

# Sovereignty, Property and Empire: Early Modern English Contexts

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*This Article is based on a larger work that seeks to map the uses of different legal vocabularies by ambitious European legal and political thinkers in the period of c. 1300-1800 in order to defend, explain and organize the exercise of power outside the domestic commonwealth. The Article examines the ways in which English legal languages (civil law, common law, natural law, jus gentium) were used to think about, propagate and defend English transatlantic expansion. For most of that time, in their relations public and private power remained closely interwoven. The pluralism of English law also contributed to the appearance of arguments from property and sovereignty in different configurations so that it is often hard to figure out which precise connotation is being made. The uses also varied significantly from Continental practices. I am above all interested in the imperial or colonial significance of these arguments. The point that emerges here is that by 1800, a conception of British Empire had arisen where the exercise of sovereign power was clearly derivative from and supplementary to claims about private property.*

## **I. A BASIC DISTINCTION: PREROGATIVE AND COMMON LAW**

Any examination of England's early modern legal Sonderweg will require attention to the all-important differentiation between the law of the prerogative and the common law. The differentiation concerns not only two sets of rules or institutions — although it is that, too — but a professional-cultural contrast between two ways of thinking about the origin of law and the hierarchy of legal institutions. Lawyers operating in prerogative institutions — such as the High Court of Admiralty, the Court of Chancery, Star Chamber or ecclesiastical courts — were usually trained in civil law and had imbibed Roman ideas about government and polity, while their rivals, the common lawyers, were trained

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in English customary law with the Inns of Court and operated typically in the court of the King's Bench and other common law tribunals, often assisting the Parliament in its confrontations with royal power during the Stuart era. The distinction is thus also deeply political. Prerogative and the common law bear contrasting views on how we should understand power and government both within and outside a commonwealth.

To say something about the role of "sovereignty" and "property" in the expansion of early modern England during the three centuries from 1500 to 1800, attention must be paid to how those two notions were articulated within the systems of prerogative and the common law. For that purpose, this Article aims to make two points. First, that "sovereignty" and "property" are configured differently depending on whether we examine them from the perspective of the prerogative or within common law. This is especially evident in England's foreign and colonial relations where the role of the royal and parliamentary prerogative was quite central. The common law "meddles with nothing that is done beyond the seas," as Coke once declared to the Parliament.<sup>1</sup> Even though this was not true, strictly speaking, most English (and from 1707 British) expansion did take place through the use of prerogative law and the royal *imperium*. The second point this Article tries to make, however, is that although the "First British Empire," including the settlement of the Atlantic colonies, *commenced* as a prerogative operation under the Crown, in the late-seventeenth and eighteenth centuries, the role of the common law (or perhaps more loosely "common law thinking") significantly expanded, accompanied by a transformation in the understanding of international governance, especially visible in a novel articulation of the relations of "sovereignty" and "property."

Although the focus here is on English law, the survey of the relations between "sovereignty" and "property" carries a wider meaning. In great part owing to the success of the English colonial and imperial project, this narrative automatically expands into a query about the principles of international rule in the eighteenth century and beyond. The expansion of England had to do also with the diffusion of English legal and political thought across the globe. Even though the central pillars of the common law, for instance "ancient rights of Englishmen," are rooted in English historical experience, they can be used as a starting point for arguments about universal rights. Indeed, Coke himself as well as Sir John Fortescue were clear that the common law gave a historically specific articulation to principles of natural law and "artificial reason" that were

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1 Sir Edward Coke in 1628, as quoted in Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439 (2003).

valid everywhere.<sup>2</sup> At the heart of those principles lay the right of property that Englishmen at home and in the American colonies increasingly saw as being counterpoised to the prerogative rights invoked by the Stuarts in the seventeenth century and the Parliament in the eighteenth century.

This Article proceeds as follows. I first outline the two legal contexts in which the idiom of “law of nations” appears — civil law and common law — with their differing emphasis on sovereignty and property (Part II). I then examine the way sovereignty and property were, in the course of the constitutional conflicts of the sixteenth and seventeenth centuries, sometimes reduced to (Part III) and sometimes in steadfast conflict with (Part IV) each other. In due course, the need to enlist property in the service of the foreign activities of the sovereign became the heart of the policy of “jealousy of trade” (Part V). British Atlantic colonization, too, took place mostly by government through property (Part VI). But the expansion of British influence across the world received its final form in the “empire of free trade” (Part VII), the smooth alignment of private international entrepreneurship with the public authority of the state.

## II. TWO CONCEPTS OF THE LAW OF NATIONS

As the legal historian William Holdsworth has observed, in England, the “rules of international law were regarded as matters which concerned the Crown, and fell within its prerogative in relations to foreign affairs.”<sup>3</sup> These rules were administered by civilians whose extensive view of the royal prerogative often led them to take the Crown’s side in the constitutional conflicts of the Stuart era. However, alongside rules of inter-sovereign interaction in peace and war, the *jus gentium* was also understood to govern the conduct of trade and settlement by private actors, merchants and companies, sometimes (but by no means always) labelled *lex mercatoria*, which overlapped with private rights under the common law. The pluralism of the English legal system ensured that the relations of Englishmen to the outside world would be covered by two kinds of law of nations, one administered by civil lawyers within the changing confines of the royal prerogative, and another operated by both civil and common lawyers having to do with the expansion of English private and public interests across the world.

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2 See, e.g., GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT 1603-1642*, at 29-48 (1992).

3 William Holdsworth, *The Relation of English Law to International Law*, 21 MINN. L. REV. 141 (1942).

Civil lawyers understood the *jus gentium* as an emanation of Roman imperial ideas that involved an expansive concept of the royal prerogative. After all, when Henry VIII established the first *Regius* Chairs of Civil Law at the universities of Cambridge and Oxford in 1540-1546, he did this as part of the effort to make a reality of the famous statement in the Act on the Restraint of Appeals (1533) that “this realm of England is an Empire, and so hath been accepted in the world, governed by one Supreme Head and King having the dignity and royal estate of the imperial Crown.”<sup>4</sup> The professional vocabulary of civil lawyers made them frequently use Bodin’s theory of sovereignty and appear “almost natural exponents of royalist politics.”<sup>5</sup> Alberico Gentili, for example, the most important of English civilian experts on the law of nations, read into the royal prerogative alongside the *potestas ordinata* also the *potestas absoluta* that would authorize the King (James I) to breach even fundamental laws without a *causa*.<sup>6</sup>

On the opposite side, common lawyers, in part jealous of the professional opportunities offered to civil lawyers, in part genuinely opposed to what they regarded as the latter’s royalism, argued for the “ancient” nature of the common law and the way it defined and limited the powers of the King. They also “held that its purpose was the maintenance of individual rights, particularly the right to property.”<sup>7</sup> As a result, two types of law of nations were employed in the English debates, one supporting the sovereignty of the king, the other the binding character of the rights of property of Englishmen. While the former regulated Britain’s relations with foreign powers and gave the justification for its expansion, the latter began to be associated with commercial laws and the conditions under which mercantile interests entered as parts of English statecraft.

The middle of the sixteenth century was the golden era of English civilians occupying positions close to the Court where they “helped to cultivate the art of statesmanship.”<sup>8</sup> Their university training and their humanistic interests bred among them a professional cosmopolitanism; they “represented the

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4 Ecclesiastical Appeals Act 1532, 24 Hen. 8 c. 12 (Eng.). For commentary, see Walter Ullmann, *This Realm of England Is an Empire*, 30 J. ECCLESIASTICAL HIST. 175 (1979).

5 BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND, 1603-1641: A POLITICAL STUDY* 25-27 (1973); see also BURGESS, *supra* note 2.

6 Alberico Gentili, *Disputatio I*, in *REGALES DISPUTATIONES TRES*, 5, 10-11 (London, Thomas Vautroller 1605); see also GLEN BURGESS, *ABSOLUTE MONARCHY AND THE STUART CONSTITUTION* 75-78 (1996); J.P. SOMERVILLE, *ROYALISTS AND PATRIOTS: POLITICS AND IDEOLOGY IN ENGLAND 1603-1640*, at 51 (2d ed. 1999).

7 SOMERVILLE, *supra* note 6, at 84.

8 See LEVACK, *supra* note 5, at 49.

most important manifestation of both reformation and the renaissance in contemporary English Culture.”<sup>9</sup> They tended to look down on the archaic and disorganized nature of the theory and practice of common law and worried about the practice whereby increasing amounts of business were moving from the civil law to the common law courts.<sup>10</sup> In a passionate plea for the increased study of the civil law, Sir Robert Wiseman (1609/10-1684) pointed to its key role in the organization of the relations of nations and in England’s dealings with other countries; civil law embodied what all nations had agreed on as being in accordance with reason and equity.<sup>11</sup> A sustained attack on the civil lawyers was carried out by the most prominent of the common lawyers, Sir Edward Coke, Solicitor-General and Attorney-General, Chief Justice of Common Pleas and member of the Privy Council. The common law courts expanded the use of writs of “*assumpsit*,” established prohibitions and created fictions that enabled them to encroach on the (often lucrative) work of civil law jurisdictions, including in mercantile matters of the High Court of Admiralty.<sup>12</sup> For Coke, if a transaction had the most marginal connection to the realm, then the whole transaction came under the common law.<sup>13</sup> Coke did not at all reject the idea of a law of nations, but he argued that when English courts pronounced on international or commercial matters, they were to do this from the perspective of the common law.<sup>14</sup> In Coke’s mind, the common law may have had a long pedigree in England, but it expressed principles of a legal “reason” that were universal: “Reason is the life of the law, nay the common

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9 DANIEL R. COQUILLETTE, *THE CIVILIAN WRITERS OF DOCTORS’ COMMONS*, LONDON: THREE CENTURIES OF INNOVATION IN COMPARATIVE, COMMERCIAL AND INTERNATIONAL LAW 44 (1988).

10 Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1670 (1994).

11 SIR ROBERT WISEMAN, *THE LAW OF LAWS, OR, THE EXCELLENCY OF THE CIVIL LAW ABOVE ALL OTHER HUMANE LAWS WHATSOEVER* 50 (Royston, London 1686).

12 For the struggle by the common lawyers to limit the jurisdiction of the civil law courts, see especially COQUILLETTE, *supra* note 9, at 103-15 *passim*; and LOUIS A. KNAFLA, *LAW AND POLITICS IN JACOBAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE* 134-38 (1977) (discussing the conflict with ecclesiastical courts). For the struggle against ecclesiastical jurisdictions especially, see CHRISTOPHER W. BROOKS, *LAW, POLITICS AND SOCIETY IN EARLY MODERN ENGLAND* 97-123 (2008).

13 EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 134-36 (London, Flesher 1644).

14 See, e.g., 2 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 182a (London, Clarke 1823) (“[A]nd this is *per legem mercatoriam* which (as hath been said) is part of the lawes of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico* . . .”).

law itself is nothing else but reason, which is to be understood as an artificial perfection of reason, gotten by study, observation, and experience, and not every man's natural reason, for *Nemo nascitur artifex*."<sup>15</sup>

Two aspects of that statement are noteworthy. First, the alignment of the common law with reason enabled Coke to expand the application of the principles underlying it beyond the territory of England. Coke himself had ample experience in commercial law and recognized the fertility of *lex mercatoria*.<sup>16</sup> Also Coke's contemporary, Lord Chancellor Ellesmere (Thomas Egerton), held it obvious that "the common law of England is grounded upon the law of God and extends itselfe to the originall lawe of nature, and the universall law of nations."<sup>17</sup> Second, the most important substantive aspect of this "artificial reason" lay in the protection of rights of property and the powers of the Parliament against royal intervention. The common law did not distinguish between private and public law. What Continental lawyers addressed as "public law" came in England under the label of the royal prerogative. Coke of course accepted the existence of the prerogative, but conceived of it as limited by the rules of common law protecting property.<sup>18</sup> Moreover, the purpose of the prerogative was, common lawyers agreed, protection of the commonwealth. This they interpreted as involving the protection of Englishmen's right to exercise trade and professions and limiting the Crown's power to set up monopolies. Since the Elizabethan era, the provision of monopoly privileges had been a favored technique by the Crown to extract revenue and, despite criticism, it continued to expand during the early Stuarts.<sup>19</sup> Coke, however, regarded monopolies as impermissible because they encroached on the Parliament's competences, violated the prohibition of usury, and undermined the rights of Englishmen to trade and employment. They were not automatically illegal — Coke himself participated in the drafting of the first patent of the Virginia company — but they were often, perhaps in most cases, harmful: "the ruling principle at common law was freedom of enterprise."<sup>20</sup>

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15 EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND* 97b (London, Adam Islip 1628), *quoted in* ALLEN D. BOYER, *SIR EDWARD COKE AND THE ELIZABETHAN AGE* 84 (2003).

16 *See* COQUILLETTE *supra* note 9, at 103.

17 *Calvin v. Smith*, 77 Eng. Rep. 377 (K.B. 1608) (Lord Chancellor Ellesmere).

18 *See* BURGESS, *supra* note 6, at 194-207.

19 *See, e.g.*, CHARLES WILSON, *ENGLAND'S APPRENTICESHIP, 1603-1763*, at 100-03 (London, Longmans 1965).

20 Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 30, 44 (1953); *see also* *The Case of the Tailors of Habits of Ipswich*, *reprinted partly in* 1 *SIR EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES*

To conclude, at the turn of the seventeenth century, two notions of the law of nations were present in the English legal debates — one based on the use of the royal prerogative and largely regulated by a *jus gentium* of more or less civil law inspiration, the other based on the idea of “artificial reason,” embedded in common law and focusing on the protection of the rights of property of Englishmen, but also embracing naturalist principles that were valid everywhere. In practice, the two could not, however, exist independently of each other. The point of the royal prerogative, many held, was to protect the rights of Englishmen — while what these rights were and how they were to be adjusted against each other and those of the Crown would depend largely on prerogative institutions.

### III. SOVEREIGNTY AND PROPERTY INTERTWINED: ENGLISH POWER IN THE SIXTEENTH AND EARLY SEVENTEENTH CENTURY

The English state in the sixteenth century was much weaker than its Continental rivals. Its rulers therefore either had to limit their foreign policy ambitions or finance their wars by enlisting the economic interests of the noble and mercantile classes. The latter strategy is exemplified by Elizabeth’s privateering war against Spain in 1585-1604: only 34 of the 197 ships that were sent to meet the Armada in 1588 were Crown ships.<sup>21</sup> By that time, privateering had become an industry. A private merchant or a shipper would receive a letter of reprisal from the High Court of Admiralty or the Queen herself in case that person had suffered from Spanish confiscations. Of the few avenues available to get rich in England at that time, joining Elizabeth’s war was among the more attractive, despite the hazards. As many as one hundred private vessels participated at any one time in the Queen’s war effort, contributing to the unique motivational combination of profit and nationalism that would lie at the origin of British naval hegemony.<sup>22</sup> The men enriched by privateering then

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OF SIR EDWARD COKE 393 (Steve Shepard ed., 2003) (“[T]he Common Law doth abhor all Monopolies which forbid any one to work in any lawful Trade.”).

21 JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE 1688-1783*, at 10-11 (1988).

22 KENNETH R. ANDREWS, *ENGLISH PRIVATEERING VOYAGES TO THE WEST INDIES 1588-1595*, at 16-28 (1959). Not all of the voyages were profitable. But the value of the annual prize sometimes rose to £100,000 or more, of which the Queen’s formal share was between five and ten percent (though in fact often much less). The greatest part went to large merchant-ship-owners from London whose powerful fleet counted for about one half of the vessels engaged. These vessels and many of the captains trained in privateering would later form the core of the

took the initiative in founding the large trading companies, including the East India Company, as well as the North American ventures; they would provide the ships and manpower to seize maritime superiority from the Dutch.<sup>23</sup> In due course, the use of monopoly charters as well as the stabilization of the pound sterling and the establishment of the Royal Exchange (1560-1561) laid the foundation for the migration of high finance and *entrepôt* trade from Amsterdam to London. The alliance of territorialism and high finance enabled England to outmaneuver its purely territorial (Spain, France) or capitalist (Netherlands) rivals. For example, Elizabeth's £42,000 investment in the Levant Company in 1580 produced returns that not only financed the East India Company's initial capital but, according to Keynes, generated the value of the entire capital of the principal trading companies around 1700, "and something close to £4000 million that constituted the entire stock of British investments in 1913."<sup>24</sup>

By the first decades of the seventeenth century it had become clear that a nation's international power depended on its wealth, and that wealth — especially if the state possessed only a limited population and territory — depended on the intensity of its commerce. At this time, the cloth trade, England's most important export, was organized around a monopoly patent with the Company of Merchant Adventurers. In a tract from 1601, the Company's director, John Wheeler, explained the great utility, for the state itself, of this practice. The Company conducted diplomacy on behalf of the state, maintained navigational links and provided naval support. It produced customs revenue, engaged in works of charity and piety and in innumerable other ways advanced the nation's welfare. It also provided loans to the royal house and spent great sums in coronation and triumphal proceedings: "And when for the defence of the Realme, Shippes have beene to bee made out, it hath cost them notable summes of money . . . all which could not have been done but by men united into a Societie or companie."<sup>25</sup>

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commercial fleet at the service of the English Levant and East India companies. For the early history of English privateering, see further Grover Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT'L L. 694 (1933).

- 23 See ROBERT BRENNER, *MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON'S OVERSEAS TRADERS 1550-1653*, at 19, 45-50 *passim* (2003); DAVID SCOTT, *LEVIATHAN: THE RISE OF BRITAIN AS A WORLD POWER* 77-80 (2013).
- 24 2 JOHN MAYNARD KEYNES, *A TREATISE ON MONEY* 156-57 (1903), *quoted in* GIOVANNI ARRIGHI, *THE LONG TWENTIETH CENTURY: MONEY, POWER AND THE ORIGINS OF OUR TIMES* 191-92 (1994); *see also* ARRIGHI, *supra*, at 200-18 (addressing the British strategy of flexibly combining territorial with commercial power).
- 25 JOHN WHEELER, *A TREATISE OF COMMERCE* 111 (London, Harison 1601).

Wheeler's company originated in a London mercers' guild from the thirteenth century.<sup>26</sup> Its trade had increased rapidly between 1480 and 1540, stabilizing then at about fifty percent of London's total exports. The Company was a significant financier of the state, receiving wide privileges in England and at its foreign headquarters.<sup>27</sup> At the end of the fifteenth century, the Merchant Adventurers had received wide legislative and prerogatory jurisdiction in disputes between English merchants and foreigners and it was authorized to seize violators' person and assets.<sup>28</sup> By the time Wheeler sat down to write, the Company's heyday was already over and the most dynamic entrepreneurs had begun to engage in long-distance commerce. Nevertheless, the form of their operations, and especially their relations with the Crown, followed the pattern set up by earlier companies.

The reasons for using companies in foreign trade were both practical and legal. Setting up a trading post, factory or a settlement in a foreign territory was costly, and the risks enormous. By chartering a company, the King could prevent parliamentary intervention in matters under company jurisdiction, while simultaneously making those endowed with exclusive rights dependent on the court. It was no accident that the London merchants by and large sided with the King in the tumults of the seventeenth century.<sup>29</sup> The investors could be engaged either through "regulated companies" where they would unite to buy and sell on their own account, or in "joint stock companies" where transactions were conducted on behalf of the company itself.<sup>30</sup> The stock might be joint for a single voyage or for a more extended period. Moreover, establishment in a foreign territory required the consent of the other side, to

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26 The substantial extraterritorial privileges enjoyed by the corporation in Antwerp contributed significantly to the prosperity of the town, until expulsion during the Spanish occupation in 1585. See PERCIVAL GRIFFITHS, *A LICENCE TO TRADE: A HISTORY OF THE ENGLISH CHARTERED COMPANIES* 9-16 (1974). That admission to the Merchant Adventurers was limited (its membership in the seventeenth century rose to 3500) was a source of constant complaints, as were also its monopoly privileges. However, its revenues to the Crown were substantial and it saw itself as an instrument in the good government of the realm.

27 See BRENNER, *supra* note 23, at 56-57.

28 2 JOHN P. DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE* 74-77 (New York, Franklin 1970) (1905).

29 See BRENNER, *supra* note 23.

30 An excellent discussion is in Henry S. Turner, *Corporations. Humanism and Elizabethan Political Economy*, in *MERCANTILISM REIMAGINED: POLITICAL ECONOMY IN EARLY MODERN BRITAIN AND ITS EMPIRE* 153, 163-67 (Philip J. Stern & Carl Wennerlind eds., 2014).

which the presence of a charter signaled that the activity was supported by a foreign ruler. In some cases, however, extraterritoriality was granted simply as part of the customary law of nations.<sup>31</sup> As a result of the very wide use of the business of monopoly chartering, “the early modern English ‘state’ became a composite of agents, networks and ‘grids of power’ that operated within, aside and sometimes in conflict with the sovereign Crown.”<sup>32</sup>

Stagnation of the Merchant Adventurers’ trade in the mid-sixteenth century led to a new type of commerce, the import of silk, spices, furs, and other luxury manufactures from the east — especially the Mediterranean and the East Indies.<sup>33</sup> Monopoly charters were issued to long-haul operators such as the Muscovy (Russia) Company in 1555, directed by the explorer Sebastian Cabot, with great notables such as the Lord Chancellor and two Privy Councillors among the investors.<sup>34</sup> The company was authorized to set up detailed regulations for eastern trade, punish offenders and conquer any infidel lands that had not been “commonly frequented” by Englishmen.<sup>35</sup> Its good relations with the Czar led to the receipt of monopoly rights in Russia, too, and local authorities were instructed to assist the company in arresting interlopers.<sup>36</sup>

An even more interesting example of the merger of state policy and mercantile interest was provided by the Levant Company. On September 11, 1581, Elizabeth issued a charter to twelve of the richest London merchants, most of them participants in the Muscovy Company, for a seven-year trade

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31 For instance, a patent by Richard III from 1485 appears to be based simply on general custom. See HOPE SCOTT QC, REPORT ON BRITISH JURISDICTION IN FOREIGN SEAS (1843), reprinted in SIR HENRY JENKYNs, BRITISH RULE AND JURISDICTION BEYOND THE SEAS 247 (1902).

32 Philip J. Stern, “Bundles of Hyphens”: Corporations as Legal Communities in the Early Modern British Empire, in LEGAL PLURALISM AND EMPIRES 1500-1850, at 21, 24 (Lauren Benton & Richard J. Ross eds., 2013).

33 On the growth of the new import trade, see BRENNER, *supra* note 23, at 24-33, 39-45.

34 GRIFFITH, *supra* note 26, at 22-23.

35 See 2 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 36-47 (1912); DAVIS, *supra* note 28, at 97-103. For extracts from the charter of February 6, 1555, see ADAM ANDERSON & JOHN ADDAMS, AN HISTORICAL AND CHRONOLOGICAL DEDUCTION OF THE ORIGIN OF COMMERCE 98-99 (London, Walton 1778).

36 The company’s monopoly and its profits began to fluctuate in the late-sixteenth and early seventeenth centuries, with the English revolution and Dutch commercial pressure opening Russia to “interlopers” and other nations’ merchants. From the 1620s onwards the company operated under the control of the East India Company. DAVIS, *supra* note 28, at 99-102; BRENNER, *supra* note 23, at 79.

monopoly in the whole of the Middle East.<sup>37</sup> Organized initially on a joint stock basis, the Company was authorized to make laws and ordinances for the government of English activities in the enormous area allocated to it, on the standard condition that they would “not be[] contrary or repugnant to the laws, estates or customs of our realm.”<sup>38</sup> In exchange, the company was expected to pay the Crown an annual fee of £500 and allowed its ships to be commissioned for privateering activities against Portuguese vessels returning from Brazil, thus ensuring “enormous quantities of sugar without having to pay for it.”<sup>39</sup> The Company’s director William Harborne was appointed ambassador, but his salary was paid by the company. Harborne was also authorized to appoint consuls across the Ottoman realm and to take action to secure the implementation of the privileges by often recalcitrant Turkish officials. Profits from the company’s first years of operation amounted to 300% for some voyages.<sup>40</sup> As the company’s historian has summarized: “From its inception therefore the embassy at Constantinople had a dual aspect; its holder was at once a royal representative, commissioned by the sovereign and employed in diplomatic duties, and a commercial agent paid by a company of merchants, and pledged to safeguard and promote their business interests.”<sup>41</sup>

Even as common lawyers grew increasingly critical of the use of monopolies and legislation was passed by the Parliament limiting their domestic use by the Crown, none of this decisively influenced these operations. The companies for trade and settlement were an essential part of English foreign policy under the royal prerogative. No-one disputed their usefulness for sustaining English economic and naval power vis-à-vis the country’s enemies. Without the network created by the companies, including the activities of the East

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37 *The Letters Patents, or Privileges Granted by her Majestie to Sir Edward Osborne, M. Richard Staper, and Certaine Other Marchants of London, for Their Trade into the Dominions of the Great Turke, Anno 1581*, in 5 RICHARD HAKLUYT, *THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFIQUES OF THE ENGLISH NATION* 192 (1965); see also ALFRED C. WOOD, *A HISTORY OF THE LEVANT COMPANY* 11 (1964); DAVIS, *supra* note 28, at 88-92. Andrews argues, however, that the English interest at this stage was exclusively commercial. KENNETH R. ANDREWS, *TRADE, PLUNDER AND SETTLEMENT: MARITIME ENTERPRISE AND THE GENESIS OF THE BRITISH EMPIRE, 1480-1630*, at 90-91 (1983).

38 *The Letters Patents*, *supra* note 37.

39 BRENNER, *supra* note 23, at 19.

40 WOOD, *supra* note 37, at 17; BRENNER, *supra* note 23, at 62. The new charter joined the Turkey Company with the Venice Company, providing them with a twelve-year monopoly in their respective territories and enlisting them to seek out an overland mercantile route from Aleppo via Baghdad to the Indies.

41 WOOD, *supra* note 37, at 12-13.

India Company, Britain could not have dreamed about being taken seriously by its main rivals, France, Spain and the Netherlands.

#### IV. SOVEREIGNTY AND PROPERTY IN CONFLICT: THE *SHIP MONEY* CASE

After the prolonged depression in the 1620s, the Stuart Crown's economic situation worsened. Royal income was in principle limited to the product of Crown lands, customary duties and fees from tenurial relations.<sup>42</sup> If extraordinary expenses were needed, the King was expected to turn to the Parliament. But there was no guarantee that the Parliament would look favorably on the King's financial requests. To avoid such difficulties, Charles I resorted to extra-parliamentary levies, operating on his prerogative powers instead of under common law, and defending this by the argument that the country's military forces, especially the navy, were to be modernized in view of external threat. In 1634 Charles resorted to raising the so-called "ship money" with the ostensible intention of strengthening the preparedness of the country to fight piracy and to prepare for possible intervention from the Continent.

The *Ship Money* case (1637) became the climactic political event of the pre-Civil War period, resurfacing the conflict between royal prerogative and property rights that was supposed to have been resolved by the Petition of Right (1628).<sup>43</sup> On August 4, 1635, Charles issued a writ for the payment of the ship money. A case against those refusing to pay was argued at length in front of the twelve judges of the Court of Exchequer during 1635-1637.<sup>44</sup> The opinions turned around the relations between the royal prerogative and the subjects' right of property.<sup>45</sup> One theme had to do with the character of

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42 MICHAEL J. BRADDICK, *STATE FORMATION IN EARLY MODERN BRITAIN C. 1550-1700*, at 246-53 (2000).

43 Petition of Right 1627, 3 Car. 1 c. 1 (Eng. & Wales); see SOMERVILLE, *supra* note 6, at 134-53.

44 *Proceedings in the Case of Ship-Money, Between the King and Mr John Hampden Esq.*, in 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 825 (London, Hansard 1811).

45 *Id.* For a good summary, see D.L. Keir, *The Case of Ship-Money*, 52 LAW Q. REV. 546 (1936). Much of the argumentation in the *Ship-Money* case had to do with procedural detail. One of the issues was whether it was a tax at all, for the original writ of August 4, 1635 was formulated so as to concern a service that Mr. Hampden was due to his monarch. While there was no question at all of the subject's duty of service, including the duty to provide vessels to the navy when the King so commanded, the case now concerned a *debt* that Hampden allegedly

the prerogative: Was it part of common law or instead of law of nature and of nations, standing independently *against* the common law? Another concerned the nature of emergency measures and the notion of “necessity.” Were these legal or political concepts, and how was one to assess their presence? A third problem was whether the Parliament (or indeed a court) was entitled to examine the monarch’s determination. Pleading for the defendant, Mr. St John accepted that defense of the realm was inherent in the King’s prerogative. The problem was not with that principle, but with the fact that “the Forms and Rules of Law [were] not observed.”<sup>46</sup> Any new levy could only be decided with the approval of the Parliament. An external threat might allow bypassing the Parliament, but only in case of “sudden and tumultuous war, which shuts the Courts of Justice, and brings his majesty in person to the field.” But “it appear[ed] not by any thing in this Writ, that any war at all was proclaimed against any prince or state.”<sup>47</sup>

Arguing for the King, Sir Edward Littleton stressed that the prerogative to decide in case of necessity in no way affected the rights of property of the subjects — to suggest otherwise “savour[ed] more of malignity than reason.”<sup>48</sup> When the King acted to protect the realm, he did so to protect his subjects’ properties. “The public and the private are so nearly connext that they can hardly be separated; the public loss falls immediately, and by consequence, upon particular persons. . . . It is impossible to save private fortunes if the public be lost.”<sup>49</sup> There was no doubt, he said, of the King’s duty to protect the nation against external threats. But how could he possibly do this without the power to determine when to act and what was needed for that purpose? “Sometimes dangers are fit to be communicated to the people, and sometimes not. The King should best know what is done abroad . . . and it is very fit that preparation be done before-hand.”<sup>50</sup> Littleton discussed many prior cases where English kings had called upon their subjects to assist them urgently without prior consultation. But the thrust of his argument was not in positive laws or customs. “Necessity,” he said, “is the law of the time and place of action, and

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owed to the monarch to enable the construction of the specialized naval ships for which the money was allegedly needed. Many denied that a duty of service could be transformed into a debt. See BRADDICK, *supra* note 42, at 239-43.

46 Argument of Mr. St. John, *Proceedings in the Case of Ship-Money*, *supra* note 44, at 861, 859-61.

47 *Id.* at 903, 905.

48 Argument of Sir Edward Littleton, *Proceedings in the Case of Ship-Money*, *supra* note 44, at 924.

49 *Id.* at 927.

50 *Id.* at 930.

things are lawful by necessity, which otherwise are not.”<sup>51</sup> The King was the trustee of the defense of the realm, and in this capacity he needed freedom of maneuver. Littleton even cited the principle of the “*salus populi*” — a law to which “[a]ll other laws positive are subordinate” — and stressed the natural law principle that “the common-wealth is to be preferred before all private estates.”<sup>52</sup> For Littleton, as for most of the judges, the arguments on “necessity,” “reason” and law of nature coalesced with upholding the monarch’s privilege to determine, with binding force, the existence of a danger to the realm, and to take action, including deviating from positive law, for dealing with it.<sup>53</sup>

The case was decided in favor of the King with a narrow seven to five majority (two judges decided for the defendant on the basis of a technicality, agreeing with the majority in substance). As the Long Parliament met in 1640, however, it resolved that the case had been wrongly decided and commenced proceedings for the impeachment of the judges who had voted for it. There had been procedural irregularities — for example, Charles had already in 1635 and 1637 received from the judges extrajudicial opinions on the presence of a danger and the legality of the levy.<sup>54</sup> They were hardly impartial at the later stage. The MPs’ worry was with the substance, however. They felt that if the *Ship Money* had stood, the laws would have become “instruments of taking from us, all that we have.”<sup>55</sup>

The *Ship Money* case had starkly juxtaposed the principles of royal sovereignty and individuals’ property. For the King, the procedures of the common law on the protection of property could not override the King’s sovereign determination, made within his competence, that the nation was in danger. For the Parliament, however, the King was misusing the prerogative; the power of sovereignty was limited by the common law. Indeed, the dangers of “absolutism” and “tyranny” were enshrined precisely by the King’s uses of the prerogative in the way he had.

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51 *Id.* at 927.

52 *Id.* at 926.

53 The arguments from *salus populi* and necessity were treated on the defendant’s side by Mr. Holborne, who did accept that there were moments of impending danger — when “fire though not burning, yet ready to burn [or] war, *furor belli*.” But, he claimed, this was not at all the case here. Here it was simply “not, what we are to do by necessity, but what is the positive law of the land.” Argument of Mr. Holborne, *Proceedings in the Case of Ship-Money*, *supra* note 44, at 1013, 1011.

54 Michael Mendle, *The Ship Money Case, The Case of Shipmony, and the Development of Henry Parker’s Parliamentary Absolutism*, 32 *HIST. J.* 513, 517 (1989).

55 BURGESS, *supra* note 2, at 219; *see also* Keir, *supra* note 45, at 546-50.

The royal position in the *Ship Money* case was stated with great force by Thomas Hobbes in *Leviathan* (1651). Hobbes had lived through the Stuart reign, witnessing their early clashes with the Parliament, the Commonwealth, Protectorate, and the beginnings of restoration. His life spanned almost constant international conflict. At the heart of *Leviathan*, as is well-known, is the nexus between protection and obedience: the egoistic, violent and passionate character of human nature necessitated unflinching obedience to authority. In *Ship Money*, the issue of who had authority to determine the presence of a danger to the commonwealth was decided in favor of the monarch. Hobbes agreed but, like Littleton, sought to show that none of this encroached on the subjects' rights because the sovereign actually acted *on behalf of the subjects themselves*. In a late work devoted to the critique of the common law, Hobbes reaffirmed this view; it was wholly senseless to subordinate the sovereign's determination about a danger to the realm to a decision by the Parliament. No doubt, the Parliament possessed general competence in matters of taxation. But it took six weeks to call a Parliament and nobody could tell how long its debates would last, as there "the most ignorant and boldest Talkers rule." If levying money was necessary owing to a danger to the commonwealth, the King would "sin" if he did not look to beyond the letter of the law and take immediate action so as to protect his subjects.<sup>56</sup>

The Parliament was keen to protect propertied interests. But property was dependent on sovereignty. In the state of nature, no property existed; there was "no *Mine* and *Thine*."<sup>57</sup> It was not that there was no "right" in the natural state, there was *too much* of it: "in the state of nature, to have all, and do all, is lawful for all."<sup>58</sup> As a result, each had reason to fear that others would "come prepared with forced united, to dispossess and deprive him, not only the fruit of his labour but also of his life or liberty."<sup>59</sup> To appeal for justice was vain because "justice" was but a "word," an opinion: "For one man calleth *Wisdome*, what another calleth *fear*, and one cruelty, what another justice; one prodigality, what another magnanimity; and one gravity, what

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56 THOMAS HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 62-63 (J. Cropsey ed., Univ. of Chi. Press 1971) (1681). Somewhat disingenuously, Hobbes argued that there was fear that the King would misuse his powers by disenfranchising his subjects. This would undermine the basis of his own power. It is, he says, in the King's own interest not to let his subjects be "destroyed, or weakened." *Id.* at 76.

57 1 THOMAS HOBBS, LEVIATHAN 188 (C.B. Macpherson ed., Penguin 1968) (1651).

58 THOMAS HOBBS, *De cive*, in MAN AND CITIZEN I.10 (117) (B. Gert ed., Indianapolis, Hackett 1991) (1642).

59 HOBBS, *supra* note 57, at 13 (184).

another stupidity &c. And therefore such names can never be true grounds for any ratiocination.”<sup>60</sup>

It was precisely this bewildering variety of opinion that was the source of England’s troubles, leading to anarchy and self-destruction. Hence, as the first law of nature compelled humans “to endeavour Peace,” it also necessitated transferring the right of judgment to what Hobbes in *De cive* called “*supreme power*, or *chief command*, or *dominion*,” a “man or council” to whom “each citizen hath conveyed all his strength and power.”<sup>61</sup> Rightly understood, there was no conflict between sovereignty and property. Property was a creation of, and dependent on the “sovereign” to whom the multitude had transferred their rights: “they have authorized all his actions, and in bestowing the Sovereign Power, made them their own.”<sup>62</sup> This did not signify tyranny. In transferring their rights to the sovereign, the multitude authorized the sovereign to act on their behalf, and accepted “ownership” of the sovereign’s acts.<sup>63</sup> “[E]very Subject is by this Institution Author of all the Actions, and Judgments of the Sovereigne Instituted.”<sup>64</sup> It was easy to see why royalists and the supporters of the Parliament might *both* accept this arrangement. “And thus it is also that Propriety [property] begins.”<sup>65</sup>

## V. A NEW POLITICS: JEALOUSY OF TRADE

The views expressed by Hobbes and the judges in the *Ship Money* case failed to prevail. If it was true, as was increasingly held, that state power was dependent on the wealth of the state, and wealth required well-planned commercial policy, then it was crucial to enlist leading economic operators in the state’s business by liberating them to act in profitable ways. The idea had already been expressed by Sir Thomas Smith (1513-1577), the first Regius Professor of Civil Law at the University of Cambridge. Smith also worked as Elizabeth’s ambassador in Paris, as Privy Councillor and Secretary of State. He was author of the widely-read *Discourse of the Commonweal of this Realm of England* (1549, published 1581) that expressed profound concern over the state of the realm.<sup>66</sup> The ruler’s wealth and power was

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60 *Id.* at 109-10.

61 HOBBS, *supra* note 58, at 11 (171).

62 HOBBS, *supra* note 57, at 24 (297).

63 *Id.* at 16 (217-18).

64 *Id.* at 18 (232).

65 *Id.* at 15 (203).

66 THOMAS SMITH, DISCOURSE OF THE COMMONWEAL OF THIS REALM OF ENGLAND 34-35 (Elizabeth Lamond ed., Cambridge Univ. Press 1929) (1583). Lamond

completely dependent on that of his subjects. Using the vocabularies of “commonwealth,” “*res publica*” and even “civil society,” Smith sketched a realm of governmental action that operated through its own intrinsic laws. By inventing a dialogue between the “knight,” the “husbandman,” the “capper” and the “doctor” (the learned expert in government), he constructed England as a system of interdependent classes of economic operators whose relations he described by a familiar metaphor: “as in a clock there be many wheels yet the first wheel being stirred it drives the next, and that the third, till the last moves the instruments that strikes the clock.”<sup>67</sup> Smith joined the interests of the economic operators to that of the state, fully accepting the profit motive: “True it is that that thing which is profitable to each man by him self, (so it be not prejudicial to any other) is profitable to the whole commonweal.”<sup>68</sup> A prosperous nation that engaged all its economic actors in productive work will also be a formidable international actor. “Yea, among all the nations in the world,” Smith wrote, “they that be politike and civil, do master the rest though their [forces] be inferior.”<sup>69</sup>

Smith had also been one of the initiators of the first Atlantic plantation projects, the colonization of Ulster in Ireland. For this purpose, he had received from Elizabeth a charter on November 16, 1571, where he and his son were “granted . . . all & singular the manors lordships castles monastries abbies priories . . . houses edifices lands tenements meadows pastures . . . [etc.] . . . TO HOLD of us our heirs & successors as of our Castle of Knockfergus by the servise of one Knight’s fee [plus annually 20 Irish shillings per 120 acres of land].”<sup>70</sup>

Smith intended to organize a group of small investors in a joint stock company to settle in a neatly planned, hierarchically organized community. Elizabeth’s courtiers revised the plan, however, allocating large manors (from 4000 to 12,000 productive acres) to designated “undertakers” who would finance the settlement of English families in groups of freeholders, copyholders, tenants and cottagers as an “example of civic living to the Irish

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attributed this work to Sir John Hales but the attribution to Smith is nowadays widely accepted. See Mary Dewar, *The Authorship of the “Discourse of the Commowweal,”* 19 *ECON. HIST. REV.* 388 (1966).

67 See SMITH, *supra* note 66, at 98.

68 *Id.* at 51, 57-60, 127-31; Turner, *supra* note 30, at 157-58; NEAL WOOD, *FOUNDATIONS OF POLITICAL ECONOMY: SOME EARLY TUDOR VIEWS ON STATE AND SOCIETY* 207-10 (1994).

69 SMITH, *supra* note 66, at 23.

70 *Grant to Sir Thomas Smith (Translation) of 16 November 1571*, in *HISTORICAL NOTICES OF OLD BELFAST AND ITS VICINITY* 24, 25 (R.M. Young ed., Belfast, Ward 1898).

population.”<sup>71</sup> Despite the very generous terms offered to the undertakers, a sufficient number was never found and the incipient settlement was overthrown in the Earl of Tyrone uprising in October 1598.<sup>72</sup>

In the course of the early seventeenth century, a literature would emerge in England and elsewhere that focused on the need to enlist commercial concerns and mercantile actors into foreign policy. One of these was Gerard Malynes’s *Lex Mercatoria* (1622/29) that celebrated merchants as the heart of a nation’s international greatness: “Right merchants are taken to be wise in the profession, for their own good and benefit for the common-wealth, for of the six members of all the government of monarchies and common-weales, they are the principal instruments to increase or decrease the wealth thereof. . . .”<sup>73</sup> The civil lawyers, Bartolus and such, Malynes wrote, produced “long discourses and books,” “questions and disputations,” distinctions and definitions that were too far away from practice.<sup>74</sup> How much more useful were the mercantile skills, arithmetic, geometry, cosmography, weights and measures, applied across the world, that a merchant needed to know to serve his nation well! These customary forms of trade now operated like a living organism, Malynes argued, they could not be usefully codified in domestic laws or applied by the courts. They were a spontaneous law that responded to the needs of practice.<sup>75</sup>

Another author, Edward Misselden, deputy governor of Merchant Adventurers and a negotiator on behalf of the East India Company, produced a robust defense of commercial monopolies as an aspect of state power.<sup>76</sup> Trade needed government and in England trade was “reduced to order and Government into Corporations, Companies and Societies [so that they] doe certainly much Advance and Advantage the Commerce of this Commonwealth.”<sup>77</sup> Monopoly was order and competence — freedom chaos and loss. The misuse of monopoly was wrong, but not the orderly operation of large trading companies that enabled collecting capital never available from single merchants. Was it

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71 NICHOLAS CANNY, *MAKING IRELAND BRITISH, 1580-1650*, at 130, 133 (2001).

72 *Id.* at 162.

73 GERARD MALYNES, *CONSUETODO VEL LEX MERCATORIA, OR THE ANTIENT LAW-MERCHANT* 62 (London 1629) (the “six members” being those of clergy, nobility, husbandmen, magistrates, artificers and merchants). For the background of the merchant Malynes, see, for example, COQUILLETTE, *supra* note 9, at 133-34.

74 MALYNES, *supra* note 73, at 5-6.

75 *See id.* at 1-5; COQUILLETTE, *supra* note 9, at 135-36.

76 EDWARD MISSELDEN, *FREE TRADE OR THE MEANS TO MAKE TRADE FLOURISH* (London, Legatt 1622).

77 *Id.* at 53-54.

not right and just to compensate those investors?<sup>78</sup> In another text, *The Circle of Commerce* (1623), Misselden further exalted the role of trade companies, but suggested that public intervention otherwise was only needed to correct “imbalances” or “abuses.”<sup>79</sup> Combining metaphors from physics and geometry with aesthetics, Misselden depicted an organic world of trade where the “circle of commerce” would naturally lean towards the center.<sup>80</sup> “Politick” intervention was needed only as “medicine” for “malady,” to help profit-seeking merchants align their private interest with that of the commonwealth.<sup>81</sup> The King was like a father “*of that great family of a Kingdome*” who would have to determine the balance between the exports and imports and on that basis assess the state of his realm.<sup>82</sup>

## VI. RULING THROUGH PROPERTY: ATLANTIC SETTLEMENTS AND LOCKE

The monopolistic views discussed in the previous Part would be gradually undermined during the first century of North American colonization. The impetus for settlement came from groups of individuals close to the Crown, members of landowning elites and City merchants. Or as Coke put it: “The ends of private gain are concealed under cover of planting a colony.”<sup>83</sup> In the period between 1578 and 1732 the Crown granted roughly thirty-five patents and charters for the purpose of establishing settlements in the Atlantic region.

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78 *Id.* at 73-75.

79 EDWARD MISSELDEN, *THE CIRCLE OF COMMERCE OR THE BALLANCE OF TRADE, IN DEFENCE OF FREE TRADE* (Bournew, London 1623). For a good overview of the debate, see, for example, ANDREA FINKELSTEIN, *HARMONY AND BALANCE: AN INTELLECTUAL HISTORY OF SEVENTEENTH-CENTURY ENGLISH ECONOMIC THOUGHT* 26-73 (2000); see also Carlos Eduardo Suprinyak, *Merchants and Councilors: Intellectual Divergences in Early 17<sup>th</sup> Century British Economic Thought*, 21 *NOVA ECONOMIA* 459 (2011).

80 MISSELDEN, *supra* note 79, at 91. For the “natural” — “politick” distinction in support of interest-taking, see *id.* at 97-99. The metaphor of the “circle of commerce” took a parable from a story about a perfect circle drawn freehand by Giotto — the mastery of his hand was like the mastery of the merchant carrying out trade and bringing the most valuable gifts to his commonwealth. *Id.* ch. *Epistle dedicatorie*.

81 On Misselden, see FINKELSTEIN, *supra* note 79, at 54-73.

82 MISSELDEN, *supra* note 79, at 130-31.

83 BARBARA ARNEIL, JOHN LOCKE AND AMERICA. *THE DEFENCE OF ENGLISH COLONIALISM* 68 (1996) (citing Coke).

Issuing a patent took place under the royal prerogative. The document was prepared by the attorney general or the solicitor general — Coke himself is said to have prepared the first Virginia Charter of 1606.<sup>84</sup> The rights granted to patent-holders were very extensive, following closely the principles and language of land distribution in England, and presuming the inseparability of property and personal jurisdiction.<sup>85</sup> The early patents to Sir Humphrey Gilbert and Sir Walter Raleigh, for example, provided proprietary rights for the individuals mentioned therein — “to have, hold, occupy and enjoy . . . for ever, all the soil of all such lands countries & territories to be discovered or possessed.” The territories were “to be had or used with full power to dispose thereof & of every part thereof in fee simple or otherwise, according to the laws of England.”<sup>86</sup> This was a feudal relationship of vassalage in which land was held directly of the Crown by the vassal as tenant-in-chief, nevertheless enjoying as “fee simple” the widest bundle of rights and interests that could be possessed on a land. The patent-holders were entitled to the “rites, royalties and jurisdictions” attached to the territories they received while simultaneously confirming their allegiance to the Crown by the provision of a fifth part of the gold and silver to be found.<sup>87</sup>

While the oldest ventures were designed for exploring precious metals and setting up trading posts, most seventeenth century Atlantic charters concerned permanent plantations.<sup>88</sup> The lightest form that royal authorization could take was through a royal commission. The one granted to Robert Harcourt in the Caribbean in 1609 authorized travel in a more or less clearly marked direction

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84 *The First Charter of Virginia; April 10, 1606*, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/va01.asp](http://avalon.law.yale.edu/17th_century/va01.asp) (last visited Feb. 15, 2017). For a detailed discussion of the preparation of Elizabethan and Stuart patents and charters, see KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576-1640*, at 80-89 (2006).

85 See also Ken MacMillan, *Imperial Constitutions: Sovereignty and Law in the British Atlantic*, in *BRITAIN'S OCEANIC EMPIRE* 69, 74-78 (H.V. Bowen, Elizabeth Mancke & John G. Reid eds., 2012).

86 *Letters Patent to Sir Humphrey Gilbert*, 1 FED. & STATE CONST. 49, 50 (1578); see also *Letters Patent to Sir Humphrey Gilbert June 11, 1578*, THE AVALON PROJECT, [http://avalon.law.yale.edu/16th\\_century/humfrey.asp](http://avalon.law.yale.edu/16th_century/humfrey.asp) (last visited Feb. 15, 2017); CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR AND CIVIL IDENTITY IN COLONIZING ENGLISH AMERICA 1580-1865*, at 166 n.102 (2010).

87 *Letters Patent to Sir Humphrey Gilbert*, *supra* note 86, at 50.

88 The exception being the Hudson's Bay Company, established in 1670 predominantly for fur trading with the indigenous inhabitants by a series of trading posts. It would also, however, seek to govern the enormous area delimited by the catchment of the rivers emptying into Hudson Bay.

to occupy land of which the Crown would retain the rights.<sup>89</sup> A much more substantive form was the charter issued to the Virginia Company in 1606 and endowing the company with authority in its respective territories over:

[A]ll the lands, Tenements and Hereditaments which shall be within the Precincts limited for that Colony, as is aforesaid, to BE HOLDEN of us, our heirs and Successors as of our Manor of East Greenwich in the County of Kent, in free and common Soccage only, and not in Capite.<sup>90</sup>

Land held “in free and common Soccage” was a feudal type of tenure that involved some rent payable either in kind or in money, but was fixed and did not involve personal service. It was lighter than “in Capite” tenure, held directly of the Crown and involving some variable and potentially heavy personal duties. It was the form to which most feudal tenures were converted in the seventeenth century, involving full freedom to use the land and enjoy its product as proprietor, including the right to administer it, to legislate for it, to alienate it in whole or in part as well as to create sub-tenures.<sup>91</sup> This would eventually be the form in which most of the English colonies in the New World would be organized. The company’s powers were extended in a second charter of 1609 where it was empowered to “make, ordain, and establish all Manner of Orders, Laws, Directions, Instructions, Forms and Ceremonies of Government and Magistracy, fit and necessary for and concerning the Government of the said Colony and Plantation.”<sup>92</sup> It was given

full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of Us . . . according to such Orders, Ordinances, Constitutions, Directions, and Instructions, as by our said Council as aforesaid, shall be established; And in Defect

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89 JAMES A WILLIAMSON, *THE CARIBBEE ISLANDS UNDER THE PROPRIETARY PATENTS* 26 (1926).

90 *The First Charter of Virginia*, *supra* note 84. In the Second Charter of May 23, 1609, the London merchants were incorporated as “The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony in Virginia.” At the time, the second colony — that of Plymouth merchants — had already failed. *The Second Charter of Virginia; May 23, 1609*, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/va02.asp](http://avalon.law.yale.edu/17th_century/va02.asp) (last visited Feb. 15, 2017).

91 See A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 11-14, 47-52 (2d ed. 1986); B.H. McPherson, *Revisiting the Manor of East Greenwich*, 42 AM. J. LEGAL HIST. 35 (1999); TOMLINS, *supra* note 86, at 161. The Virginia council did set up sub-tenures for individual proprietors which, Tomlins writes, “tended to function as self-contained communities analogous to England’s manor-dominated ‘closed’ parishes, or the armed Irish plantations . . .” TOMLINS, *supra* note 86, at 264.

92 *The Second Charter of Virginia*, *supra* note 90, para. 13.

thereof in case of Necessity, according to the good Discretions of the said Governor and Officers respectively, as well in Cases capital and criminal, as civil, both Marine and other; So always as the said Statutes, Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our Realm of England.<sup>93</sup>

In addition, the governor was granted, in case of rebellion, the power to set up martial law — this was used by Governor Thomas Dale with full force in order to deal with the disorder in Jamestown during 1611-1619.<sup>94</sup> However, owing to persistent economic problems and disputes among the company's leadership, Charles I finally decided to rule the territory himself. On the basis of a *quo warranto* writ, the Privy Council cancelled the charter in 1625 and turned Virginia into a Crown colony, to be ruled directly under the Crown. It had a governor and a council that was appointed by the governor. However, as a concession to the settlers, the Crown allowed its assembly — the House of Burgesses — to continue its work; in due course it began to see itself as a colonial variant of the House of Commons in London.

After the companies either had failed (Virginia) or been unable to quell rebellion (Massachusetts Bay Company), the Stuart kings began to grant lands to private courtiers and businessmen. These so-called “proprietary grants” reverted to “palatine” relationships of tenure no longer practiced in England, involving vice-regal privileges under virtual sovereignty from the Crown. The proprietor was entitled to establish manors, to exercise lawmaking and judicial powers, and had the right to assign sub-grants and leases.<sup>95</sup> When the proprietor then granted lands to his tenants, whether manorial lordships, freeholds or copyholds, the result was “a pyramid of proprietorships beginning with the king and reaching down to the lowliest tenant. Each level of hierarchy was marked by quasi-governmental privileges under which the landholder would determine the destiny of those on the land.”<sup>96</sup>

Nothing gives a better sense of the extensive nature of palatine powers than the charter of the colony of Maryland, granted by Charles I originally

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93 *Id.*

94 *Id.* paras. 21, 22. For the infamous “Lawes Divine, Morall and Martiall,” see Brent Tarter, *Lawes Divine, Morall and Martiall*, ENCYCLOPEDIA VIRGINIA, [http://www.encyclopediavirginia.org/Lawes\\_Divine\\_Morall\\_and\\_Martiall](http://www.encyclopediavirginia.org/Lawes_Divine_Morall_and_Martiall) (last modified Jan. 20, 2012).

95 KEN MACMILLAN, *THE ATLANTIC IMPERIAL CONSTITUTION: CENTER AND PERIPHERY IN THE ENGLISH ATLANTIC WORLD* 17 (2011).

96 Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 *LAW & HIST. REV.* 453 (2003).

to George Calvert (1579-1632), the first Baron of Baltimore, and a member of the Privy Council. Calvert, a convert to Catholicism, received initially a palatine proprietorship over Avalon, Newfoundland, but as the conditions there appeared overly harsh for settlement, he was granted, against strong opposition of the Virginia settlers, a large territory north of the Potomac and into the Western mountains. Here the Baron, as “the true Lord and Proprietary of the whole Province,” was given “free, full and absolute power . . . to Enact Laws, of what Kind soever, according to their sound Discretions whether relating to the Public State of the said Province, or the private Utility of Individuals.” The Baron and his heirs were empowered to set up courts to see to penal enforcement on all persons within the province or on the way in or out. Finally, it was specified that the Baron would hold

As ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region, Islands, Islets, and Limits aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England.<sup>97</sup>

The reference to the powers of the bishop of Durham designed the Calvert property analogously to the palatinate provinces that had been originally set up in England’s frontier areas, such as the fourteenth century Welsh and Scottish marshlands, where vice-regal prerogatives came in exchange for protecting the realm.<sup>98</sup> The bishop was “exempt from English political, judicial and administrative institutions,” cases from Durham could not be argued in English courts, no taxes were paid to England, and Durham had no representatives in the Parliament.<sup>99</sup> Moreover, in Maryland (unlike in Durham), the writs would run in the proprietor’s name. Even as the Crown reserved for itself “the Faith and Allegiance and Sovereign Dominion,” Privy Council lawyers objected to the grant of such wide powers. Maryland’s autonomy went much further than Virginia’s and might even jeopardize the rights of Englishmen.<sup>100</sup>

The company and proprietary settlements were governed as private property — even as the Crown and the Board of Trade, Privy Council, committees and

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97 *The Charter of Maryland: 1632*, THE AVALON PROJECT, [http://avalon.law.yale.edu/17th\\_century/ma01.asp](http://avalon.law.yale.edu/17th_century/ma01.asp) (last visited Feb. 15, 2017).

98 *Id.* art. 5.

99 See Tim Thornton, *The Palatinate of Durham and the Maryland Charter*, 45 AM. J. LEGAL HIST. 242 (2001).

100 JOHN E. POMFRET & FLOYD M. SHUMWAY, *FOUNDING THE AMERICAN COLONIES 1583-1660*, at 73 (1971).

commissions often expressed their critique of the way this had been done without regard to provisions in the charters or to metropolitan interests.<sup>101</sup> In March 1701, for example, the Board stated that the colonies had not at all respected the conditions “for which such large tracts of land, and such privileges and immunities were granted by the Crown.” They had enacted their own laws, sometimes in ways that were “repugnant to the Laws of England,” had failed to comply with the navigation acts and harmed the trade of the country, kept no military forces, and felt no need to consider the needs of their neighbors. The charters were to be “reassumed by the Crown and these colonies be put in the same state and dependency as your Majestie’s other Plantations.”<sup>102</sup>

But the proprietors first, and the settlers, as represented in the colonial assemblies, refused to yield. They had succeeded in making the plantations profitable through enormous risks and great suffering; it was unjust for the metropolitan rulers now to tamper with their rights of property and government. The settlers had always thought that they would enjoy all the rights of Englishmen and once those rights seemed threatened by metropolitan activities, they responded by adopting declarations of rights in their assemblies and engaging in petitions and polemics against what they viewed as unconstitutional imperial measures.<sup>103</sup> For that purpose, they could refer to the position taken towards the end of the seventeenth century that when Englishmen settled in open lands or lands inhabited only by uncivilized tribes, they carried their law with them. This position had been stated many times, for example in a memorandum by the Privy Council of 1722 that stated that “if there is a new and uninhabited country found out by English subjects, as the law is the birthright of every

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101 On Crown efforts to control the Atlantic colonies, see MACMILLAN, *supra* note 95, at 11-29; JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENTS IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES 1607-1788*, at 12-18 *passim* (1986).

102 CALENDAR OF STATE PAPERS, COLONIAL SERIES: AMERICA AND WEST INDIES, 1701, at 141, 142-43 (1910). See further the detailed overview of all the colonies in their ability to protect themselves, in their relations with the Indians and with respect to their government, suggesting that all the colonies be put under one “Lord Lieutenant or Captain General from whom all others [sic] Governors of particular provinces should receive their orders,” in REPRESENTATION OF THE LORDS COMMISSIONERS FOR TRADE AND PLANTATIONS TO THE KING [MICROFORM]: ON THE STATE OF THE BRITISH COLONIES IN NORTH AMERICA 35-42 (1721) (see especially pages 41-42).

103 See, e.g., GREENE, *supra* note 101, at 15-16, 23-28. See generally CRAIG YIRUSH, *SETTLERS, LIBERTY AND EMPIRE: THE ROOTS OF EARLY AMERICAN POLITICAL THEORY 1675-1775* (2011).

subject. Wherever they go, they carry their laws with them.”<sup>104</sup> Armed with this theory, the settlers tried to defend their rights to trade against the Navigation Laws of 1651 and 1660, for example, which were resented because they paid no attention to the colonies’ need to trade wherever they could make the best bargain. In the early eighteenth century, the colonials increasingly saw themselves in the same situation as the revolutionaries of 1688-1689. Were the metropolitan rulers now trying to exert the prerogative over their property rights just like the Stuarts had done?

But the status of the law applicable in the Americas was notoriously unclear. The theory that “settlers” carry English law as their “birthright,” as Bacon had put it early in the seventeenth century in *Calvin’s Case* (1608),<sup>105</sup> was countered by Coke’s famous statement in that same case where he distinguished only two types of situation — descent and conquest (plus cession) — and held that where a territory was held through the former means, the King could legislate new laws by a prerogative act and, in case the territory was that of “infidels,” its laws would automatically lapse and the King would rule “according to natural equity.”<sup>106</sup> Because early English law did not recognize a third category (“settlement”), this supported the metropolitan view that America was held as conquered territory, so that whatever rights settlers enjoyed had been granted by the Crown and could be modified by the Crown if necessary.<sup>107</sup> Provisions inscribed in the *Magna Charta* (1215), *Petition of Rights* (1628) or *Bill of Rights* (1689) would then not apply and rights embodied in the charters and patents could, as simply emanations of royal will, be retraced whenever needed. However, to this settler assemblies sometimes responded that those

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104 See *Case No. 15*, in 2 REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY 75 (William Peere Williams ed., London 1787); see also *Blankard v. Galdy* (1693), in 2 REPORTS OF CASES ADJUDGED IN THE COURT OF KING’S BENCH 411 (William Salkield ed., 6th ed. Dublin, Green 1791); YIRUSH, *supra* note 103, at 42-44.

105 *Calvin v. Smith*, 77 Eng. Rep. 377 (K.B. 1608).

106 *Coke, The Case of the Postnati (Calvin’s Case) (1608)*, in A COMPLETE COLLECTION OF STATE TRIALS 638 (T.B. Howell ed., Longman, London 1816).

107 Most people took a middle-ground, however, recognizing that even as the whole of English law did not accompany settlement, some of the basic rights — especially rights of property and political representation — did follow them to America. On what has been called “Coke’s Imperial Constitution,” see Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439, 458-79 (2003). See also PAUL MCHUGH, *ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS* 290-92 (2011).

instruments only *declared* the relevant rights and did not *create* them, that they are inherent rights, valid independently and as a matter of natural law.<sup>108</sup>

This latter idea was nowhere better expressed than in the writings of one with an intimate knowledge of colonial government, John Locke, Secretary to the Proprietors of Carolina (1668-1675) and Secretary to the revamped Board of Trade (1695-1700). The famous fifth chapter of Locke's *Second Treatise*, written in 1681 when there was no longer serious contention over private property in England, was designed to address the colonial issue. Locke agreed with the Proprietors that a colony was above all an economic unit. His contribution to thinking about colonies was to dress colonial government in the language of natural rights over the uses of land that would justify constant expansion in vast tracts of territory to draw "the greatest conveniences of life . . . from it."<sup>109</sup> God had given the world to humans, Locke suggested, so that they would use it to their own benefit. But much of the land in the New World was completely unused, or used by native inhabitants for hunting and gathering that left large tracts of what the settlers thought of as "waste." This was anathema; if land had been donated to humans by God, "it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to his title to it); not to the fancy or covetousness of the quarrelsome and contentious."<sup>110</sup> By configuring the English ways of agriculture — engrossing, enclosing, increasing the productive capacities of land — as the kind of rational land-use that God had intended to accompany his donation, Locke was able to join a Puritan ethic of labor with his theory of property rights in a way that fitted perfectly the settlers' view of their situation.

In order to demonstrate how the settlers could appropriate lands in the New World without native consent (even though such consent was required in Europe), Locke developed his well-known labor theory of property. Speculating about original contracts or patriarchic succession from Adam onwards was unnecessary. What created entitlement to land was the way it was taken into productive use. Everyone owned the labor of their body and the work of their hands. Through such labor, something was attached to things that were taken from nature that entitled closing them off from others. "For this 'labour,' being the unquestionable property of the labourer, no man but he can have

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108 See GREENE, *supra* note 101, at 36, 70-72, 98-99.

109 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 132 (William S. Carpenter ed., London, Everyman's 1984) (1690).

110 *Id.* at 132-33 § 34.

a right to what that is ones joined to, at least where there is enough, and as good left for others.”<sup>111</sup>

According to Locke, property arose in the natural state but remained insecure there. A political society was needed that protected property and regulated its modes and limits.<sup>112</sup> But the Indians had not formed a political commonwealth; they lived in the state of nature.<sup>113</sup> From this it followed that there was no limit to the extension of European *sovereignty* in America, or to turning wide expanses of land into private property. In America, land was amply available “and there was still enough and as good left, more than the yet unprovided could use.”<sup>114</sup>

But even if the Indians did not live in political commonwealths, they too enjoyed the right of property. They did not seem to have private property, however, but instead enjoyed things in common. But to limit the right of settlers against the natives required that Indian property be somehow individuated. This would be through the criterion of labor. “God, when he gave the world in common to all mankind, commanded man also to labour.”<sup>115</sup> Individual natives did possess an (inclusive) claim-right to things that they may gather or hunt, such as fruit or venison or the deer in the forests.<sup>116</sup> But this did not establish property over land. Instead, long-term cultivation was necessary. Even as Indians had an exclusive right to things they possessed, this did not extend to the vast tracts that lay open and in which anybody could exercise their rights of appropriation by extending their labor over them.

Labor thus founded the right to property. And as Locke explained elsewhere in the *Two Treatises*, property founded the right of political community. In Locke’s famous view, “the great and chief end . . . of men uniting into commonwealths, and putting themselves under government is the preservation of their property.”<sup>117</sup> Whatever its constitutional form, government was a kind of trust, its supreme objective the protection of the rights that individuals enjoyed already in the state of nature and that they set up the commonwealth to preserve. If government failed its trust — as James II had done — then subjects were freed from their duty of obedience. The question was: “Who

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111 *Id.* at 130 § 27.

112 *Id.* at 131 § 1.

113 *Id.* at 140 § 49; *see also* JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 141-55 (1993).

114 LOCKE, *supra* note 109, at 132 § 33.

115 *Id.* at 132 § 32.

116 *Id.* at 131 § 30.

117 *Id.* at 180 § 124. By “property,” he meant the “lives, liberties of estates” of human beings. *Id.* at 180 § 123.

shall be the judge whether the prince or legislative act [is] contrary to trust?"<sup>118</sup> This was the same question that Hobbes had asked almost forty years earlier. But Locke's response was quite different. The struggles between the King and the Parliament had shown that the matter could not be resolved by mere division of powers. In England, none of the institutions of the commonwealth was actually supreme. Instead, "the community itself perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even the legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."<sup>119</sup> The "body of the people" was the ultimate judge. Its opinion provided the standard of criticism of government action. Moreover, the right of criticism belonged to each individual: "every man is Judge for himself."<sup>120</sup>

What is significant for international relations in this well-known set of ideas is that they reduce statehood to a secondary instrument of the civil society that continues to be ruled by a system of (pre-political) natural rights — especially the right to property — that also provides the standard for assessing political government. The causally effective interests are the private interests, while the most influential actors are property-holders with easy access to the levers of governmental power.<sup>121</sup> A political commonwealth is needed only to get rid of the "inconveniences" that property-holders experience in the state of nature and to make enforcement of contracts more secure.<sup>122</sup> But it did not *create* property. Even though positive laws regulated its use, this was to take place under the guidance and within the limits of universal natural law, understood in terms of the natural right to property. This reconstructed the *international* realm in two superimposed levels. On the one hand, there was natural law that joined all property-holders of the world in a "great and natural community."<sup>123</sup> On the other hand, there would be the law of nations, the positive laws of treaty and custom upheld and regulated by professional diplomacy and sovereign statecraft that in Britain were administered under the "federative power" of the royal prerogative.<sup>124</sup>

We can apply this in the eighteenth century transatlantic context by suggesting that the conflict between the settler assemblies and the metropolitan Parliament on new legislation such as the Stamp Act (1765) and the Townshend duties

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118 *Id.* at 241 § 240.

119 *Id.* at 192 § 149.

120 *Id.* at 241 § 241.

121 For a discussion, see JUSTIN ROSENBERG, *THE EMPIRE OF CIVIL SOCIETY* (1994).

122 See LOCKE, *supra* note 109, at 180-81 §§ 124-127.

123 *Id.* at 181 § 128.

124 *Id.* at 191 § 146.

(1767) was not exhaustively a conflict between (metropolitan) sovereignty and (settler) rights of property. On both sides there was a fundamental *property* issue involved that then took on the form of arguing about where *sovereignty* should lie. In England, the eighteenth century Parliament (by now the unquestioned focus of sovereignty in the country) was ruled by what Cain and Hopkins have called “gentlemanly capitalism” — the alliance between great landowners and City merchants who were genuinely worried that the mercantile system that had so long guaranteed their privileges in the New World would be destroyed; they felt that a revolution against the constitution was being conducted and that if they did not react in a determined way, then the colonies would be independent and their property rights would suffer.<sup>125</sup> But the colonial assemblies were also exclusive representatives of white propertied males who clung to the ability they had developed in the course of the years to act as the representative rulers of their territories in the image of the Westminster Parliament in London.<sup>126</sup> On both sides, groups of property-holders argued on the basis of their “ancient” rights and their ability to represent communities that were to be “sovereign.”

## VII. SOVEREIGNTY AND PROPERTY: TOWARDS AN EMPIRE OF FREE TRADE

The eighteenth century saw the gradual spread of the view that the wealth of individuals and intensive commerce were the key to a polity’s wealth and power. The debate on security turned to deliberation about how to secure wealth. Already by the 1690s the English had begun to attain control of the most important sea lanes. Why this was important was laid out with admirable clarity by the most influential of the economic writers, the Doctor of Civil Law Charles Davenant (1676-1714), Locke’s colleague in the Board of Trade. Davenant warned his readers of the desire of universal monarchy that was an ineradicable part of “the deprived manners, and wild passions of humankind.” History demonstrated that such an inflated idea of sovereignty led to disaster: “all these great monarchies degenerate into tyranny, with which trade is incompatible.”<sup>127</sup> For the English to resist and eventually prove victorious, it

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125 See P.J. CAIN & A.G. HOPKINS, *BRITISH IMPERIALISM: INNOVATION AND EXPANSION 1688-1914*, at 58-104 (1993); see also Harry T. Dickinson, *Britain’s Imperial Sovereignty: The Ideological Case Against the American Colonies*, in *BRITAIN AND THE AMERICAN REVOLUTION* 64 (Harry T. Dickinson ed., 1998).

126 See, e.g., GREENE, *supra* note 101, at 28-33.

127 CHARLES D’AVENANT, *An Essay upon Universal Monarchy*, in 4 *THE POLITICAL AND COMMERCIAL WORKS OF CHARLES D’AVENANT* 3, 4 (CharlesWhitworth ed.,

was vital to safeguard what they had been taught to think of as their “liberty.” This was not only a side-product of increasing wealth; it was the source of a nation’s commercial power and, if destroyed by “corruption,” loss of power would automatically follow. To keep or enhance its dominant power, a nation needed to respect this liberty as crucial for the conquest of trade: “Whatever country can be in the full and undisputed possession of it, will give law to all the commercial world.”<sup>128</sup>

Following the natural lawyers, Davenant described the development of private property from the difficulties of life in conditions of shared ownership, and the move to trade that was occasioned by the variations in domestic resources across the globe.<sup>129</sup> If trade was necessary owing to the uneven distribution of goods in the world, this had to take place by respecting the liberty of merchants to find the most profitable outlets for their products. If this was undermined by regulation and monopolies, trade would suffer and the way to decline would be open. The point was to respect the intrinsic laws of trade, namely that “[t]rade is in its nature free, finds its own channel, and best directeth its own course”; and all laws to rule and direct it, and to limit and circumscribe it, may serve the particular ends of private men, but are seldom advantageous to the public.<sup>130</sup> This was accepted by the Parliament. Taking control of trade policy in the 1690s, it abolished the privileges of companies such as the Merchant Adventurers and the East India Company; the Crown would no longer be entitled to grant monopoly rights. Overall, there was “a decisive shift towards a much more liberal commercial environment.”<sup>131</sup>

At the close of the Seven Years’ War (1756-1763), critics began to worry about imperial overreach.<sup>132</sup> Writers such as Josiah Tucker, James Stuart,

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London, Horsefield 1771). D’Avenant received the LL.D. from Cambridge University and joined the Doctors’ Commons in 1675. David Waddell, *Charles Davenant (1656-1714) — A Biographical Sketch*, 11 *ECON. HIST. REV.* 279 (1955).

128 CHARLES D’AVENANT, *An Essay on the East India Trade*, in 1 *THE POLITICAL AND COMMERCIAL WORKS OF CHARLES D’AVENANT* 83, 94 (Charles Whitworth ed., London, Horsefield 1771).

129 CHARLES D’AVENANT, *That Foreign Trade Is Beneficial to England*, in 1 *THE POLITICAL AND COMMERCIAL WORKS OF CHARLES D’AVENANT*, *supra* note 127, at 345, 348-49.

130 D’AVENANT, *supra* note 127, at 98.

131 DAVID ORMROD, *THE RISE OF COMMERCIAL EMPIRES: ENGLAND AND NETHERLANDS IN THE AGE OF MERCANTILISM, 1650-1770*, at 45 (2003).

132 The peace was controversial, many arguing that Britain had given away too much in view of the completeness of its military victory. After all, Britain had captured both Canada and a great part of India, while the navy had routed its French and Spanish enemies in Europe. On the disagreements about a peace

Joseph Massie and David Hume, for example, wrote on “jealousy of trade” with a new sense of urgency, suggesting that something like “political economy” (the expression is Steuart’s) might be conceived of as a science to offer policy guidelines based on what were imagined as the “laws” of trade.<sup>133</sup> The basic argument was expressed by the lawyer-diplomat Sir William Mildmay in his *The Laws and Policy of England Relating to Trade* (1765). To gain wealth, a nation had to employ its population as fully and in as diversified a way as possible so as to outsell its rivals by the “cheapness of materials [and] the cheapness of labour.”<sup>134</sup> Commercial treaties with most-favored nation clauses were often necessary but insufficient. More important was the “expediency of laws to regulate our exports and imports, in such a manner as to encourage Trades that are beneficial, and refrain from such as may be prejudicial.”<sup>135</sup>

The monopoly of colonial trade had great economic significance. Part of manufacturing could be undertaken in the colonies (India, for example), while raw materials such as sugar or timber could be brought to England at reasonable cost. The pressure on domestic labor costs, again, could be mitigated by importing cheap grain from Ireland. Like most commentators, Mildmay was aware that colonies could contribute in the form of taxes and as markets for goods produced in England, but also that these policies tended to cancel each other out.<sup>136</sup> Nevertheless, he had no doubt that the colonies should above all serve metropolitan needs. Few contemporaries would have disagreed with his summary of the importance of colonial imports: “new materials will introduce new Manufactures; new Manufactures will introduce new Trades; and new Trades will introduce new Wealth and Power to the kingdom in general.”<sup>137</sup>

In Mildmay’s account, law played a twofold role. First, it was to guarantee freedom of trade and enterprise and provide protection for property — “for men will be but little anxious towards the pursuit of riches, if they cannot be secure in the possession of them.”<sup>138</sup> But second, it was also to become a flexible instrument of “regulation” in the form of strategically directed taxes, duties and

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generally felt to be conciliatory towards France, see NANCY F. KOEHN, *THE POWER OF COMMERCE: ECONOMY AND GOVERNANCE IN THE FIRST BRITISH EMPIRE* 149-84 (1994).

133 See ISTVAN HONT, *JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE* (2005).

134 WILLIAM MILD MAY, *THE LAWS AND POLICY OF ENGLAND RELATING TO TRADE* 22-27 (Harrison, London 1765).

135 *Id.* at 75.

136 See, e.g., KOEHN, *supra* note 132, at 76-104.

137 MILD MAY, *supra* note 134, at 35.

138 *Id.* at 8.

“bounties” designed to enhance the wealth of the country. These objectives led to intense lobbying by mercantile and colonial interests, to frequent changes of government and increasingly unstable colonial policies. When the Stamp Act of 1765 met with colonists’ boycott of British manufactures it was almost immediately rescinded; the import duties enacted soon thereafter met with a similar response, while their partial withdrawal was insufficient to mend what turned out to be a fundamental breach in Britain’s Atlantic colonial system.<sup>139</sup> The Parliament’s effort to restate its unconditional legislative supremacy with the Declaratory Act of 1766 merely strengthened the colonists’ conviction that their interests would never be equally represented in the mother country.<sup>140</sup>

Mildmay’s recipe for governing the international world through commercial regulation would of course be increasingly targeted by men such as Adam Smith, contemplating the possibility that independence for the colonies, with intense commercial links, would actually be the *best* result for everyone. But I want to end by quoting the former governor of Massachusetts, the widely-respected Thomas Pownall, who in successive editions of his *Administration of the Colonies* from 1764 to 1774 tried to canvass a new constitutional system for the transatlantic sphere that would take account of the growth of the colonies and the interests of both sides in the debate. According to Pownall, the liberty of the colonists could be best guaranteed under the Crown and within a consensual union based on both sides’ willingness to compromise. By the time the fifth edition was published in 1774, however, the revolutionary conflict had exacerbated into war and the time of compromise was over. Instead, he now turned to European statesmen to “adopt a system whose basis thus lies in nature; and which by natural means alone (if not perverted) must lead to a general dominion, founded in the general interest and prosperity of the commercial world.”<sup>141</sup>

Pownall attacked what he called the “artificial or political state of the colonies” that consisted of efforts to regulate their commerce, while metropolitan policy followed the “principle of repulsion.” Instead, he wanted to turn to the “natural state” under which nations moved “by a general, common and mutual principle of attraction.” In such a natural state the “general commercial interest

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139 See KOEHN, *supra* note 132, at 105-47.

140 For the text of the Declaratory Act of 18 March 1766, see *1766 Declaratory Act — Original Text*, STAMP ACT, <http://www.stamp-act-history.com/documents/1766-declaratory-act-original-text/> (last visited Feb. 15, 2017). For the repeal of the Stamp Act and the enactment of the Declaratory Act, see KOEHN, *supra* note 132, at 185-95.

141 2 THOMAS POWNALL, *THE ADMINISTRATION OF THE BRITISH COLONIES* 11 (5th ed. Walter, London 1774).

which is most extensive, necessary and permanent, settles and commands the market.” This latter principle, universal free trade, “is the foundation of commercial dominion which, whether we attend to it or not, will be formed.” From this Pownall concluded that the subordinate status of the American colonies must be given up, and their enormous economic potential fully enlisted in a comprehensive pursuit of “some general system” in which Britain would be the center. By tapping into this growing commerce, it would be possible

that Great Britain may be no more considered as the kingdom of this Isle only, with many appendages, colonies, settlements, and other extraneous parts; but as a grand marine dominion, consisting of our possessions in the atlantic, and in america, united in a one [sic] center; where the seat of government is.<sup>142</sup>

In 1780, when the prospect of reestablishing the “transatlantic constitution” was no longer in the cards, Pownall published another work where he suggested a complete overhaul of the “old system of Europe,” associated with balance of trade, secret diplomacy, war and national interest. The work was directed to the “sovereigns of Europe” and made the point that America had now become too great a power for any nation to subordinate. America was a great naval power and its citizens possessed a “spirit of investigation” attuned to ever expanding commercial activity. In due course, Americans would exclude all monopoly so that it would become “a free port to Europe.”<sup>143</sup> This is the change the wise European sovereign should seize; from artificial policies that support individual merchants but are deleterious to the people, it would lead to “the principle of general communion, genuine spirit of life of commerce.”<sup>144</sup> With occasional footnotes to Adam Smith, Pownall finally indicted the idea of the merchant-prince that had too long dominated European policies. The “new system” would be of universally free commerce. England was already beginning to take this direction, and other nations should follow:

[I]f Nature has so formed Man, if policy has so formed Society, that each labouring in his destined and definite and line of labour, produces a surplus of supply, it is the Law of Nature and of Nations, it is of perfect justice as well as policy, that men and nations should be free, reciprocally to interchange, and respectively as their wants mark the course, these surpluses, that this Communion of Nations with each other

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142 *Id.* at 10.

143 THOMAS POWNALL, A MEMORIAL MOST HUMBLY ADDRESSED TO THE SOVEREIGNS OF EUROPE ON THE PRESENT STATE OF AFFAIRS BETWEEN THE OLD AND THE NEW WORLD 92 (2d ed. London 1780).

144 *Id.* at 103.

. . . ought to be thus enjoyed and exercised to the benefit and interest of each, and to the common good of all.<sup>145</sup>

Pownall suggested that there should be a Congress of the “great Trading Bodies of Europe” at the end of the present crisis.<sup>146</sup> This would not be a general council of the kind once suggested by Henry IV or Elizabeth I, but a Council of Commerce for all Europe and North America, led by a “standing perpetual Council of deliberation and advice, and a set of judicial administration common to all.” Owing to the unsettled and disputed character of the law, it should also include a “Great and General Court of Admiralty.”<sup>147</sup> As soon as the revolutionary crisis ends, Pownall suggested, sovereigns should send their ministers to meet “with power and instructions to form some general laws and establishment on the ground of Universal Commerce.” The treaty should include three types of provisions: on how to manage the system of the free high seas; on how to organize navigational rights, taking into account the present claims of maritime states; and a provision for what Pownall called “*Libertas universalis Commerciorum*, free ports and free markets, in open equal traffic.”<sup>148</sup> Although no proposal for a general treaty was actually adopted, the negotiations for the bilateral commercial treaty of 1783 were largely based on free trade principles. The rights of property, operating as part of a universal commercial system, would now be detached from sovereignty, bringing the time of “bounties” and monopolies and “old diplomacy” to an end. If only the Americans would take the initiative in this, they would be working for a greater goal than merely the national interest only. “America will then be the *Arbitress* of the commercial, and perhaps . . . the *Mediatrice* of peace, and of the political business of the world.”<sup>149</sup>

### VIII. A METHODOLOGICAL POSTSCRIPT

Sovereignty and property form a typical pair of legal opposites that while apparently mutually exclusive and mutually delimiting, also completely depend on each other. Their relationship greatly resembles the equally familiar contrast between the “public” and the “private,” or “public law” and “private law.” Such names have routinely been related to apparently definable identities of legal substance and types of legal institution. “Public law” is about the government

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145 *Id.* at 115.

146 *Id.* at 119.

147 *Id.* at 121.

148 *Id.* at 123-24.

149 *Id.* at 77.

of a “commonwealth,” while “private law” has to do with the organization of the relations between individuals, abstracted from their character as citizens. The substance and use of sovereignty has typically been allocated as the business of public lawyers, while the uses of property have formed a large chunk of the business of private lawyers.

It is, however, equally clear that these oppositions cannot be steadily held. What emerges as “public” is the result of all kinds of interactions in the “private” sphere; the content and limits of the “private” sphere are constantly delimited within “public” decision-making. This is not problematic as long as legal culture feeds a professional sense of the flexibility and interdependence of such notions. But if the notions are associated with various normative assessments — as they often are — then the debate tends to become analytically confused. Being “in favor of” or “against” sovereignty or property, for example, is nearly meaningless if considered as such — for every sovereignty relies on a complex network of private property relations and all property relations are supported by some type of “public” power. But it is not at all meaningless as a proposition about governance: *it determines who will rule us*. The turn to free trade at the end of the above narrative laid the basis for Britain’s empire of “free trade.” Was this an empire created by sovereignty or property? It was both. But the important point is that through it, certain commercial and economic interests in Britain were empowered.

We are ruled by sovereignty and by property, but at different moments with different emphasis: sometimes we meet the power of sovereignty first, while property will follow thereafter. At other times, property’s power is prior, while sovereignty will only arrive later to guarantee its faithful execution. For most people, sovereignty’s power — especially its *international* power — seems obvious, while the power of property has become invisible. No doubt, its invisibility is in part due to the ideological thesis that only “sovereignty” is real, political power, while “property” only describes something that is naturally due to us — apolitical and unproblematic. The larger historical work from which this Article emanates will try to demonstrate precisely how the two — sovereignty and property — have always operated together so as to create the structure of power that is, at any moment, the real government of the world.

