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978-0-521-87009-2 - Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640

Ken MacMillan

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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).¹ 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

¹ John Dee, *General and Rare Memorials Pertayning to the Perfect Arte of Navigation* (London, 1577). A recent discussion of this image is in Lesley Cormack, *Charting an Empire: Geography at the English Universities, 1580–1620* (Chicago, 1997), pp. 3–4.

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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

² On these voyages, see John Dee, *The Limits of the British Empire*, ed. Ken MacMillan with Jennifer Abeles (Westport, CT, 2004), pp. 43–48. See also Carol Sparks, “England and the Columbian Voyages: The Attempt to Legitimize English Voyages to the New World,” *Terrae Incognitae* 22 (1990): 1–12.

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.

⁵ A classic study of this activity is Charles M. Andrews, *The Colonial Period of American History, I: The Settlements* (New Haven, 1934). A number of modern studies also exist: Kenneth R. Andrews, *Trade, Plunder, and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480–1630* (Cambridge, 1984); David B. Quinn, *England and the Discovery of America, 1481–1620* (London, 1974) and *Explorers and Colonies: America, 1500–1625* (London, 1990); David B. Quinn and A. N. Ryan, *England's Sea Empire*,

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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 Raleigh, 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 Raleigh 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 associated 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 settlement 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 History of the British Empire (Oxford, 1998).

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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 1640.⁶ 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.⁷ 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.”⁸ 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.

⁷ See especially Andrews, *Trade, Plunder, and Settlement*; John C. Appleby, “War, Politics, and Colonization, 1558–1625,” in *The Origins of Empire*, ch. 3; and George Raudzens, *Empires: Europe and Globalization, 1492–1788* (Phoenix Mill, 1999), ch. 6.

⁸ G. L. Beer, *The Origins of the British Colonial System, 1578–1660* (New York, 1922); J. A. Froude, *The English in the West Indies; or, The Bow of Ulysses* (London, 1888); W. Foster, *England’s Quest for Eastern Trade* (London, 1933); A. P. Newton, *The European Colonizing Activities of the English Puritans* (London, 1914); J. R. Seeley, *The Expansion of England: Two Courses of Lectures* (London, 1883); and J. A. Williamson, *A Short History of British Expansion: The Old Colonial Empire*, 2nd edn. (London, 1930). On this body of literature, see Wesley Frank Craven, “Historical Study of the British Empire,” *Journal of Modern History* 6 (1934): 40–69.

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other nations.⁹ 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.¹⁰ 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.¹¹

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’.”¹² 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.”¹³ 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

⁹ Jacob Viner, “Power Versus Plenty As Objectives of Foreign Policy in the Seventeenth and Eighteenth Centuries,” in *Theories of Empire, 1450–1800*, ed. David Armitage (Aldershot, 1998), pp. 277–309. Originally published in 1949.

¹⁰ See Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (Chicago, 1992), chs. 3–4; Edward Said, *Culture and Imperialism* (London, 1993), pp. 98–9; and Frances Yates, *Astraea: The Imperial Theme in the Sixteenth Century* (London, 1975), part 2. As an effective challenge to these writings, see David Armitage, “Literature and Empire,” in *The Origins of Empire*, pp. 99–123; and Armitage, “The Elizabethan Idea of Empire,” *Transactions of the Royal Historical Society* 14 (2004): 269–77.

¹¹ H. E. Egerton, “The Seventeenth and Eighteenth Century Privy Council in Its Relations with the Colonies [1925],” in *Government and Governance of European Empires, 1450–1800*, ed. A. J. R. Russell-Wood (Aldershot, 2000), vol. II, pp. 559–74; and A. Berriedale Keith, *Constitutional History of the First British Empire* (Oxford, 1930), ch. 2.

¹² Richard Koebner, *Empire* (Cambridge, 1961), pp. 61–4. See also Charles M. Andrews, *The Colonial Background to the American Revolution* (New Haven, 1931), and *The Colonial Period of American History, IV: England’s Commercial and Colonial Policy* (New Haven, 1934–38).

¹³ Armitage, *Ideological Origins*, pp. 7–8; Armitage, “The Elizabethan Idea of Empire.”

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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

¹⁴ On the rise of “imperial” policy after 1680 as distinct from “colonial and commercial” policy, see Michael J. Braddick, “The English Government, War, Trade, and Settlement, 1625–1688,” in *The Origins of Empire*, pp. 286–308; Ian K. Steele, “The Anointed, the Appointed, and the Elected: Governance of the British Empire, 1689–1714,” in *The Eighteenth Century*, ed. P. J. Marshall, The Oxford History of the British Empire (Oxford, 1998); and Stephen Saunders Webb, “William Blathwayt, Imperial Fixer: From Popish Plot to Glorious Revolution,” *William and Mary Quarterly*, 3rd ser., 25 (1968): 3–21, and “William Blathwayt, Imperial Fixer: Muddling Through to Empire, 1689–1717,” *William and Mary Quarterly*, 3rd ser., 26 (1969): 373–415.

¹⁵ Elizabeth Mancke, “Negotiating an Empire: Britain and Its Overseas Peripheries, c. 1550–1780,” in *Negotiated Empires: Centers and Peripheries in the Americas, 1500–1820*, ed. Christine Daniels and Michael V. Kennedy (New York, 2002), p. 236; Mancke, “Empire and State,” in *The British Atlantic World, 1500–1800*, ed. David Armitage and Michael J. Braddick (New York, 2002), ch. 9. See also James Muldoon, *Empire and Order: The Concept of Empire, 800–1800* (New York, 1999); Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain, and France, c. 1500–c. 1800* (New Haven, 1995), chs. 1–2; and various essays in Armitage, ed., *Theories of Empire*.

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

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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 entrepôts – 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.¹⁷ 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.¹⁸ 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.¹⁹

The second purpose of this book is to show some of the ways in which the English crown expressed sovereignty and possession (*imperium* and

sovereign authority” (*Ideological Origins*, p.22). See J.H. Elliott, “A Europe of Composite Monarchies,” *Past and Present* 137 (1992): 48–71; C. Tilly, “Reflections on the History of European State-Making,” in *The Formation of National States in Western Europe* (Princeton, 1975); and H. G. Koenigsberger, “*Dominium Regale* or *Dominium Politicum et Regale*,” in *Politicians and Virtuosi: Essays in Early Modern History* (London, 1986), pp. 1–25.

¹⁷ A. F. McC. Madden, “1066, 1776 and All That: The Relevance of English Medieval Experience of ‘Empire’ to Later Imperial Constitutional Issues,” in *Perspectives of Empire: Essays Presented to Gerald S. Graham*, ed. John E. Flint and Glyndwr Williams (London, 1973), pp. 9–26; Armitage, *Ideological Origins*, ch.2; R. R. Davies, *The First English Empire: Power and Identities in the British Isles 1093–1343* (Oxford, 2000); Stephen Ellis, *Tudor Frontiers and Noble Power: The Making of the British State* (Oxford, 1995).

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.

¹⁹ On center–periphery literature, see Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* (Athens, GA, 1986); Greene, *Negotiated Authorities: Essays on Colonial Political and Constitutional History* (Charlottesville, 1994); Greene, “Transatlantic Colonization and the Redefinition of Empire in the Early Modern Era: The British-American Experience,” in *Negotiated Empires*, pp. 267–82. See also Braddick, *State Formation*, part 5.

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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 Hakluyts, Thomas More, Samuel Purchas, John Smith, and William Strachey exerted themselves to legitimize the dispossession of indigenous peoples.²⁰ 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.²¹ 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.²² The natives of the New World could, therefore, be conquered by means

²⁰ Andrew Fitzmaurice, *Humanism and America: An Intellectual History of English Colonisation, 1500–1625* (Cambridge, 2003), especially pp. 138–48.

²¹ On Ireland, see the works of Nicholas Canny: "The Ideology of English Colonisation: From Ireland to America," *William and Mary Quarterly*, 3rd ser., 30 (1973): 575–98; *The Elizabethan Conquest of Ireland: A Pattern Established, 1565–76* (London, 1976); and "The Permissive Frontier: The Problem of Social Control in English Settlements in Ireland and Virginia," in *The Westward Enterprise: English Activities in Ireland, the Atlantic, and America, 1480–1650*, ed. K. R. Andrews, N. Canny, and P. E. H. Hair (Liverpool, 1979). See also Armitage, *Ideological Origins*, ch. 2.

²² The best contemporary source on these matters is Vitoria's essays "On the American Indians" and "On the Law of War," in Francisco de Vitoria, *Political Writings*, ed. and trans. Anthony Pagden and Jeremy Lawrance (Cambridge, 1991), pp. 231–327. For secondary interpretations, see James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford, 2003), pp. 96–164; Anthony Pagden, "Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians," in *The Languages of Political Theory in Early-Modern Europe* (Cambridge, 1987), pp. 79–98; and the works of Olive P. Dickason, especially "Renaissance Europe's View of Amerindian Sovereignty and Territoriality," *Plural Societies* 8 (1977): 97–107; and "Old World Law, New World Peoples, and Concepts of Sovereignty," in *Essays on the History of North American Discovery and Exploration*, ed. Stanley H. Palmer and Dennis Reinhartz (Arlington, TX, 1988).

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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 inhospitability, 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

²³ On the subject of conquest and just war, see especially Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, NC, 1975); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York, 1990). Regarding natural and European law and aspects of native sovereignty, see Jörg Fisch, "Law As a Means and As an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion," in *European Expansion and Law: The Encounter and Indigenous Law in 19th- and 20th-Century Africa and Asia*, ed. W. J. Mommsen and J. A. de Moor (Oxford, 1992), pp. 15–38; Richard Tuck, *The Laws of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999).

²⁴ A number of recent studies amplify these arguments: Armitage, *Ideological Origins*, pp. 90–9; Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Chicago, 1991), ch. 3; Fitzmaurice, *Humanism and America*, pp. 137–48; Eric Hinderaker and Peter C. Mancall, *At the Edge of Empire: The Backcountry in British North America* (Baltimore, 2003), ch. 1; Karen Ordahl Kupperman, *Indians and English: Facing Off in Early America* (Ithaca, NY, 2000), ch. 1; James Horn, "The Conquest of Eden: Possession and Dominion in Early Virginia," in *Envisioning an English Empire: Jamestown and the Making of the North Atlantic World*, ed. Robert Appelbaum and John Wood Sweet (Philadelphia, 2005), pp. 25–48; Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry* 26 (2001): 315–72; Patricia Seed, *American Pentimento: The Invention of Indians and the Pursuit of Riches* (Minneapolis, 2001), chs. 1–3.

²⁵ Cronon, *Changes in the Land*, pp. 56–63, quotation at p. 63. See also Armitage, *Ideological Origins*, pp. 94–8.

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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.²⁶

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.²⁷ 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.²⁸ 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.²⁹ This is largely because most

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, *Law 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*.