
[98] Firth, *Scotland and the Protectorate*, 214.
[99] Dow, *Cromwellian Scotland,* 221.
[100] Ibid., 222.
[101] Ibid., 211.

council replaced those members who had passed, adding James Dalrymple in July 1657 as a judge in the outer house, Archibald Johnston of Wariston to the council in November 1657, and Alexander Brodie as a judge in January 1658.[102] Yet, this was not the end of the council's problems for the positions of Goodyear and Smith were never filled due to the dissolution of parliament in April 1659 and restoration of the Old Rump parliament.[103] The restoration of the Old Rump parliament threw the Scottish council into chaos, ultimately ending all supreme judicatory bodies in Scotland until the restoration of Charles II.[104] Ultimately, then, the Council of Scotland and English MPs attempted to reform Scotland, especially in northern communities, into a state which provided security for England yet the problems within the council indirectly affected the running of Scotland and thereby the security of England.

Throughout 1651-1659 English MPs and the Council of Scotland attempted to appease the Scottish people, promoting peace and union in Scotland. MPs' attempts to promote peace and union were embroiled with English interests, focusing on the need for security in England which was believed to occur following a complete and perfect union. The reforms completed during this period- the 'Highland campaign,' the establishment of JPs, the creation of the Council of Scotland, attempts at assimilating the laws, acts for suppressing theft along the borders, the use of forfeiture, the use of transportation- attempted to transform Scotland into a more 'civilized' state which would provide security for England through policies of law and order deemed appropriate by English officials. Furthermore, the installation of JPs, changes to border laws, and the council's

[102] Dow, *Cromwellian Scotland* 221.
[103] Ibid., 240.
[104] Ibid., 240.

attempts to assimilate the laws show that the Council was attempting to produce changes in Scotland and hopefully improve Anglo-Scottish relations. Yet the problems which arose within the Council of Scotland and in England meant that not as much stability was given to Scotland as was hoped for. The differences in legal proceeding in English Common law and Scots law outlined in this chapter bring to light contemporaries' anxieties regarding any attempt to assimilate the laws of both nations. More importantly, however, when the differences outlined are placed within the context of the act for decreasing crime along the borders, they suggest English MPs were possibly disregarding English and Scots rights as citizens of the commonwealth. The reforms completed during this period further transformed Scotland into a republican state which provided security for England, even if attempts at producing a legal code failed. Ultimately, it would be those problems in England noted in this chapter, such as the lack of quorum, that would lead to the commonwealth's undoing.

Chapter 5: Conclusion

The events of the 1650s created a republican Scotland within the growing union of England and Scotland and English control in Scotland. The English invasion of Scotland and the subsequent conquest of Scotland produced a union between the two nations, unforeseen by many contemporaries. The union itself allowed English MPs to impose multiple changes to law, justice, and religion which they believed would transform Scotland into a republican state providing security for England and establishing a united British republic. The multitude of changes addressed in chapters 2 and 3- the establishment of a mixed judicial bench, a new Treason Law, abolition of the office of king and speciality offices, abolition of servitude and vassalage, remodelling of Courts Baron, establishment of the Council of Scotland, establishment of Justices of the Peace, changes to the border laws, increased use of transportation- were all attempts to 'improve' Scottish custom, law, and access to impartial justice deemed non-existent in Scotland prior. As was seen throughout this project, some Scottish contemporaries welcomed the changes introduced by English MPs and commissioners in Scotland. Meanwhile, there remained quite a few Scots with royalist and monarchical sympathies, who waited for the day monarchy would be restored. In 1660, these contemporaries' hopes were achieved as Charles II was welcomed back and monarchy restored.[1]

Historians are generally in an agreement that the restoration was welcomed with open arms by most contemporaries. Historian Tim Harris argues that "republicanism had

[1] For a detailed examination of the restoration see Tim Harris, *Restoration, Charles II and his Kingdoms, 1660-1685* (London: Penguin, 2005), 43-135; Frances Dow, *Cromwellian Scotland, 1651-1660* (Edinburgh: J. Donald, 1979), 249-77.

shallow roots in England" and even shallower roots in Scotland.[2] Yet for many contemporaries the events which followed the restoration were not what they had hoped for. The restoration in England transformed the constitutional process of England back to that of 1640 while the 1640 legislation restricting extra-judicial powers passed by the long parliament remained.[3] Ultimately then, all changes, whether that be religious, constitutional, or legal, were made null and void except for the removal of prerogative courts and the court of wards.[4] Like England, the majority of reforms attempted during the English occupation of Scotland were revoked upon the restoration, with episcopacy and the Lords of the Articles being restored.[5] Thus, Scotland in terms of law and constitution reverted back to its position in 1633, and England that of 1640.[6]

In 1660 Charles II had passed a 'free and general pardon' to English supporters of the republic and shortly thereafter issued another for Scottish subjects. Like the general pardon passed by Oliver Cromwell, Charles's pardon was not extended to everyone.[7] Prominent supporters of the republic such as General John Lambert, Judge Swinton, Secretary John Thurloe, Sir Archibald Johnston Lord Wariston, and Sir Archibald Campbell marquess of Argyll were all exempted.[8] Those who quietly resisted the republic or participated in Glencairn's Rebellion were rewarded for their continual

[2] Harris, *Restoration*, 43, 105.
[3] Ibid., 46-47.
[4] Barbara Shapiro, "The Restoration Chapter in the History of English law Reform," *Law and Humanities* 10, no. 1 (2016): 45.
[5] Particularly the laws regarding the border communities returned to those under James VI/I. *RPS* 1663/6/75; 7 Jac 1 c. 1 *HeinOnline*; 29 & 30 Car II c. 2 *HeinOnline*; Harris, *Restoration*, 106; Dow, *Cromwellian Scotland*, 268.
[6] Harris, *Restoration*, 108.
[7] Ibid., 44. This pardon was passed in Scotland in 1662.
[8] Ibid., 110-11; Dow, *Cromwellian Scotland*, 270.

support of the monarchy and granted positions of power.[9] Specifically, the Earl of Middleton became commissioner to parliament, the Earl of Glencairn became Chancellor, the Earl of Lauderdale became secretary of state, and the Earls of Rothes, Cassillis, and Crawford became Lord President of the Council, Justice General, and Lord Treasurer respectively.[10]

Although most of the legal reforms were revoked, some were retained and proved helpful in the future. Specifically, the establishment of Justices of the Peace in Scotland was sustained as parliament believed these to be helpful in bringing back monarchy throughout the nation.[11] Prior to the restoration of the Scottish Privy Council, the Scottish government was run by a new body reflecting the Council of Scotland previously established during the republic.[12] The previously established mixed judicial bench also became helpful to both Charles and Scottish contemporaries. Obviously English judges were removed from the bench following the end of the union but the judgements produced by the English judges were upheld, though contemporaries had the opportunity to bring any judgements deemed unsuitable back to the courts.[13] That so few judgements were returned to the courts suggests that English judges had delivered adequate justice in many trials. Thus, the majority of legal changes produced under the English occupation in Scotland were revoked; however, some remained and became beneficial to the restoration.

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[9] Dow, *Cromwellian Scotland*, 269; Harris, *Restoration* 106.
[10] Harris, *Restoration*, 106.
[11] *RPS* 1661/1/423; Dow, *Cromwellian Scotland*, 271.
[12] Dow*, Cromwellian Scotland*, 268.
[13] *RPS* 1661/1/117.

Like the revocation of legal changes in Scotland made by English officials throughout the commonwealth, the union between England and Scotland was also made null and void with Scotland regaining its political independence. Since the union was revoked, one could question why English officials in the last ten years believed the union so important that they took on the political, economical, and ethical issues which came with the invasion and union. Chapter 2 attempted to explore this question, focusing particularly on the reasonings behind the invasion and the union debates following. Particularly, the English were fearful of Scottish involvement within their own government or worse a Scottish invasion of England following the execution of Charles I. Although these reasonings explain why the English invaded and conquered Scotland, the movement towards a union rather than subjugation suggests the potential difficulty of subjugating Scotland. If we add to this the length of time English MPs, particularly Oliver Cromwell, discussed subjugation in comparison to union and the quick insistence of meetings with Scottish communities, it would seem that subjugation had never been the plan. The quick transition from subjugation to union and almost extreme differences between the treatment of Scotland vs Ireland suggests that English officials saw Scotland as both a greater threat and a greater addition to the British republic they were building than Ireland. Yet, the debate remains open and further digging within the transition from subjugation to union is likely to produce more answers.

This thesis explored the legal changes attempted in Scotland by English MPs during the English occupation. Yet, the exploration and analysis of the legal changes produced in Cromwellian Scotland not only highlighted what changed, how changes were introduced, and who made these changes, but also how contemporaries adapted to and

integrated these changes. The increased use of forfeiture, the removal of speciality courts, and the abolition of servitude and vassalage produced somewhat harsh changes for Scottish nobles, restricting their power base and influence over the people living on their lands. A percentage of these nobles would have adhered to the changes and attempted to use other changes to their own advantage, such as the establishment of constables, JPs, and the revival of elections. Yet, the changes introduced by English MPs which restricted Scottish noblemen would have also pushed some to become royalists and monarchical sympathizers. On the other hand, the mixed judicial bench, courts baron, and abolition of servitude and vassalage would have improved the livelihood of lower levels of society, through the ability for one's cases to be heard and with a shred more hope of impartial justice. Thus, each change would have affected each level of society differently, resulting in differing reactions from contemporaries and how they integrated these changes into their lives.

How contemporaries adapted to these changes also allows for some insight into how contemporaries understood the law. This thesis showed that contemporaries understood the law in various ways whether that was through a King or through the commonwealth; however, it also showed that contemporaries understood that the law was easily manipulated and abused by those who had the power to do so. For instance, this can be seen through the changes imposed by General Monck in the Highlands, where he used a mixture of martial law and Scots law to impose 'order.' The 1657 act which allowed remand in the border areas examined in chapter 4, showed how the law was manipulated to allow for greater control over the borders, which would increase English MPs' control over Scotland. Specifically, these changes arguably threw Scots and

English citizens' rights and liberties as members of the commonwealth to the wind, allowing both to be charged and tried in either nation under different laws than their constitution adhered to. The fact that this had been discussed previously in 1607 but rejected suggests that English MPs were distinctly more willing to forgo rights and liberties as long as the 'safety of the nation' was being considered. On the other hand remand was not a new phenomenon produced by the commonwealth and thus should not be directly considered a direct attempt to overthrow Scottish contemporaries' constitutional rights. Rather, it should be understood that some contemporaries may have believed this to be the case, while English officials were largely attempting to provide security for England by ensuring the border areas would not be problematic. Ultimately, Scottish contemporaries either adapted to the changes imposed by governmental officials, attempting to find some way to manipulate these changes in the hopes of improving their own status, or secretly moved against them waiting for the day Charles would return.

With these actions in mind, one should consider whether English MPs were actually attempting to impose the changes which Scottish contemporaries hoped to see or whether they used the lingo of law reform for their own benefits. Ultimately, the mixture of law reform, manipulations of the law, and uncertain intentions behind attempts at law reform suggests that English MPs were using the law as a tool of conquest. Even though it would have been easier to subjugate Scotland through force, English MPs went forward into the politically complicated waters of establishing a union between England and Scotland for reasons which are not completely obvious. In the making of this union, English MPs directly engaged with Scottish communities, allowing these communities a chance to voice their opinion on the union and any proposals they wished to share. The

obvious conclusion to these actions would be that the English were attempting to make the union as easy as possible by avoiding conflict through means of communication. Yet, the action of taking the Scottish registers and then failing to return all of them, not only restricted Scots' ability to fight against the English but also English MPs' ability to produce a true legal union in Scotland.[14] As was noted by Brian Levack, the English had the opportunity to complete a perfect union wanted by James VI/I but failed to use it to their advantage, remaining at a parliamentary level of union rather than a complete legal union. Yet, English MPs still insisted on producing legal changes within Scotland and changing Scottish governmental procedures to reflect a republican style of government in much the same way they were changing England. If we add to this mixture the obvious manipulations of the law within some of these changes, English MPs use of 'law reform' was for two reasons: to produce a republican Scottish nation which did not present any threat to England and allow for the creation of a British republic, and to control the conquest of the Scottish nation.

This thesis also showed examples of law reform in Scotland which could have only occurred within a united republican state: the Treason Law and the allowance of remand in 1657. The Treason Law of 1654 was created specifically for a republican state and was the first unified law amongst England and Scotland. Although later attempts to produce one legal code for England and Scotland failed, the 1654 Treason Law was a success, providing a structured and parallel law in both England and Scotland for the good of the commonwealth. The 1657 allowance of remand, although quite similar to the

[14] Following the restoration, the remaining public Scottish registers in England were to be returned to Scotland. According to Burnet the registers never made it to Scotland as they were lost at sea due to winter weather. Airy, *Burnet's History*, 201-2.

1617 directive, held unique quirks which would have been more accepted within a united republican nation. The ability to apply remand as a legal clause and not through royal prerogative, in both England and Scotland while separate bodies of law remained, was only appropriate within a united state attempting to produce one legal code. Other changes occurring earlier, such as the mixed judicial bench, meant that offenders tried in Scotland would have been tried by a somewhat fairer body of judges than if the bench were wholly Scottish or wholly English, as at least one judge would have been of the same nationality. Furthermore, the allowance of remand forced both English and Scottish JPs and border judges to work effectively with one another, ensuring fair capture and sufficient proof existed. This co-existence and cooperation only occurred because the two states were united and failure to curb the crime and problems within the border areas would have been detrimental to the union. Ultimately both the Treason Law and application of remand were completed successfully because they were either built for or applied specifically for a republican union.

This thesis examined various attempts at law reform in Scotland, manipulations of the law by both English and Scottish contemporaries, and how the law was used as a tool of conquest. These examinations also allow us to see how the attempts at law reform and brief union affected Anglo-Scottish relations during the 1650s and onward. Historians are generally in agreement that the Cromwellian Union negatively influenced Anglo-Scottish relations, mainly because Scotland was under military rule and control for almost 10 years.[15] Particularly, the union changed the structure of highland clans, leading them

[15] Levack, *The Formation of the British State*, 204; Ferguson, *Scotland's Relations with England*, 138-39; Laura Stewart, "Cromwell and the Scots," in *Cromwell's Legacy*, ed. Jane Mills (Manchester: Manchester University Press, 2012), 173.

deeply into debt, and "accelerated the assimilation of chiefs and leading gentry (clan elite) into Scottish landed society."[16] Obviously it would be unrealistic to suggest that the union did not negatively affect Anglo-Scottish relations but we should not automatically assume there were no positive effects of the union either. Specifically, the union allowed many Scottish contemporaries to better their personal stature and improve their livelihood. Furthermore, the republic granted the opportunity to impose changes to the law, courts, and justice in both England and Scotland which contemporaries had been pushing for since the 1630s. The Interregnum and English occupation of Scotland produced some lasting changes which generally are considered to be hallmarks of the British state going forward and were the building blocks to the British state of the eighteenth and nineteenth centuries. Arguably, the restoration itself probably affected Anglo-Scottish relations as much as the brief union did, due to the return of Episcopacy, restriction of Scottish trade and later loss of Scottish trade partners through the Anglo-Dutch wars, and return of monarchical control over the law and church. Which event had the greatest negative influence is as much a guess as an informed answer, but it is obvious that the union and attempts at law reform, some more than others, negatively affected Anglo-Scottish relations.

Finally, we must ask how the Cromwellian Union of England and Scotland affected future attempts at union. In 1670 Charles attempted to revisit previous discussions of a union but these were thrown out without much conversation at all due to the ongoing memory of the 1650s union.[17] It is impossible to determine whether the

[16] MacInnes, "Impact of the Civil Wars and Interregnum," 58.
[17] *His Majesties Letter to his Parliament in Scotland* (Tho: Newcomb, 1669), 2. *EEBO*; William Seton, *The Interest of Scotland in Three Essays* (London: 1700), 40. *EEBO.*

1650's union of England and Scotland influenced the remaining events of the seventeenth century or the 1707 union within the limits of this project, yet a thoughtful inference would suggest that the Cromwellian union left contemporaries whose history was full of failed attempts of union with mixed feelings. That being said the manipulations of the law, disregard for Scottish custom and religion, and the invasion of Scotland left Anglo-Scottish relations in tatters; such events would surely not leave many contemporaries wanting to relive it. By 1707 those who were a part of the Cromwellian Union would be few in number, leaving only the history of its events behind. Thus, one can only assume the memory of the Cromwellian Union produced enough of a negative view of union between England and Scotland, that a relatively complete union did not occur until 1707.

The events which transpired between England and Scotland during the 1650s produced a union between the two nations for almost a decade. The invasion of Scotland and brief union allowed English MPs the opportunity to introduce a variety of legal changes which were generally accepted by most Scottish contemporaries. This examination not only outlined some of these changes and the effects of these changes, but how contemporaries manipulated the law and viewed the law. Particularly, this thesis showed that the law was used as a tool of conquest by English MPs in Scotland, most notably through the possible disregard of contemporaries' rights and freedoms and a disregard of their desire for law reform. Furthermore, this thesis proved that attempts at law reform were meant to ensure security for England and transform Scotland into a republican state, thereby creating a republican British state. The events of the 1650s would be remembered in the upcoming years, influencing how future events would unfold.

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