Introduction

One of the most striking images of early English New World expansion is the illustrated title page to John Dee’s *General and Rare Memorials Pertayning to the Perfect Arte of Navigation* (1577, opposite). Queen Elizabeth is shown at the helm of an “imperial ship” named the *Europa*, on whose rudder is displayed the royal coat of arms. The queen is steering the ship toward the mainland, where Fortuna, the goddess of fortune and opportunity, is standing on a powerful fortification. Elizabeth is reaching out her hand to grasp both Fortuna’s forelock and a proffered laurel wreath, a traditional symbol of Roman imperial authority. Britannia, an allegorical figure demonstrating England’s agrarian economy, is kneeling on the ground beside a sheaf of grain, which is deep within the fertile, virgin earth and ready for cultivation. In the sea are armed ships and on the land are soldiers, colonists, and fortresses, all of which are protected by Saint Michael, who is descending from the heavens with sword and shield. Despite the complex allegory, Dee’s message is a simple one: Queen Elizabeth, head of the British imperial monarchy and a leader of Christendom, needs merely to seize the New World opportunities with which she is being presented to improve her wealth, strength, and imperial power, and thereby achieve supremacy over other European princes.

Although this image reflects a number of themes with which this book is concerned, its allegorical representations of imperial sovereignty over, and territorial control of, the New World are somewhat at odds with current ideas about Elizabethan and early-Stuart activities in America. Dee’s image belies the fact that the English arrived late and fitfully in the New World. Setting aside the apocryphal voyages of Britons such as Saint Brendan, Prince Madoc, Hugo of Hibernia, and the legendary King Arthur, it was only in 1497 that the English made their way across

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the Atlantic Ocean.\(^2\) By the time John Cabot embarked for America in that year, it had already been discovered by Christopher Columbus (1492), donated to the Spanish by Pope Alexander VI in the papal bull *Inter caetera* (1493), and divided between the Spanish and Portuguese crowns under the terms of the Treaty of Tordesillas (1494). When the English renewed their interest in exploring and settling the New World under Queen Elizabeth, they were immediately faced with the problem of addressing these claims to exclusive rights.\(^3\) Could the English crown simply ignore rival discoveries, papal bulls, and temporal treaties and begin settling the New World?\(^4\) If so, what risks did the crown incur for its subjects and colonies? If not, how could the crown gain access to these lands and their riches in a manner that could satisfy or at least allow it legally to engage with other European colonizing powers? In this book, I investigate methods by which the crown and its subjects expressed sovereignty and possession in the English New World between 1576 and 1640. These expressions resulted in some of the legal foundations of empire and helped to realize much of Dee’s aggressive imperial vision.

Elizabethan activities in the New World began with the three voyages commanded by Martin Frobisher to the North Atlantic between 1576 and 1578.\(^5\) Frobisher and his fellow adventurers were principally

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\(^3\) Although subjects from Ireland, Scotland, and Wales were also involved in New World affairs under Elizabeth and the early Stuarts, the majority of these activities were solely English or conducted under English patronage. In addition, although the English monarchs extended their sovereignty into these “British” peripheries during this period, these were not new lands in the European imagination and their legal status was different than the “unknown lands” (*terra incognita*) in the Americas. This study, then, focuses on English expansion into the *New World*, and looks only incidentally at wider “British” affairs. For context, see David Armitage, *The Ideological Origins of the British Empire* (Cambridge, 2000), especially ch. 2.

\(^4\) The term *crown* refers to the authority exercised by the English monarch and his or her personal advisors, especially the privy council, a body also known as king-in-council. The privy council was responsible for giving “private” or confidential advice to the monarch, and for working exclusively for the monarch to protect his or her sovereign and prerogative interests. It was, thus, an extension of the king’s authority rather than an extension of political authority. For context, see Michael J. Braddick, *State Formation in Early Modern England*, c. 1550–1700 (Cambridge, 2000), ch. 1.

interested in finding the Northwest Passage to Cathay (China), but the
discovery of gold in the region of Baffin Island resulted in the possibility
of settlement. These enterprises ultimately ended in failure: the gold
turned out to be rock; Elizabeth personally lost money in the venture
and was thereafter disinclined to fund speculative transoceanic voyages.
At the same time that Frobisher was sailing into the North Atlantic, Sir
Humphrey Gilbert developed a scheme in 1577 that called for the
colonization of Newfoundland as a base of operations from which to
engage the homebound Spanish treasure fleet. Although he was granted
a royal charter in 1578, without crown financial assistance Gilbert did
not manage to get underway until 1583. He took possession of St. John’s
harbour, Newfoundland, for Queen Elizabeth before perishing on the
return voyage to England, his colony never having been established. In
1584, the terms of Gilbert’s charter were taken up by his half brother,
Sir Walter Ralegh, under whose patronage several small colonies were
established at Roanoke Island, within the North Carolina Outer Banks,
between 1584 and 1587. As is famously known, by 1590 the English
settlers on Roanoke had mysteriously disappeared. In 1595 Ralegh
turned his attention to the Amazon region of South America, in an
ultimately unsuccessful search for a fabled kingdom of gold and riches,
El Dorado. Further attempts at New World settlement in Elizabethan
England were heavily proscribed because of the costs and needs asso-
ciated with the Anglo-Spanish War of 1585 to 1604.
Interest in New World settlement quickly renewed after James I
arranged a peace with Spain in 1604. Following a plan established by
Elizabeth for the East India Company (1600), in 1606 James I
authorized the Virginia Company of London and Plymouth to settle
North America using the joint-stock model. This enabled settlement to
proceed at no cost to, and with little central supervision by, the monarch
and privy council. Although the Plymouth merchants failed to plant a
successful colony, the London merchants funded the permanent settle-
ment of Jamestown, Virginia, in 1607, a fledgling colony that came under
direct royal control in 1625. Shortly after the settlement of Virginia,
English merchants looked once again toward Newfoundland, which by
virtue of its fisheries was highly desirable. Between 1610 and 1638,
numerous groups of merchants and individual proprietors attempted
settlement and the English managed to maintain a constant, though
small, presence in Newfoundland thereafter. English presence in North

1550–1642 (London, 1983); and various essays in Nicholas Canny, ed., The Origins of
Empire: British Overseas Enterprise to the Close of the Seventeenth Century, The Oxford
America was further strengthened by the permanent settlement of Bermuda, then known as the Somers Islands, in 1612. Back on the American mainland, the New England Company founded the Plymouth colony in 1620 and the Massachusetts Bay Company broadened the franchise in 1629, using the terms of its charter to found additional colonies in Connecticut, New Hampshire, and Rhode Island. Maryland was founded as another lasting colony in 1632, becoming a refuge for recusant Catholics. Finally, between 1625 and 1640, small English colonies were founded on various islands in the West Indies – including Antigua, Barbados, and Providence Island – and pockets of the Amazon region of South America.

Such were the uneasy beginnings of the English New World, which despite the “Great Migration” of the 1630s remained tenuous well beyond 1640. Recent historians have characterized these Elizabethan and early-Stuart activities as mundane, commercial ventures that were extremely fragile and always in jeopardy of failure, largely because of the lack of crown interest in transoceanic enterprises that brought no wealth and power to the monarchy. To some extent, this argument is in direct reaction to the writings of a past generation of historians, who offered overtly Anglocentric and imperialistic interpretations in which ideological monarchs and crown officials pursued an aggressively expansionist policy in order to improve the size, strength, wealth, and international status of the “British Empire.” Even the commercial nature of overseas affairs – better known as the economic ideology of mercantilism – was viewed as part of a power struggle for imperial supremacy in Europe, a battle that was defined by gaining “plenty” while denying the same to

6 An excellent study that shows the nature of migration in the 1630s is Alison Games, *Migration and the Origins of the English Atlantic World* (Cambridge, MA, 1999). Games estimates that the English New World population was 9,500 in 1630 and 53,700 in 1640. Although this impressive increase “secured England’s precarious Atlantic empire” (ibid., p. 4), much still had to be learned about the environment before these colonies could prosper. See, for example, William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England*, rev. edn. (New York, 2003); and Karen Ordahl Kupperman, “The Puzzle of the American Climate in the Early Colonial Period,” *American Historical Review* 87 (1982): 1262–89.


other nations. This imperial theme was taken up by Elizabethan literati such as John Dee, Richard Hakluyt, and Edmund Spenser, who emphasized the importance of the English crown commanding a large empire. Because of its ideological value in both domestic and foreign spheres, the monarch and privy council took a keen interest in the affairs of its overseas empire.

One of the first writers to turn away from this “imperial” tradition was Richard Koebner. To him, “during the whole Tudor and Stuart periods the crown lacked an ‘empire’ [because] … it was understood that the realm of England in its territorial confines was not imposing enough to qualify as an ‘empire’.” Having an empire meant controlling large territorial holdings, having the ability to wield power and authority by force, and gaining a voice in international power politics. England had none of these before about 1680, when it finally had a vast, more fully integrated territorial network and a strong enough navy to legitimately call itself a “sea empire.” Reinforcing this argument, modern writers have pointed out that despite the writings of contemporary literati, Elizabeth and the early Stuarts had few imperial aspirations, did little to help overseas adventurers and trading companies beyond the formal issuing of a colonial charter, and were hesitant to get involved even when such involvement appeared to be necessary and justified. Because of its laissez-faire approach to commercial matters, because activities in the New World before 1640 could yield little economic dividend and political power, and because the impoverished crown was unwilling to become involved in risky, speculative trading ventures, the monarchy deliberately refused to take responsibility for colonial affairs and


relegated the mercantile “sea empire” to private commercial interests. Under this revisionist interpretation, the English New World before at least 1670 was, therefore, colonial, commercial, and part of emerging Atlantic connections, but was not imperial.14

One purpose of this book is to demonstrate that the lack of Queen Elizabeth’s and the early Stuarts’ desire for a large, Protestant overseas empire does not mean that they relinquished their sovereign rights and responsibilities, gave over their authority to various trading companies and commercial interests, and were not concerned for the welfare of their colonies and subjects. Instead, the English crown had a legal, sovereign, prerogative, and imperial obligation to authorize, supervise, protect, and proclaim its overseas holdings, particularly when faced with challenges from other European colonizing monarchs. The activities of the crown under Elizabeth and the early Stuarts, as shown through official state documents, treatises commissioned or considered by the crown, records and proceedings of the privy council, and instructions to and actions of colonial agents and diplomatic envoys, indicate that it took these rights and responsibilities seriously. The crown was especially concerned to ensure that its imperium, or independent and absolute sovereignty, and its dominium, or right to possess and rule territory under its jurisdiction, were fully and legally expressed.15

These expressions were consistent with early-modern English and European notions of sovereignty, empire (though defined differently than the term would subsequently be employed), law, and international relations, and with the way the English crown supervised dominions throughout its ancient empire and wider composite monarchy.16 These


16 The term “composite monarchy” is generally associated with early-modern European models of state formation. To quote Armitage, it is when “a diversity of territories, peoples, institutions, and legal jurisdictions is cemented under a single, recognized
dominions included the principality and marches of Wales, bishoprics and palatinates such as Durham and Lancaster, proprietorial fiefdoms such as Gascony and the Isle of Man, and overseas territories such as Flanders and Calais. Although these dominions and trading entrepots – like those in the New World – were sometimes given near-regnal autonomy with a considerable amount of self-governance and legislative control, and were often extremely resistant to central authority, these English peripheries did not hold imperium and an imperial authority was imposed over the whole. This authority was based, in part, on the limited efficacy of English common law and its central institutions – including the national courts and parliament – outside of England, which meant that the crown (king-in-council), ruling through royal prerogatives and Roman laws of liberty and natural equity, was the principal body that retained sovereignty and legal oversight throughout the composite monarchy. In seeking to bring the crown and empire back in, this study finds a middle ground between the imperial and anti-imperial schools of historians by arguing that, although there was no ideological British Empire in late-Tudor and early-Stuart England, there was, nonetheless, an important exercise of sovereign authority that fundamentally involved the English crown and dictated a specific historical and legal relationship between the imperial center and the colonial peripheries.


18 Throughout this book, the term Roman law is used broadly to refer to the corpus of work undertaken by contemporary civilian lawyers, as distinct from the work of common and canon lawyers. Further definitions are discussed below.

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dominium) in the New World, and the extent to which these expressions helped to establish the legal foundations of the English empire in America. English promoters of New World sovereignty legally justified their activities in two related but often distinct ways: against the rights of native peoples and against the competing claims of other European colonizing powers. Most of the literature on this subject has focused on the first of these. As Andrew Fitzmaurice has shown, contemporary writers such as John Donne, the two Richard Haklusys, Thomas More, Samuel Purchas, John Smith, and William Strachey exerted themselves to legitimize the dispossession of indigenous peoples. By drawing upon a set of legal arguments similar to that which had been used in the context of Elizabethan activities in Ireland in the 1570s, these and certain continental writers denied that the natives had rights of sovereignty because of their alleged incivility (as shown by their lack of political organization) or infidelity to canon or divine laws (such as polygamy and cannibalism), or because the natives refused to apply natural law, which applied equally to all mankind. The natives’ refusal, for example, to allow Europeans to make use of their rivers and harbours, and their outright hostility when attempts at trade and friendship were made, meant that they breached fundamental laws. These laws stated that the whole world was a single, universal state given filius hominem (to the sons of man) for the purpose of interdependency and self-preservation. Only in a state of war could these privileges be denied. The natives of the New World could, therefore, be conquered by means

of a legally justified and prosecuted war for breaching the universal laws of mankind, one result of which would be loss of rights to the land.23

Even if, as many English writers came to believe by the early seventeenth century, the natives were accorded rights of sovereignty regardless of their incivility, infidelity, and inhospitality, their unwillingness to put the land to agricultural use meant that they further betrayed the laws of God and nature. The English were always more interested in the possession and exploitation of land than the subjugation and conversion of native peoples. Subjugation, extending back to the Norman Conquest of 1066, had historically doubtful legitimacy to the English. Instead, the land’s vacancy was frequently used as the chief rationale for establishing lawful possession (dominium). According to natural and canon law, unoccupied and uncultivated territories (res nullius) become the possession of the first person to discover them and put them to productive use, usually through cultivation.24 When, for example, there was doubt over precisely what lands could be possessed in New England, the Massachusetts Court declared that “what lands any of the Indians, within this jurisdiction, have by possession or improvement, by subduing of the same, they have just right thereto, according to that Gen[esis]: 1:28, chap: 9:1, Psa[lm]: 115, 16.”25 As interpreted by the English, these Biblical injunctions to “be fruitful and multiply, and replenish the earth, and subdue it” suggested that dominium over the


earth was only acquired through settlement and cultivation, which the nomadic natives did not accomplish. Though abstract and frequently the subject of intellectual debate, these varied arguments were usually sufficient in the eyes of European colonizing powers to dispossess the native peoples in the late sixteenth and early seventeenth centuries, after which it became more common for English colonial agents and the crown to “purchase” large tracts of land from native peoples or to engage in treaties. 

Although it is an important topic that represents some of the “many legalities of early America,” native dispossession is not the subject of this book. Instead, I focus on English expressions of sovereignty and possession vis-à-vis other English subjects and, especially, other European colonizing powers. These expressions were based heavily on the recovering and emergent Roman law and its fundamental divisions, civil law, natural law, and the law of nations, the separate but intersecting legal resources that encompassed the work of civilian lawyers throughout England and Europe. In comparison especially to the amount of literature on native dispossession, the subject of Roman law in relation to Anglo-European claim-making in the New World has received surprisingly little attention from historians. This is largely because most

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26 See, especially, Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (Cambridge, MA, 2005); Seed, American Pentimento, ch. 1; John Weaver, The Great Land Rush and the Making of the Modern World, 1650–1900 (Montreal, 2003); and Richard White, The Middle Ground: Indians, Empire, and Republics in the Great Lakes Region, 1650–1815 (Cambridge, 1991). Acquiring land through purchase is the subject of on-going debate. The English perception was that if compensation (however slight) was offered, the natives had no right of refusal, effectively making all contracts of purchase – which should have included consent and lack of coercion – illegal. Alternatively, the crown entered into “treaties,” often of protection, with native rulers, but these were not always honoured and the two parties were not seen as equal partners. Since the English were usually interested in land and not subjugation, these methods were preferred to outright hostility, but should not necessarily be confused with recognition of native land rights or a sound legal basis for taking possession.

27 I make no pretence to offer a comprehensive examination of the variety of legal systems at play in the English New World, which is too large a subject for any one book. Instead, for reasons that will become clear, I highlight the employment of certain Roman legal resources. For an introduction to the legal complexities of America, see, for example, Christopher L. Tomlins and Bruce H. Mann, eds., The Many Legalities of Early America (Chapel Hill, NC, 2001). A broader approach to legal variation in colonial discourse is Lauren Benton, Late and Colonial Cultures: Legal Regimes in World History, 1400–1900 (Cambridge, 2002).

28 These branches of Roman law are discussed in more detail in Chapter 1. Although the early-modern law of nations (ius gentium) is often referred to as “international law” by modern writers, this term did not come into common usage until its articulation by Jeremy Bentham in the late eighteenth century. For the sake of historical accuracy, I prefer the terms “law of nations” or “supranational law.”

29 The most notable exceptions are Pagden, Lords of All the World; and Tuck, The Laws of War and Peace.