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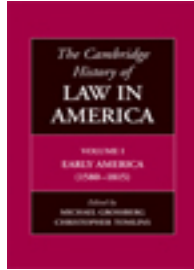
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ENGLISH SETTLEMENT AND LOCAL GOVERNANCE

MARY SARAH BILDER

In late 1584, as Sir Walter Raleigh began to organize an effort to send settlers to Roanoke Island, an anonymous author asked, “What manner of gouernement is to be vsed and what offic to geouerne?”¹ The mysterious end to the Roanoke settlement offers no answer. Yet, as the vast record of charters, letters patent, and correspondence about governance testifies, the manner of government preoccupied settlers, investors, and Crown officials. The question of governance also intrigued past generations of historians. Simply put, when English settlement began in the 1570s, not one of the institutions that symbolized American representative government was in existence; by the 1720s, colonial American institutional development was largely complete.

For the casual reader, institutional histories of early America often revel in overly obscure details of colonial and English political organization. The current tendency to reject the entire venture, however, goes too far the other way. As we shall see, institutional history is important for two reasons. First, it helps us understand the development of authority – in this case, the roots of American federalism and representative democracy. Second, it helps us put British North America in its transatlantic context as part of English politics, the expanding English empire, and the Atlantic world.

For much of the past century, with notable exceptions, early American historians have shied away from institutional history. We can attribute this shift in part to the quantity and quality of work written in the first half of the twentieth century by the “imperial school” of colonial historians. Their detailed accounts of colonial American institutional development in an English world, crowned by Charles McClean Andrews’ magnificent four-volume *The Colonial Period of American History* (1934–8), seemed definitive. The foundations apparently set, succeeding generations of historians

¹ “Anonymous Notes for the Guidance of Raleigh and Cavendish” (1584–1585) in David Beers Quinn, ed., *The Roanoke Voyages* (London, 1955), I: 136.

turned to different concerns. In part, too, for the imperial school historians – mostly born in the nineteenth century and raised in a nation whose governing structure had been torn apart and remade and which had then embarked on its own imperial expansion – the colonial period encouraged institutional explanations for contemporary questions, such as regional differences, discussions of legitimate and illegitimate colonial and imperial policies, and theories of American democratic identity. Later historians, raised in a nation with an apparently unalterable governmental structure but torn by social tensions, looked to the colonial period for insights into different matters – the problems of the modern “United States”: economics and class, politics and ideology, social relations, race, gender, sexuality, and cultural practices.

Although historians turned away from writing institutional history, the questions relating to it have never disappeared. The arrangement of power and authority that developed over the first century of English colonization remains a central, inescapable theme in American history. Yet, our approach to these questions has necessarily changed. Interpretations and theories about historical development become dated; the insights that produce interpretive originality carry intentional or unconscious oversights. In its way this chapter is no exception, for the reader will find that I advance here my own argument about a certain “American manner of government.” But in fact my main concern is not to construct a particular, new interpretive approach. Rather, I hope to suggest the ways in which old questions about governance retain their vitality and interest.

To this end, the chapter retraces the classic institutional narrative, focusing on moments where a reexamination disrupts conventional expectations. The theme is simple. Institutions of government are not preordained. Governance practices are contingent and embedded in particular contexts, and institutional labels and meanings change over time. A revitalized institutional history hence should focus on offices, officers, and the “manner of government” of the early colonial period. So pursued, institutional history reveals law as an instrument of governance and a rhetoric of authority – a discourse about legitimating and also contesting power.

In focusing on governance and authority, I suggest that we should reverse our traditional understanding. We have recognized that both in England and in the North American settlements concerns about the location of authority lay at the center of seventeenth-century English institutional development. But we have approached debates over authority as if there could be only one authority. What is striking about the early colonial period, however, is the centrality of the practice (and hence the problem) of the delegation of authority and the recurrence of developments that created dual authorities and then embraced their inherent tensions. To put it simply,

for the first century and a half, English governance in America was *imperium in imperio*.

Two final preliminaries. First, I focus here on the mainland settlements that eventually become the United States. Additional coverage of Canadian and Caribbean English settlements – the Newfoundland fishing communities, the proprietary colony of Barbados, the long-lived corporation colony of Bermuda, the royal colony of Jamaica, all of which remained longer within the British empire and British imperial governance practices – would reinforce the argument that dual authorities were not inherently unmanageable. Second, I have chosen the agenda for this chapter recognizing how influential the tendency to frame discussions by current institutional assumptions remains. Conventional approaches usually discuss colonial institutions under an executive-legislative-judicial model – that is, starting from the premise that powers can and need be separated. The courts, however, were not a separate branch, and the controversy was whether courts were to be controlled by the legislature or the Crown through the governor. In fact, for most of the colonial period, the “third branch” was the English Crown and Privy Council. To emphasize these understandings, the Privy Council appears as part of governance and the courts as part of the culture of law.

I. SETTLING COLONIES

Discouraging on patterns of colonial settlement often precedes discussion of governance. However, because the Crown began to delegate governmental authority long before any settlements arose, governance is an inescapable foundation for settlement. Yet, English settlement in North America did not proceed according to any preconceived master plan established by the Crown, or private individuals, or groups of investors. Discovery, trade, and military outposts, not settlement, were the initial goals in exploring North America. Ireland, not North America, was the first site for English colonization and plantation. Nonetheless, all the initial English efforts at exploration required a delegation of the Crown’s governmental authority.

Early delegations occurred in letters patent, grants under seal by which the Crown gave privileges and authority but did not necessarily constitute any particular political entity. *Patent* referred to the open or public nature of the grant. Letters patent usually began with the words, “To all to whom these presents shall come, greeting.” In 1496, Henry VII gave John Cabot (Giovanni Caboto) the first English letters patent over land in North America. The Latin words of the document implicitly delegated governance in that Cabot and his sons were enabled to conquer, “occupy and

possess" lands as "vassals and governors lieutenants and deputies."² Soon after, letters patent given to Bristol merchants in 1501 and 1502 contained explicit delegations of governance authority, but did not address the specific structure of government. The patentees received authority to govern and to establish laws, ordinances, statutes, and proclamations for good and peaceful government.

Historians tend to use *charter* as a generic term to refer to the Crown's grants for mainland settlements. In fact, most of these documents were letters patent and referred to themselves as such. Technically and traditionally, letters patent and charters are somewhat different documents. A charter was a grant of privileges in perpetuity; it was more formal, with more witnesses, written in Latin and, until the early sixteenth century, filed in the Charter Rolls. The first documents of North American settlement that explicitly referred to themselves as charters came not as we might expect with the early corporate colonies, but with the first proprietary colonies, followed by the 1644 Parliamentary charter to Rhode Island. Before 1660, contemporaries usually talked not of charters but of patents and of their holders as patentees. Indeed, the etymology of *patent* as a term referring to land conferred by letters patent can be traced to this specific North American context. Only after 1660 did colonists and English officials begin to refer consistently to foundational documents as charters.

In discussions of the substance of the letters patents and charters, the temptation has been to identify the charters as proto-democratic constitutions. Most gave inhabitants the right to the liberties, franchises, immunities, and privileges of free denizens and natural subjects as if born in England. Several provided for land to be held relatively free of feudal obligations. In legal terms, land was to be granted in a technical form: as of the Manor at East Greenwich in the County of Kent in free and common socage and not *in capite* nor in knights service. Free and common socage meant that the land was to be held in fee simple with limited payments (for example, one-fifth of the gold or a certain number of beaver skins).

Many proprietary charters, however, did not envision a settlement of freeholding inhabitants. Although by the early seventeenth century, English landholders largely held land directly from the Crown, these charters permitted land to be held with feudal services and rents owed to a lord. Such grants contradicted the statute *Quia Emptores Terrarum* (1290), which had initiated the decline of English feudalism by permitting the sale of land without penalty, and in fact, these charters explicitly rejected application of

² All quotations from charters and patents unless otherwise noted are from Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and other Organic Laws . . .*, (1909; reprint, Buffalo, 1993).

the statute. The proprietary charters thus affected to resurrect feudal land-holding practices. Letters patent and charters were compatible with both feudal and freeholding practices.

The Corporation Colony

In narratives of English settlement, the corporate form is a crucial component of the American institutional story. The corporation's role, however, was not necessarily that which has been emphasized. Certainly, the corporation provided a mechanism for delegating governance authority to private individuals. Ironically, however, the corporation's failings as a delegated authority and its reinvention as an independent authority would be its lasting contributions to American colonial governance.

Discussions of the corporation as a vehicle for settlement often have implied that the corporation and corporate governance were stable legal forms. The corporate form, however, was itself developing as settlement began. Corporations were created by means of letters patent granting the privilege of incorporation. By the mid-sixteenth century, incorporation signaled a particular set of privileges: the capacity to sue and be sued, possession of a seal, perpetual succession, the power to hold lands, and the power to pass bylaws. The use of this form for overseas trade remained haphazard. The first joint-stock trading company was the Muscovy Company, created in 1555, with governors, assistants, and a collective fellowship empowered to pass statutes, acts, and ordinances. Other joint-stock trading companies developed slowly in the late sixteenth century: the Merchant Adventurers, the Eastland (Baltic) Company, the Levant or Turkey Company, and the East India Company. But it was not until John Wheeler's account of the Merchant Adventurers, *A Treatise of Commerce* (1601), that the structure of corporate governance began to acquire a stable cultural definition as a governor, deputy governor, and twenty-four assistants with "politike gouernement, lawes, and orders."³

Incorporation did not require this particular form of governance. Boroughs, for example, were also incorporated entities. As England shifted from a feudal society to one in which increasingly power came directly from the Crown, boroughs repeatedly requested new Crown charters. But the restructuring these bodies politic sought was not uniform. Not until the 1660s did corporate boroughs begin to possess relatively similar municipal governmental charters. Instead, borough corporations retained their older municipal offices (such as mayor, high steward, bailiff, and recorder) and governance practices. After the Corporation Act (1661) restricted

³ John Wheeler, *A Treatise of Commerce* (London, 1601), 24.

corporate offices to those who were willing to participate in the Anglican Communion, borough corporations came to symbolize sectarianism in English governance. In neither respect, then, were seventeenth-century English models of corporate governance for local government necessarily “democratic.”

The first attempt to use the legal form of the corporation for purposes of colonization reveals the delegated authority underlying corporate governance. In the 1560s, Sir Humphrey Gilbert became interested in English settlement in Ireland. In 1568–9, Gilbert requested privileges to make “a Corporat Towne” in Munster. Gilbert’s interest lay in self-governance: the power “to make Sutch statutes and lawes as shall seeme good to their discrecions, for the better ordning of them selves, and their people, those being agreeable to the lawes of this Realme.” The “chieften of this company” was to have power to make “laws and ordinances, not contrary to the laws of Ireland.”⁴ The Crown granted Gilbert letters patent with lawmaking authority limited by the laws of England. By the late sixteenth century, corporations in general were understood to be similarly bound.

Gilbert kept alive the idea of lawmaking authority limited by the laws of England while aspiring to create a more feudal-style settlement in Newfoundland where English fisheries for catching and drying salt cod existed. In 1578, he obtained letters patent that gave him “full and meere power and authoritie to correct, punish, pardon, governe and rule” with laws “for the better government of the said people,” but “as neere as conveniently may, agreeable to the forme of the lawes & pollicy of England.” Gilbert claimed the area for the Crown in 1583, but his death on the voyage home ended his scheme.

We can conceptualize this formula of lawmaking authority bounded by the laws of England as a constitutionally limited delegation of governance. The formula appeared in letters patent and charters, as well as in royal instructions, commissions, internal delegations of authority, gubernatorial correspondence, colonial laws, court proceedings, and appeals to the Privy Council. The precise language varied, as did the various types of colonial lawmaking that were contemplated: laws, statutes, ordinances, constitutions, acts, orders, bylaws, rules, methods, directions, instructions, as well as court proceedings, procedures, and penalties. Common variations included “not contrary,” “be as near as conveniently may, agreeable,” and “not repugnant.” Many versions included a repugnancy principle (colonial laws could

⁴ Requests of Sir Warham St. Leger . . . Humphrey Gilbert, et al., *The Voyages and Colonising Enterprises of Sir Humphrey Gilbert*, ed. David Beers Quinn (Hakluyt Society, 1940; reprint, Nendeln, 1967), 1: 122–124; Petition to the Privy Council (1569) and “A brief of thinges allowable . . . (1569), 493–6.

not be repugnant to the laws of England), as well as an explicit or implicit divergence principle (the laws could diverge for local circumstances). Similar variations on the “laws of England” appeared. The phrase included “laws and statutes,” but “government,” “customs,” “policy,” “proceedings,” and “rights” also might appear. Eventually the formula was understood to bind even self-authorized settlements: the 1641 Piscataqua River settlers gave their freemen lawmaking authority “not repugnant to the laws of England.”

Although the corporate form offered the capacity to raise funds, adapting the corporate governance of the trading companies to transatlantic settlements was a different story, as Gilbert’s half-brother, Sir Walter Raleigh (Raleigh), discovered in attempting to use the corporation to govern a settlement. Raleigh’s first attempt in 1585 to settle Roanoke Island failed within a year. The letters patent had granted constitutionally limited lawmaking authority, but had made no provision for specific forms of governance. In his second attempt, Raleigh delegated his authority to a “Bodye pollitique & Corporate,” the governor and assistants of the City of Raleigh in Virginia.⁵ Reflecting the settlement’s intended future social hierarchy, the governor, John White, and the twelve assistants were each given a coat of arms. Corporate governance was divided, with three assistants remaining in England while the others and approximately 100 men, women, and children sailed to Roanoke. The need for additional supplies brought White back to England in 1587, but the fragmented corporate structure and the following year’s fight against the Armada foiled fundraising efforts. A new company was created to raise funds for a relief effort in 1590, but by then the settlement had vanished. Whatever the fate of the settlers, Raleigh’s colleague Thomas Hariot pointed out that there was “noe especiall example” of a corporation for planting that had “proued well.”⁶

Difficulties with the corporate form continued. In 1606, James I granted letters patent for two companies (the Virginia Company of London and the Virginia Company of Plymouth) and two colonies. The Plymouth Company undertook only one venture. In 1607, Sir Ferdinando Gorges and George Popham organized 120 settlers to land in Sagadahoc (Maine). The corporate structure remained in England. Difficulties with supplies, bad weather, and, perhaps most important, the governor’s return to England ended the colony a year later. Another small corporation, the London and Bristol Company, fared no better. Its settlement under John Guy at Cuper’s Cove, Newfoundland, in 1610 declined after Guy returned to England several years later. By 1620, disenchantment with the corporate form led the Plymouth arm of

⁵ *The Roanoke Voyages*, 2: 508.

⁶ “Thomas Hariot’s Notes on Corporations for Trade and Plantations” (n.d.) in *The Roanoke Voyages*, 1: 389.

the Virginia Company to reorganize as the Council for New England with authority transferred to a small group of titled lords.

Even when a settlement survived, governing it through a London-based corporation proved difficult. The Virginia Company of London encountered repeated governance problems. The initial letters patent created a multi-layered delegation of authority: a Crown-appointed London council, a resident council, and a requirement that the council's laws be signed by the Crown. In 1607, 104 men set forth to found Jamestown. In barely enough time for the news to travel to England and back, never mind any laws to be approved, disease and starvation reduced the colony by two-thirds. In 1609, the company reincorporated with a single London council that held constitutionally limited lawmaking authority and was to delegate this authority to an appointed governor. Under a strict martial code, the 1611 *Laws Divine, Morall and Martiall, &c.*, Governors Sir Thomas Gates and Sir Thomas Dale stabilized the settlement. But their discretionary authority seemed contrary to the corporate form, so in 1612, new letters patent returned lawmaking authority to the London corporation's general court. Now, the Virginia settlers were left with insufficient discretion. In 1618, the Company issued a "greate Charter or commission of privileges, orders, and laws," delegating its authority to a subsidiary political corporation with a council and assembly of elected representatives.⁷ The first assembly met at Jamestown in July 1619. According to the 1621 ordinance, laws were to be ratified and confirmed in England and the assembly required "to imitate and follow the Policy of the Form of Government, Laws, Customs, and Manner of Trial, and other Administration of Justice, used in the Realm of *England*, as near as may be, even as ourselves, by his Majesty's Letters Patent, are required."

This corporation-within-a-corporation was, theoretically, a coherent model for London-based governance, but the only settlement actually governed that way was Bermuda. In 1612, a subsidiary venture of the Virginia Company settled Bermuda and incorporated in 1615 as the London-based Governor and Company of the Somer Islands (the Bermuda Company). In 1619, Bermuda followed Virginia in encouraging settlement with company instructions to establish an assembly for local governance with the power to make laws not "repugnant to the laws of England," the governor's instructions, or any company laws and subject to confirmation by the company. The assembly convened in 1620, and until 1684 Bermuda was governed as a corporation-within-a-corporation.

No other London-based corporation governed a settlement successfully. The Virginia Company's financial difficulties were a constant liability for

⁷ Susan Myra Kingsbury, *The Records of the Virginia Company of London* (Washington, 1906), 3: 158.

the settlement, and in 1624 the Crown repealed its letters patent by writ of *quo warranto*, a procedure used to revoke borough corporate charters. *Quo warranto* (“by what authority”) accused the corporation of acting outside its charter. In 1625, the new King, Charles I, proclaimed that the government of Virginia would “depend upon Our Selfe.”⁸ The governor became a Crown appointee bound by Crown instructions. Yet, although the corporation no longer existed and the assembly’s legal status was in some doubt, corporate practices continued. In 1629, answers to a set of propositions seemed to confirm authorization of a “grand assembly to ordain laws.”⁹ In 1639, Crown instructions at last specifically acknowledged that the governor and assembly held lawmaking authority so long as its laws were as near as may be to the laws of England. Virginia became a royal colony after 1676, when that designation came to signify a new institutional form that would become dominant in the English settlements. Before then, Virginia looked more like a corporate colony in which the Crown had simply substituted itself for the London corporation.

Virginia was not the only settlement in which the maintenance of corporate governance practices – not necessarily the legal corporate entity – was understood to confer self-governing authority. The English separatists in Leyden, the Pilgrims, were not a corporation as such. London-based investors met as a company with a president and treasurer while the planters sailed off with a governor. Nonetheless, the settlers asserted self-governing authority analogous to corporate authority in a combination (later known as the Mayflower Compact) signed after the *Mayflower* landed outside any authorizing letters patent. The Plymouth leaders in 1629 obtained a patent from the Council of New England that allowed them to “incorporate by some usual or fitt name” and make orders, ordinances, and constitutions, “not repugnant to the lawes of Englande,” and the 1636 laws referred to Plymouth as a corporation. A governor and assistants were to be elected at a general court, and laws passed. By 1640, Bradford surrendered all authority under the patent to the “Freeman of this Corporacon of New Plymouth.”

Plymouth’s experience suggested that corporate lawmaking authority could be acquired by self-governance practices. The same desire for self-governance without regard to formal corporate status appears also in Massachusetts Bay. In 1629, a company was incorporated as the Governour and Company of the Massachusetts Bay, a “Bodie politique and corporate” with letters patent based on the defunct 1612 Virginia document but emphasizing local government. A governor, deputy governor, and eighteen assistants

⁸ Clarence S. Brigham, ed., *British Royal Proclamations Relating to America, 1603–1783* (Worcester, 1911), 53.

⁹ *Calendar of State Papers, Colonial Series, America and West Indies, 1574–1660*, ed. W. Noel Sainsbury (1860; reprint, Vaduz, 1964), 1: 100.

elected by the freemen would take care of the plantation and “Government of the People there,” with constitutionally limited lawmaking authority.

The location of government worried Massachusetts Bay leaders. From the outset, the corporate form made the settlement vulnerable to dissenting shareholders and the Crown. As conditions in England worsened for Puritans, a minority of shareholders successfully voted to transfer the government of the settlement to the inhabitants in New England. This transfer alleviated the need for a corporation-within-a-corporation and placed the physical distance of the Atlantic between settlement governance and the Crown. Without such a transfer, a similar settlement in Providence Island (near Nicaragua) under a similar letters patent failed by 1641.

The sectarian leaders of Massachusetts Bay clung to a belief in corporate self-governance while treating English laws governing corporations as avoidable technicalities. Repeatedly, Crown officials and some colonists challenged the colony’s authority. A year into settlement, Massachusetts Bay leaders restricted participation in corporate governance by requiring that freemen be male members of an approved colony church. Between 1635 and 1637, the Crown conducted *quo warranto* proceedings to revoke the letters patent; however, the writ was not served. Meanwhile, to bolster sectarian governance, the government tried and banished recalcitrants: Roger Williams, Anne Hutchinson, and John Wheelwright. In 1638, the corporation was told to send the patent to the Crown, but Governor John Winthrop refused to do so.

Meanwhile, events in England lessened the threat from the Crown, but raised new challenges. In 1646, Robert Child argued that as all corporations were subject to the laws of England, English laws now favorable to Presbyterians should be followed; this argument was unsuccessful. When Puritan sympathizers took over the English government, the colony’s governance practices were left alone. In 1648, the colony’s first published law code, *The Book of the General Lawes and Libertyes*, proclaimed the general court’s authority over its inhabitants. By the 1660s, the colony coined money, executed Quakers, denied appeals to the Crown, required oaths of fidelity, and ignored English trade laws. Over three decades, the colony’s sectarian corporate governance practices and lawmaking authority surpassed the legal limits of the corporate form.

The perception that corporate governance practices created lawmaking authority – in essence, a government – appears also in Connecticut. In the late 1630s, Puritans similar to those in Massachusetts Bay founded the towns of Connecticut. At first, settlers struggled over the precise terminology for the self-authorized governments. In 1639, Connecticut referred to itself both as a “Publike State or Commonwealth” and a “Combination and Confederation.” That same year, New Haven – founded by settlers of

a particular political-religious bent – chose a “civil government, according to God” under a “plantation covenant.” Soon, however, both adopted the governance practices of Massachusetts Bay, and in 1643 Connecticut, New Haven, Massachusetts Bay, and Plymouth united under “Articles of Confederation in a “firm and perpetual league of friendship” as the United Colonies of New England.

The sectarian tendencies of these corporate-type governments have not always been appreciated. Yet, many dissenters who fled the Massachusetts Bay colony initially chose other political forms of self-governance. Providence, for example, followed a “government by way of Arbitration” and insisted on “liberty of Conscience.” When Portsmouth and Newport later adopted the corporate practices of a governor, deputy governor, and freemen, they insisted on the absence of religious limitation, declaring “the Government which this Bodie Politick doth attend . . . is a DEMOCRACIE, or Popular Government.” The “Body of Freemen orderly assembled” had the power “to make or constitute Just Lawes.” The governmental authority of the corporation was separated from particular governance practices in Rhode Island’s “free Charter of Civil Incorporation and Government,” the first to incorporate a preexisting, self-governed settlement. The Parliamentary commissioners granting the 1644 charter gave the towns the “full Power and Authority to rule themselves” by “voluntary consent of all, or the greater Part of them” as was “most suitable to their Estate and Condition.” The towns chose to elect a president, four assistants, and deputies. In 1647, the assembly emphasized the nonsectarian nature of its government as “DEMOCRATICALL . . . a Government held by the free and voluntarie consent of all, or the greater parte of the free Inhabitants.”¹⁰

By the 1660s, corporate governance practices and a corporate charter or letters patent had come to symbolize constitutionally limited self-governance. This understanding led to the incorporation of Connecticut and Rhode Island. With the Restoration of Charles II, both colonies grew concerned about their political authority. Connecticut had no authorizing document and, in 1662, quickly obtained letters patent from Charles II. The towns became the “Body Corporate and politique” of the “Governor and Company of the English colony of Connecticut.” Rhode Island thought it advisable to replace its Parliamentary charter with new letters patent – referred to by Rhode Islanders as a “charter” – with “full libertie in religious concernements.” Like Connecticut, the colony was incorporated as a Governor and Company (governor, deputy governor, and assistants chosen by the freemen) with constitutionally limited lawmaking authority. The

¹⁰ John Russell Bartlett, ed., *Records of the Colony of Rhode Island* (Providence, 1856) [hereinafter *R.I. Colony Recs.*], 1: 156.

charter affirmed the colony's "livlie experiment" in religious liberty. Rhode Island was now "Company, Corporation and Collony."¹¹

The incorporation of Rhode Island and Connecticut meant formal recognition of the institution of the corporation colony: a political document, explicitly called a charter, incorporated the government (the Governor and Company), corporate officers (governor and assistants) were elected by freemen, and the assembly held lawmaking authority limited by the laws of England. In theory, incorporation placed the settlements under English law, limited their lawmaking authority, and made them vulnerable to *quo warranto* proceedings. In reality, as Edward Randolph criticized, incorporation made the New England colonies "Independent Governm[en]ts."¹² Self-governing corporate authority on the far side of the Atlantic circumvented English corporate laws and English Crown control. After 1663, no more corporation colonies were created.

Seeds of American institutions can be found in this story of corporate governance – but not necessarily the expected ones. Corporate authority theoretically required prior delegation of authority from the Crown, but the repeated failure of corporations for settlement and the development instead of self-authorized settlements with corporate governance practices created the perception that a government based on corporate practices could validate itself. Recognizing the corporation's association with self-governing authority establishes that the desire for this governance, not simply fundraising, led to the adoption of the corporation for settlement activity. Corporate governance practices had created *imperium in imperio*. An emphasis on these governance practices, rather than on the legal corporation, helps explain why colonies without corporate charters nonetheless adopted the governance structure of governors, councils, and assemblies. Long before the Revolution, these offices and practices lost their association with the corporate form and became instead symbols of self-governing authority and the foundation of American institutions. With the seventeenth-century corporate charters no longer representing Crown delegation of authority but independent self-government, Connecticut and Rhode Island would later retain them as new state constitutions.

The Proprietary Colony

Because post-Revolutionary American government resembled the practices of the corporation colonies, proprietary governments often have been

¹¹ *R.I. Colony Recs.*, 2: 24 (Mar. 1, 1664).

¹² Petition of Edward Randolph (Aug. 9, 1687) in Robert Noxon Toppan, ed., *Edward Randolph; including his letters and official papers . . .* (Boston, 1899), 4: 166.

neglected. Yet, the proprietary form represented an equally plausible approach to delegating governance authority. Englishmen interested in the settlements viewed the invention of the proprietary form as an improvement over the corporation colony; proprietaries achieved real settlement success. Nova Scotia (1621), Avalon (1623), Maryland (1632), and Maine (1639), as well as Carolina (1663), New York and New Jersey (1664), Pennsylvania (1681), and East Jersey (1682), all followed the proprietary form. The coexistence of settlements with authority delegated through corporate governance practices and those with authority delegated to individual feudal proprietors indicates the absence of preconceived notions about the appropriate manner of government for colonies.

Although we tend to think of the charter as emblematic of democratic constitutionalism, the term *charter* first appeared in the early proprietary grants. The proprietary form involved governing practices under which an inheritable proprietorship was given by the Crown to a nobleman, a cohort of titled lords served as councilors, and a dependent assembly assented to legislation. The proprietor acquired social status as the highest lord and the economic privilege of collecting quitrents (in essence, rents or taxes on land). His political authority was similar to the English palatinates of Durham and Chester; the social aspiration came from idealized English manorial society.

The impetus for proprietary charters seems to have arisen both from frustration with the corporation and the feudalistic aspirations of a few noblemen. The oft-forgotten Sir Ferdinando Gorges played an important role. Since 1607, Gorges had been involved in the failed colonial ventures of the Plymouth Company. In 1620, he abandoned the corporation approach and had the Company restructured as the “Council . . . for the planting, ruling, ordering, and governing of New-England” (the Council for New England). The Council was in form a board of proprietors, made up of noblemen and gentlemen. It held constitutionally limited lawmaking authority and granted land to Gorges, Council members, and friends. Some grants were never used and reverted; others did not prove particularly successful.

Although the Council’s grants did not prosper, others adopted the idea of proprietary settlements. In 1621, a Scottish nobleman, Sir William Alexander, obtained a charter from James I and the Scottish Privy Council naming him hereditary Lieutenant General over Nova Scotia (New Scotland). The charter, the first so described, gave Alexander extensive powers so long as the laws were “as consistent as possible” with those of Scotland. Alexander’s was a feudal vision: he established a Scottish-style feudal order, planned to raise money by creating hereditary Knights-Baronet, and obtained a coat of arms. By contemporary standards, Nova Scotia was successful, surviving

until the early 1630s when the settlement was evacuated pursuant to a French agreement.

The proprietary approach was of interest to men who were rising in the ranks of the nobility through service to the King. In 1623, James granted letters patent for the Province of Avalon (Newfoundland) to his Secretary of State, Sir George Calvert – later to become Lord Baltimore and a Catholic convert. Calvert had already been involved in the Virginia Company and the Council of New England. The Avalon patent granted him the most extensive governance authority residing in any individual in England other than the Crown by granting him the powers of the Bishop of Durham. Avalon failed when Calvert found the weather too cold. The proprietary grant over the Caribbee (Barbados, the Leeward Islands, and others) obtained by James Hay, recently elevated to Earl of Carlisle, in the late 1620s was initially more successful, prevailing over the corporate scheme of Courteen and Associates.

During the 1630s, proprietary grants continued to vest broad government authority in a proprietor. In 1632, Calvert's son Cecilius acquired a Latin "charter" granting Maryland "forever," responding in part to his desire to found a settlement for Catholics. The charter established a palatine province in which the proprietor controlled the courts and possessed law-making authority limited only by the "Advice, Assent, and Approbation" of the freemen and the familiar repugnancy provision. In 1634, Catholic and Protestant settlers landing in Maryland laid out manors, parishes, and hundreds, with quitrents paid to the proprietor. In 1639, Gorges acquired similar letters patent for the Province of Maine. Gorges's narrative described the patent as a "Royal Charter," implicitly distinguishing the direct Crown delegation from the Council of New England's subsidiary "patents." Gorges envisioned an idealized England and began to settle Maine with borough towns and cathedral cities. His death in 1647, however, ended the proprietary.¹³

For the first half-century of settlement, the corporation and proprietary coexisted as different approaches to the problem of delegating governance and authority. In the 1640s, English political developments led Parliament to reject the chartered proprietary with its cultural associations of lords, dependent assemblies, and noble titles. Parliament's sole new charter was given to Rhode Island as an incorporated political body. This shift toward legislative authority and Protestantism left the Maryland proprietary and its charter vulnerable to charges of religious intolerance. In 1649, the assembly

¹³ Ferdinando Gorges, "A Brief Narration of the Originall Undertakings of the Advancement of Plantations . . ." (posthumously published 1658), in *Sir Ferdinando Gorges and His Province of Maine* (Boston, 1890), 2: 65.

and the newly appointed Protestant governor, William Stone, assented to, and in 1650 the proprietor confirmed, an act permitting a certain degree of “conscience in matters of Religion.” Despite the act, in 1652, the family lost control of the proprietary to Parliamentary commissioners.

Parliament had been quick to reject the proprietary form, but the restored Crown did not perceive it as an affront to Crown authority. Hence the Restoration revived proprietary grants and returned Maryland to the Calverts. Nor did the Crown bring an immediate end to corporate self-governance. Between 1662 and 1664, Charles II incorporated Rhode Island and Connecticut while also granting proprietary charters for two huge provinces, Carolina (stretching from Virginia to Florida) and an unnamed territory (including New York, New Jersey, parts of Maine, Martha’s Vineyard, and Nantucket). Because Charles would make no additional grants until the 1680s, these 1660s charters left governance by both proprietary and corporation once again apparently legitimate.

The Restoration grants confirmed the Crown’s willingness to give extensive governing authority to proprietors. The 1663 Carolina charter was given to eight lords. The multiplicity of proprietors made nonsensical the grant of Bishop of Durham powers, but the proprietors were given constitutionally limited lawmaking power on the assent of the assembly, authority to grant titles and incorporate boroughs and leet manors, and the ability to collect feudal quitrents. As in Maryland, the proprietors’ vision included a degree of religious toleration. In the 1664 letters patent for territory later known as New York, Charles did not technically name James, Duke of York, as lord proprietor, but conveyed similar authority: “full and absolute power and authority” to govern, limited only in that the laws be agreeable and the Crown have the right to hear appeals. James’s own 1664 grant of New Jersey to Carolina proprietors John Lord Berkeley and Sir George Carteret, for the nominal yearly rent of a peppercorn and, if demanded, twenty nobles (an old coin), reveals the same understanding of the proprietary. The two men established proprietary governance, planned to collect quitrents, and extended liberty of conscience to the province (declaring it the one principle that the assembly could not alter). Proprietary practices involved lawmaking authority in the proprietor, feudal rent collection, and some degree of religious tolerance.

Initially, proprietors controlled lawmaking. In New York the “Duke’s Laws” (1665) were likely prepared by Governor Richard Nicolls and legally trained Matthias Nicolls. In Carolina, proprietor Anthony Ashley Cooper and John Locke produced the “Fundamental Constitutions” (1670), outlining an elaborate feudal society, which legalized slavery and provided liberty of conscience for believers in the public worship of God. Proprietorial authority was diminished, however, by the growing cultural assumption

of the legitimacy of assembly authority. In Carolina, the proprietors failed to persuade the Carolina assembly to assent to the Fundamental Constitutions and they never became colony law. In New Jersey representatives of one town rejected the proprietary altogether as “soe obscure to us that at present we are ignorant what it is” and refused even to pay quitrents.¹⁴ The New Jersey proprietary’s political difficulties only increased in the 1680s after Berkeley’s share had passed into the hands of a group of Quakers and Carteret’s share became held by twenty-four new proprietors. In 1683, even the Duke of York was compelled to permit an assembly with lawmaking power subject to governor and proprietor concurrence.

This late-seventeenth-century transformation of proprietary governance is reflected in the final proprietary, the province and seignory of Pennsylvania given to William Penn by Charles II in a “Royall Charter” in 1681. Like other proprietors, Penn, a Quaker, provided religious toleration of a sort (here for Quakers and other dissenting Protestants) and planned to collect quitrents. Penn’s authority as lord proprietor, however, was bounded by Crown and assembly. Penn’s charter did not include the broad powers of the Bishop of Durham. Penn, instead, was to send his laws to the Privy Council for confirmation or disallowance, permit appeals to the Crown, follow Crown colonial policies, and keep an agent in London to respond to Crown concerns. Although like earlier proprietors, Penn’s 1682 “Charter of Liberties” and frame of government attempted to have the governor and council write legislation and the assembly simply accept or reject it, by 1696 this approach was deemed no longer appropriate to circumstance. The assembly took over lawmaking authority, proposing and passing legislation subject to the governor’s veto and the Crown’s disallowance.

What significance should we accord the proprietary form? From Canada to the Caribbean, proprietors settled and governed a far larger area than the corporation colonies. Landholding practices in the middle and southern colonies long continued to reflect the proprietary’s feudal, manorial vision. The proprietary’s ability to combine this vision of landholding with some degree of religious tolerance reminds us that our association of religious tolerance with democratic government is deeply contingent. Like the corporation, governance under the proprietary produced a version of *imperium in imperio* – but in this case the development of multiple authorities. This approach, however, failed. Initial proprietor ascendancy was eroded by the growth in the assembly’s lawmaking authority and the Crown’s desire for direct governance. Faced with these dual challenges, almost everywhere

¹⁴ Middletown paper (1669), quoted in Charles M. Andrews, *The Colonial Period of American History* (New Haven, 1937), 3: 147.

the proprietor's authority collapsed. Two proprietaries, Maryland and Pennsylvania, survived at least in name because of the intense commitment of their founding families, but the proprietors per se came to hold little real authority.

The Royal Colony

By the Revolution, most colonies had become royal colonies held directly by the Crown. Conventional accounts often imply that the path to royal dependency was straight and that the Crown pursued a strategic course, limited only by colonial opposition. The institution of the royal colony, however, developed over a century in fits and starts. In 1625, the Crown proclaimed "there may be one uniforme course of Government, in, and through Our whole Monarchie, That the Government of the Colonie of Virginia shall immediately depend upon Our Selfe, and not be committed to any Company or Corporation, to whom it . . . cannot bee fit or safe to communicate the ordering of State-affaires."¹⁵ But the Crown proved to be inconsistent in following this policy. Despite sporadic efforts aimed at Massachusetts Bay, not one other colony was reduced to dependency during the reign of Charles I. What a uniform course of government and, equally important, colonial dependence actually looked like remained unclear for a century.

Policy after the Restoration depended on the Crown's political advisor and his vision. Sir Edward Hyde, the Earl of Clarendon and Lord Chancellor, sought increased colonial control but used existing mechanisms: a Privy Council committee on the colonies was established in 1660, Virginia was given a seal proclaiming it the fifth royal dominion in 1663, and a Crown-appointed governor and council were placed in Jamaica (seized from Spain in 1655). New charters for Carolina (with Clarendon as a proprietor), Rhode Island, and Connecticut followed traditional delegations of authority. Crown commissioners attempted to end Massachusetts Bay's sectarian political practices and require conformity to English law, but the Crown did not pursue their recommendation to revoke the letters patent. After Clarendon fell from power in 1667, the Crown lost interest as it dealt with problems caused by the Great Fire of London and war with the Dutch.

In 1675, Sir Thomas Osborne, Earl of Danby and Lord Treasurer, resurrected the idea of a uniform course of colonial government predicated on Crown ascendancy. The new Committee on Trade and Plantations (the Lords of Trade) initiated changes in lawmaking to make colonial laws the

¹⁵ Brigham, ed., *British Royal Proclamations*, 53.

enactment of the Crown instead of the assemblies. In 1676, the Crown rejected a proposed Virginia charter affirming assembly lawmaking power subject only to review by the Crown and instead issued new letters patent that placed Virginia in “immediate Dependance upon the Crowne of England” without mention of an assembly.¹⁶ In Jamaica, the Lords attempted to impose Crown lawmaking modeled on English control over Ireland. In New England, Edward Randolph cited numerous grounds on which to revoke the corporate charters, including violations of the laws of England, refusals to take oaths or permit political participation of members of the Church of England, denial of appeals to the Crown, and the obstruction of trade laws.

Colonial opposition and Danby’s fall from power meant that the Crown’s attempt to take over colonial lawmaking went nowhere. Crown efforts to exert greater control turned instead to creating limits on colonial lawmaking authority by developing means to enforce the rhetoric of repugnancy and agreeableness to the laws of England, which avoided the difficulty and drama of *quo warranto* proceedings. Thus when, in 1679, the Crown established a royal province in New Hampshire with a Crown-appointed president and council, the assembly’s power was constrained by requirements that the president and council approve laws and that the Privy Council have an opportunity for review. Bermuda was similarly restructured after *quo warranto* proceedings permitted a new colonial government under a royal governor in 1684 – a move initially welcomed by colonists tired of the company. The Massachusetts charter was vacated in somewhat similar fashion and Massachusetts and Maine placed in theoretical dependency on the Crown.

Charles’s death in 1685 halted the process in some confusion, leaving Massachusetts without a charter and Rhode Island and Connecticut as the only remaining corporation colonies. The accession of James, Duke of York, again altered the Crown vision of colonial government and royal dependency. Consistent with James’s policies in England, the colonies were envisaged as a small number of large dominions, with diminished assembly lawmaking authority. James’s own proprietorial colony of New York was merged with East and West Jersey, Massachusetts (and Plymouth), New Hampshire, Maine, Rhode Island, and Connecticut into a new Dominion of New England to parallel the old southern dominion of Virginia and the huge Carolina proprietary. The governor-in-chief, Sir Edmund Andros, was

¹⁶ Grant from Charles II (Oct. 10, 1676) in John Burk, *The History of Virginia, from its settlement to the present day (Petersburg, 1804–1816)*, 2, Appendix, xl–xli; Virginia Colonial Records Project 578, § 2582, Virginia Center for Digital History, University of Virginia (www.virtualjamestown.org/virtjam6.html).

given constitutionally limited lawmaking authority and required to send laws to the Crown for approval. By 1688, Andros obtained the charters of the Jerseys and Rhode Island, although Connecticut's eluded him, hidden allegedly in an oak tree. Andros faced opposition throughout, however, and in 1689 the Dominion of New England collapsed amid local uprisings and the overthrow of James II.

Crown policy on the colonies changed yet again under William of Orange and his wife, Mary (James II's daughter). More accepting of Parliamentary authority, the Crown now confirmed colonial assembly power while maintaining Crown supervision. In 1691, Massachusetts Bay received a "Royall Charter" in which the Crown appointed the governor, and the freeholders elected the assembly and the twenty-eight assistants of the governor's council. Assembly control of the council limited the royal governor's legislative control, but the assembly was still required to send laws to the Crown for approval. Privy Council appeals could no longer be prevented, but jurisdiction was limited to personal actions, permitting the colony for decades to deny appeals over real property disputes. New York, meanwhile, was given a Crown-appointed governor and council, an assembly, and Privy Council review of legislation. The Jersey proprietaries, Connecticut, and Rhode Island had their charters returned. Pennsylvania was returned to William Penn after a brief period of Crown rule arising from Penn's political troubles. Maryland fared less well under a Protestant Crown unhappy with its Catholic proprietors. Although the proprietary technically remained, the Crown acquired the power to appoint and instruct the governor and the Privy Council gained the power to review legislation and hear appeals. The Crown's overall approach to supervisory authority was confirmed in 1696 with the creation of the Board of Trade.

The trend to uniformity in Crown policy created a perception that the proprietary and corporate charters made those colonies exceptional. In particular, the corporate governments appeared to make repugnant laws, refuse appeals, and flout the trade acts. They harbored pirates, coined money, competed with English goods, and did not take care of their own defense. In 1701, the Board of Trade recommended that the charters "be re-assumed to the Crown; and those colonies put into the same state and dependency."¹⁷ Proprietors and corporation governments sought to reduce their charters' vulnerability by voluntarily responding to inhabitant and Crown concerns. Penn's "Charter of Privileges" (1701) affirmed legislative power in the unicameral assembly. Colonial lobbying and the death of William in 1702 put a stop to a pending revocation bill, but a new bill to create colonial uniformity

¹⁷ State of Government under the Plantations (1701), *Proceedings and Debates of the British Parliaments respecting North America* (Washington, 1927), 2: 401.

through royal appointments and appeals appeared in 1705, during Queen Anne's reign. This bill failed too. Nevertheless, Rhode Island and Connecticut decided to permit appeals to the Privy Council and Connecticut even voluntarily sent occasional laws over for review.

The Crown did not reduce any additional colonies to dependency by direct policies after 1700. Nonetheless, disagreements ended proprietaries that had multiple proprietors. In 1702, the Jersey proprietors surrendered governance to the Crown while maintaining rights to the land. In Carolina, the proprietors' shares became embroiled in inheritance disputes, and residents petitioned the Crown to revoke the charter. In 1720 after a local revolution, the Crown appointed a royal governor in South Carolina and insisted on approving the governor for northern Carolina. In 1729 it repossessed the proprietary charter.

With the accession of George I, antagonism to the remaining charters quieted after another effort to recall them failed in 1715. That year, the Crown restored the Maryland proprietary to Charles Calvert, the Protestant great-grandson of Cecilius Calvert. In Pennsylvania, the Penns also retained their proprietary and even appointed governors (technically deputy governors) into the 1770s. In Rhode Island and Connecticut, the corporation governments remained intact even after the Revolution. Uniform government in the colonies was never completely achieved. Nevertheless, amid the variety a common denominator form emerged: a local assembly holding constitutionally limited lawmaking authority and overseen by either Privy Council appeal or review.

In 1732, the last charter granted by the Crown confirmed the emergence of this form of governance, in the process replaying the long history of settlement practices as if it were an institutional teleology. Initially, the Crown had delegated its governing authority to private individuals, as corporations or proprietors. The Georgia charter thus incorporated a group of trustees as a "body politic and corporate." The "corporation" of trustees, in turn, elected a council that appointed a governor, subject to Crown approval. After settlement, however, the Crown was to have supervisory governance returned to it. The Georgia corporation would therefore dissolve after twenty-one years, and the Crown would thereafter appoint the governor. The manner of government under the future royal governor did not have to be stated: he and the assembly would pass laws, and the Privy Council would review laws and appeals to ensure no repugnancies to the laws of England.

In 1701, the anonymous author of *An Essay upon the Government of the English Plantations* noted that if "any Alterations in the Government of the Plantations are necessary, they may be much more easily done now they are in their infancy, than hereafter when they grow more populous, and the Evils have taken deeper Root, and are more interwoven with the Laws

and Constitutions of the several Colonies.” Alterations in government were indeed done more easily in infancy. Unfortunately, by 1701, the government of the colonies was already well on the path to maturity. Every passing decade embedded common denominator governance practices more firmly and rooted colonial government into the colonial constitution. The failure to reduce the colonies to complete dependency before 1701 – indeed, the failure of the Crown even to develop a uniform idea of what constituted colonial dependency – would quietly become England’s biggest problem. English efforts in the 1760s to impose dependency on this colonial constitution led toward revolution.

II. GOVERNING SETTLEMENTS

By the early eighteenth century local governance in the English colonies depended on relations among the governor and council, the assembly, and the Privy Council. Of course, more immediate authorities governed ordinary inhabitants’ daily life. Local subdivisions – towns in New England, counties in the middle colonies, parishes in the Carolinas – governed the community by recording real estate and contract transactions, making probate determinations, imposing minor fines and penalties, dividing land, surveying highways, and policing poor and dependent individuals. Religious associations and institutions governed religious behavior. Male heads of households governed wives and children. White masters governed indentured servants and enslaved Africans, African Americans, and Indians. Compacts and treaties between English settlers and the Native American tribes, as well as intercolonial commissions and confederations, governed relations among the colonies and with their neighbors. Although all these forms of governance are important, here I focus on the transformation of settlement governance from its somewhat haphazard beginnings to a theoretically coherent, surprisingly effective, transatlantic colonial system.

The Governor and Council

We often assume the office of *governor* predated settlement. Although the origins of the office remain unclear, the word did not originally mean colony leader. At times, it referred descriptively to the one who governs, and at other times it signified a specific official, such as the governor-general of a garrison. The use of the term *governor* in the settlement context seems to reflect the early influence of the trading corporations that usually had a governor, deputy governor, and assistants, all elected by the assembled generality. But even among early corporate ventures the title given to the chief executive officer varied. Raleigh’s 1589 venture referred to a governor

but the 1606 Virginia letters patent had no such reference, whereas the 1607 Sagadahoc venture had a president. The term “governor” often seemed generic, as in the “Governor or principal Officer” of the 1609 Virginia letters patent. By the 1630s, however, governor was becoming the preferred term in corporate and proprietary colonies, and by the Restoration it was the dominant term. Almost all post-Restoration charters had a governor, and later Crown instructions named appointees as the Governor in Chief.

Historians’ focus on the legislature has left the governor’s importance often unstated. The governor symbolized the location of supreme authority in the settlement. In the colonies that followed corporate practices, the inhabitants selected the governor. In Plymouth, the men “chose, or rather confirmed, Mr. John Carver (a man godly and well approved amongst them) their Governor for that year.”¹⁸ In Massachusetts, Connecticut, and Rhode Island, the general assembly elected the governor. In proprietary colonies, the proprietor appointed the governor or held the position himself. The Crown’s gradual attempt to acquire more authority over the colonies concentrated on controlling the governor. In the 1660s, Charles II unsuccessfully encouraged colonies to request new charters with Crown gubernatorial appointment. Later, James II made Edmund Andros Captain General and Governor in Chief of the Dominion of New England. Under William and Mary, the 1696 Navigation Act required that governors nominated by proprietors be approved by the Crown. By the 1720s, only Rhode Island, Connecticut, and, to a certain degree, Pennsylvania remained outside this system of royal governor appointment and control.

Selecting the governor symbolically demonstrated authority and reinforced loyalty to that authority. Into the eighteenth century, corporation colonies repeatedly elected the same few prominent local residents who had a vested interest in the success of the colony, often because of their large landholdings or extensive mercantile assets. In the proprietaries, appointments reflected varying theories of authority. Maryland favored Calvert family members. Pennsylvania chose English or Welsh officers and colonial administrators, though many switched loyalties and died in the colony. In Virginia, early Crown appointments favored local residents, but by the late 1670s Crown governors usually came from the English military and other colonies. Francis Nicholson, for example, had served in the English army and then in the Dominion of New England. Appointed lieutenant governor of Virginia (1690–2), Nicholson then became Governor of Maryland (1694–8), Virginia (1698–1705), and South Carolina (1721–5). Although New England governors’ loyalties often remained in the colony, southern

¹⁸ William Bradford, *Of Plymouth Plantation, 1620–1647*, ed. Samuel Eliot Morrison (New York, 1952), 76.

royal governors like Nicholson began to exemplify the emergence of career interests in the English colonial system and the development of aspirations for a uniform colonial policy.

Governors rarely acted alone, instead serving with a deputy and council. The office of deputy governor or lieutenant governor was ill defined, its duties ambiguous and varied across the colonies. The council's precursors lay in the broad array of English advisory institutions, ranging from borough councils to the trading company councils to the Privy Council. Certain New England settlements initially used the term *magistrate* for council members, but in corporation colonies the term *assistant* predominated. *Councilor*, with its English governmental associations, was preferred in the proprietaries. With the exception of Massachusetts, in colonies under Crown control, governors nominated councils of twelve inhabitants. Royal instructions required these members "be men of good life and well affected to our government and of good estates and abilities and not necessitous persons or much in debt." The council advised the governor, sat as a court, composed the upper house in bicameral assemblies, and consulted in certain colonies on judicial and other appointments.

The office of governor was all important. Early governors physically founded their settlements; their absence often doomed the settlement. The thirty-six instructions given to Virginia Governor Sir Thomas Gates in 1609 indicate the extensive expectations placed on governors. Gates was to sail the fleet to Jamestown; take control of public records; appoint, consult, and dismiss counselors; ensure worship of the Church of England; befriend and try to convert the native peoples; use martial law and chancery power; make laws; settle a principal seat, build a fort and additional towns; encourage trade; oversee employment; search out additional commodities; oversee meals; keep track of letters and instructions from England; listen to all opinions and objections; and keep secret sealed documents.

Instructions to later royal governors demonstrate the same breadth of authority and obligation. They held the power of appointment, oath, and oversight over other governmental branches. They were not to assent to laws that circumvented disallowance requirements, affected trade or shipping, or prejudiced the prerogative or property of subjects. They had discretionary powers ranging from the discouragement of drunkenness to the licensing of printing presses. They oversaw escheats, collected quitrents, and supervised the value of currency. In commerce, they assisted admiralty and customs officers, aided the royal navy (for example, by enforcing laws to preserve trees for masts), enforced the laws regarding the plantations trade, and encouraged the Royal African Company's monopoly over the slave trade. They were heads of the military, empowered to assist other colonies, but not to declare war except against "Indians upon emergencies." They promoted

the established Church of England, encouraged the conversion of “Negroes and Indians to the Christian religion,” and permitted religious liberty of various degrees (in some colonies without restriction; in others to all but “Papists”).¹⁹

Governors became conduits for Crown authority and flows of information. They surveyed and transmitted maps. They wrote reports relating to population, colony affairs, and injuries to English subjects by other nations. They wrote accounts of judicial and other governmental functions, of finance, and of commercial imports and exports (including the numbers and prices of slaves imported). Although governors in royal colonies tried to follow the written commissions and instructions that specifically defined their powers and duties, governors in corporation colonies spent time trying politely and cleverly to refuse to comply with Crown requests.

Governors also supervised colonial law. The governor and council initially possessed significant lawmaking authority. In early settlements, particularly in the proprietaries and royal colonies, governors authored or helped draft legislation. Assembly lawmaking power and bicameralism would eventually reduce this direct power over legislation, whereupon governors resorted to the veto, used powers to summon and dissolve the assembly, and sent controversial laws to the Privy Council for disallowance. By the early eighteenth century, the governor, possessing only indirect control over lawmaking, appeared nevertheless to be a bar to legislation.

Into the eighteenth century, governors retained judicial authority through which they might try to control the interpretation of laws. In every colony, the governor and council initially sat as the central court. Over time, a growing caseload converted the governor and council to a court of appeal in many civil matters. The governor’s judicial authority over equity was particularly controversial because that control was seen as symbolizing supreme authority. In royal colonies and certain proprietaries, the governor and council sat as a chancery court under the theory that equity fell within the Crown’s prerogative power. Crown lawyers interpreted the Massachusetts royal charter as retaining equity courts under the Crown prerogative and therefore barring the legislature from appointing equity judges. In Pennsylvania, the assembly and governor fought over who held this equitable authority. The corporation colonies remained controversial exceptions by insisting that supreme equitable authority lay in their assemblies.

¹⁹ For royal instructions, see Leonard Woods Labaree, *Royal Instructions to British Colonial Governors, 1670–1776* (New York, 1935), 2 vols.; for Gates’s instructions, see David B. Quinn, ed., *The Extension of Settlement in Florida, Virginia, and the Spanish Southwest* (New York, 1979), 212–18.

The Assembly

We should not take the existence of the assembly for granted, for the idea that the governed should participate in governance was somewhat unusual. In English boroughs and palatines, the assembled governing body was usually referred to as a council. An *assembly* was a more representative gathering with self-governing authority. Early English trading corporations held assemblies (general courts) to enact bylaws; for example, the Presbyterian Church of Scotland had been organized by a general assembly. In 1619, the first colonial lawmaking gathering in Virginia adopted the term, referring to itself as a "General assembly." Specific local variants appeared (Virginia had a House of Burgesses and Massachusetts Bay had a General Court) but most colonies and Crown instructions referred to a *general assembly*. The term remained ambiguous, however, with *assembly* referring to the assembly of governor, assistants, and deputies, as well as only the lower branch of the legislature. Over the seventeenth century, the assembly in both senses established its existence by gaining lawmaking authority.

Once assemblies began to appear, they quickly became part of colonial government. In Virginia and Bermuda, the assemblies that convened in 1619 and 1620 likely brought some stability to local relationships. The Maryland proprietary charter provided for an assembly of freemen that would help frame laws; such an assembly met possibly as early as 1635. In 1639, the Crown officially recognized the Virginia assembly in royal instructions. Parliamentary control during the Interregnum strengthened colonial assemblies, and the Restoration did not have a significant adverse effect on them. James, Duke of York, did not include an assembly in his plans for New York, but one met in 1683. By then, Crown instructions generally assumed the presence of assemblies.

As representative institutions, assembly composition ran the theoretical gamut. The early freemen in Massachusetts Bay were also largely officers; the general court thus tended to duplicate the council. In Maryland, all freemen were initially summoned to the assembly. The need to make government work for the inhabitants altered both approaches. In Massachusetts, the complaints of ordinary landholders led to enlargement of the class of freemen electing deputies. In Maryland, freemen desiring to avoid attendance at the assembly developed an informal proxy system among themselves. Maryland would shrink participation to elected representatives. By the 1640s, representatives in most settlements were elected from towns or other defined localities. Inhabitants' concerns about governance also prompted a shift to bicameralism, which was dominant by the end of the seventeenth century. Representatives of towns, burgesses, or counties sat in the lower house; members of the governor's council sat in the upper house. Pennsylvania

remained an exception with an explicitly unicameral structure. Regardless of structure, elections were seldom contested before the end of the seventeenth century.

The idea that assemblies should exercise lawmaking authority was also accepted rapidly. In corporation colonies, the assembly was recognized as the supreme lawmaking authority. In the proprietaries, the assemblies' authority over lawmaking was initially more limited, the Maryland charter simply requiring the "Advice, Assent, and Approbation of the Free-men" or "their Delegates or Deputies" to laws made by the proprietor. By the end of the seventeenth century, however, assemblies were generally exercising significant lawmaking authority. The Crown's failed attempt in the late 1670s at imposing lawmaking on Jamaica and Virginia only confirmed assembly authority over law.

The Privy Council

The role of the Privy Council (strictly, the King in Council) in colonial governance took a century to cohere. The first Virginia patent gave the Crown a brief direct role, but otherwise early letters patents provided no formal part, leaving the Crown to address issues through private petitions and complaints. During the mid-1630s, a permanent committee on trade and a commission on foreign plantations were created. The latter, under William Laud, theoretically enjoyed broad powers over the colonies – the power to make laws, hear cases, and revoke charters and patents – but it accomplished little. During the 1640s and 1650s, Parliamentary leaders passed the first Navigation Act regulating colonial trade, sent commissioners to the settlements, and began to review laws from the Barbados. Coherent governance, however, did not occur, and various standing committees went in and out of existence.

After the Restoration, the Privy Council turned to colonial matters, in particular, disputes over the array of patents, charters, grants and indentures doled out over the past eighty years. This role was explicitly acknowledged in the 1663 Rhode Island charter, which permitted appeals to the Crown in matters of public controversy. In private matters, for which discontented individuals in New England had long argued for a right to appeal under Crown prerogative or English corporate law, the Privy Council also began to consider a formal role. In 1664, letters patent to the Duke of York for the first time explicitly reserved to the Crown the hearing of private appeals. The same year the Privy Council sent an investigatory commission to New England. But the commission foundered and the Crown was distracted from its concern over colonial affairs by more pressing foreign policy matters.

Efforts to create a coherent and cohesive role for the Privy Council developed after 1676 with the creation of the twenty-one-member committee

known as the Committee for Trade and Plantations (the Lords of Trade). At first the committee aspired to a direct role in colonial lawmaking. Since the 1660s, laws had been sent from Barbados, Jamaica, the Leeward Islands, and, on occasion, Virginia for sporadic review; the committee now proposed drafting laws for the Jamaican assembly itself. The effort failed and by 1680 the English attorney general had confirmed that Jamaica would be governed by laws made by its own assembly. The committee settled for a supervisory role. Instructions to the Caribbean and Virginia governors and to John Cutt, president of New Hampshire, required the transmission of laws so that the Privy Council could review them. By the 1680s, the committee was also hearing appeals from the colonies. In 1681, the Pennsylvania charter became the first both to require transmission of laws and to reserve explicitly the Crown's right to hear appeals. Between 1682 and 1692, such supervision spread by royal instruction and new charter to Virginia, the Dominion of New England, Massachusetts, New Hampshire, and Maryland.

At the turn of the century, the Privy Council began to decide in specific instances whether colonial laws and customs fell outside the bounds of an imperial conception of English law and customs. In 1696, it created a new advisory committee of the whole, the Committee for Hearing Appeals from the Plantations. The Crown established the separate Lords Commissioners for Trade and Plantations (the Board of Trade), composed of state officers (initially the chancellor, president, treasurer, high admiral, secretary of state, and chancellor of the exchequer) and eight appointed and paid commissioners, usually members of Parliament, to advise as to colonial laws among other duties. The approach proved effective and would remain largely in place through the eighteenth century.

Review of colonial legislation and appeals was an intriguing approach to supervising colonial law. The Crown could claim ultimate authority and ensure uniformity while still permitting local authorities to pass legislation, decide cases, and diverge from English law in the first instance. After 1690, more than 8,500 acts were submitted for review from the mainland colonies, with approximately 470 disallowed. Between 1670 and the Revolution, around 250 cases were appealed from the mainland American colonies, with Massachusetts, Rhode Island, and Virginia accounting for the largest number. Laws found repugnant to the laws of England or contrary to the royal prerogative touched on inheritance (diminishing primogeniture, limiting dower rights, treating jointly held property as tenancy in common); escheats to the Crown; relief of debtors; religious establishment and religious toleration (or the lack thereof); assembly authority and powers; regulation of attorneys; creation of courts (particularly equity, chancery, and admiralty courts), juries, and court procedures; trade and piracy regulation; and the creation of ports and regulation of custom officers. Yet, most colonial

laws remained in force without any action from the Privy Council. Colonial legislatures nonetheless manipulated disallowance by passing temporary laws or reenacting substantially similar laws, notwithstanding Crown instructions intended to prevent such evasions.

Appeals of cases provided another avenue for Privy Council decision making as to whether a colony's law was repugnant to the laws of England or a permissible departure for local circumstances, although it was more costly and dependent on individual initiative. In theory the Privy Council heard appeals as a committee of the whole. In reality the appeal was usually assigned to a smaller group, including either the Chief Justice of King's Bench or Common Pleas. Colonists retained English solicitors and Crown law officers (often the Solicitor or Attorney General) to argue the appeal. Between 1696 and 1720, civil, criminal, probate, and vice-admiralty appeals were brought from Massachusetts, New York, Virginia, Connecticut, Rhode Island, Maryland, New Hampshire, South Carolina, New Jersey, and Pennsylvania.

Theoretically, Rhode Island and Connecticut stood outside this system. Their corporate charters did not authorize Privy Council review or appeals. Throughout the 1690s the Crown and various colonists repeatedly tried to bring the colonies under the review regime, only to receive messy manuscript copies of laws from Rhode Island and a twenty-year-old edition of Connecticut's statutes. Eventually, in 1715, the English Attorney General declared that the two colonies had no obligation under their charters to transmit laws. In the 1730s, however, Connecticut would do so voluntarily. The colonies were less successful at barring appeals, the Board of Trade proclaiming that appeals were an inherent right of the Crown. Despite local legislative efforts to discourage them, appeals were heard from Connecticut and Rhode Island. Appeals became particularly prevalent in Rhode Island as the only path for review of laws.

By the eighteenth century, the Privy Council had become the third branch of colonial government. Law – both its making and interpretation – involved the governor, legislature, and the Crown's Privy Council. Rather than an early example of separated powers, colonial government was thus the English theory of mixed powers – Crown intertwined with legislative authority, known as the King in Parliament – extended to the far side of the Atlantic.

III. THE CULTURE OF LAW IN THE SETTLEMENTS

The manner and offices of colonial government depended on a culture of law. The term *legal culture* has become ubiquitous in contemporary scholarship even as the concept itself remains elusive. Rather than attempt a definition,

I want instead to plumb a component of colonial legal culture – the world of courts, attorneys, and law – in the expectation that an understanding of the meanings that came to be attached to them can suggest avenues for the broader inquiry into legal culture in general

Courts

We often discuss early seventeenth-century colonial courts as if they were a separate branch of government. They were not. The institutional names of courts – the General Court or Quarter Court (Virginia), the Court of Assistants (Massachusetts and Connecticut), the General Court of Trials (Rhode Island), the General Court of Assizes (New York), and the Provincial Court (Maryland and Pennsylvania) – prove misleading. The composition of all these courts was the same: they were all made up of the governor and council. Some might dismiss these courts as “courts” because many of the judges had not trained as attorneys, but to do so is historically inappropriate. Procedurally, the jury usually made decisions, and judges decided issues raised on motion by attorneys. Traditional legal training was unnecessary for the entire bench. Questions were resolved according to colonial laws, legal records, or English instructions (to which judges as political officers had access). The job of attorneys – and likely any legally trained judges – was to explain any additional English laws. Should there be disagreement, by the end of the seventeenth century the Privy Council (also, as we have seen, comprised of political officers) heard appeals. Because many cases turned on whether a colonial law or practice was repugnant or agreeable to England, political acumen was as valuable as formal study in addressing the question, and political power and status were as potent as a degree in ensuring respect for the answer.

The courts arranged below and above these courts in the early settlements were not separate branches either. The diversity of early inferior courts paralleled local political structures: there were county courts (Massachusetts), town courts (Rhode Island), and manor courts (parts of New York and Maryland). After 1660, county courts became the common inferior court across the colonies. Justices of peace (in many places, the members of the governor’s council) served as justices, as well as often handling immediate, local problems on an individual basis. Despite the possibility of an appeal, many matters never moved beyond these courts. Above the governor and council court, in several early colonies – Massachusetts, Virginia, Connecticut, Rhode Island, and even Maryland – was the assembly that heard cases and appeals as a court. The theory behind this jurisdiction was most apparent in the corporation colonies in which the legislature was seen as the supreme colonial authority.

The Crown's growing desire for control over law altered this system. In the 1680s, the Crown began to end where it could the assembly's jurisdiction as the highest court of appeal in favor of appeal to the Privy Council from the colony's court. New and recurring disputes over the existence and authority of other colonial courts with jurisdiction over probate, chancery, fines and recoveries, admiralty, and arbitration reflected this same fight for control between the Crown (usually in the guise of the royal governor) and the legislature.

This struggle produced the oft-claimed ancestor of modern supreme courts, the Superior Court of Judicature, comprised of an appointed chief justice and associate justices. This transformation should not be misconstrued as the separation of the judicial function from colony government; to the contrary, it was an effort to retain Crown control of the judiciary, as well as an acknowledgment of the time constraints placed on the governor and council by growth of the colonies. The new court structure appeared in the Dominion of New England in 1687 and in 1681 in Jamaican legislation. After 1691, Superior Courts of Judicature soon sat with judges appointed by the royal governor in New York (technically the Supreme Court of Judicature), Massachusetts, New Hampshire, and New Jersey. A Superior Court of Judicature heard appeals and had original jurisdiction in cases involving title to land or significant amounts of money. County sessions and inferior courts of common pleas heard smaller cases. This new terminology spread to Connecticut (1711) and Rhode Island (1729), although the legislature retained the power to appoint justices. Although Pennsylvania adopted a Supreme Court in 1722, most southern colonies retained the names of general or provincial courts and left power in the governor and council, either directly or by appeal.

The absence of published court opinions reinforced the perception that courts were not a separate branch. Most proceedings remained solely of local interest and included prosecutions for fornication, disputes over title to land, disagreements over inheritances, contested debts, and accusations of slander. Knowledge of the court was acquired by being in court, relying on the oral or written reports of others, and reading the manuscript records. When court proceedings appeared in print they reflected public interest in the substantive matter and a printer's hope for financial return. William Bradford printed the court proceedings in the West Jersey trial and execution of Thomas Lutherland for murder under the title *Blood Will Out* (1692), as well as legal materials relating to a controversy involving himself and Quaker George Keith. Other early printed legal materials include Cotton Mather's account of five of the Salem witch trials, accounts of Jacob Leisler's rebellion, Nicholas Bayard's trial for treason, and a significant number of piracy trials. Apparently unique was the printing in 1720 of copies of the

briefs in a Massachusetts civil case, *Nathaniel Matson v. Nathaniel Thomas*, involving the question whether Massachusetts had to follow the English law of primogeniture and entail. Descriptions of courts nonetheless occurred in official correspondence and printed descriptions and discussions of the colonies. From a transatlantic perspective, what the courts governed seemed less important than who governed them.

Legal Practitioners

We have tended to assume that relatively few lawyers were to be found in the seventeenth-century colonies. Certainly most criminal defendants entered the court unrepresented, and many litigants in lower courts proceeded without attorneys. In 1705, Robert Beverley of Virginia wrote, "Every one that pleases, may plead his own Cause, or else his Friends for him, there being no restraint in that case, nor any licensed Practitioners in the Law." Yet, attorneys, legal practitioners, and other legal literates abounded in the colonies. Their presence necessitates reconsideration of the seventeenth-century colonies as a world of law without lawyers.

Throughout this period, *attorney* or *practitioner* of law was the preferred label; *lawyer* was the preferred epithet. In every colony, court records, statutes, letters, and other documents demonstrate that people labeled as "attorneys" appeared early and often. In England, the term *attorney* had become ubiquitous between 1550 and 1650. *Practitioner* referred to these attorneys, along with clerks and solicitors. Attorneys conducted routine matters in central, local, and chancery courts; composed pleadings; gave advice; prepared litigation; and served as clerks of the court. Early seventeenth-century law books were aimed at these legal practitioners. Over the course of the early seventeenth century, attorneys became differentiated from barristers. Barristers were more likely to be from elite social circles, instructed at one of the Inns of Court. Only barristers could argue issues of law before King's Bench or Common Pleas. Nonetheless, this distinction was still developing during the early decades of colonial settlement.

Legal practitioners abounded in the early colonies, both in number and variety. Some had English legal training. Before 1660, a significant number of attorneys practicing in the colonies had been trained as attorneys or barristers or had studied in the Inns of Court. Familiar with English law, such men played a crucial role in writing early colonial legal codes in Massachusetts, Connecticut, Rhode Island, and New York. English-trained practitioners also served as early critics of colonial divergences from English laws. A second group of legal practitioners was comprised of men who held political offices that involved the law: recorders and clerks, general attorneys, governors, and members of councils. In 1649, because people had

asked magistrates (councilors) for advice in cases that later went to trial, Massachusetts prohibited such a practice. For similar reasons, after 1670, colonial acts prevented clerks, sheriffs, constables, deputies, and justices of the peace from practicing law. A third group of practitioners can be labeled simply as legally literate. Written literacy, combined with speaking skills and basic legal knowledge, permitted competent participation in the legal system despite the absence of formal training. Some legal literates acted as attorneys; others limited themselves to representing themselves, friends, associates, or dependents. Merchants comprised one category of legal literates because the skills needed for transatlantic business and law overlapped.

Women appeared as attorneys, representing themselves, their husbands, or other family members. Although these appointments have been described as “attorney-in-fact” appointments, the phrase was not used, and the distinction between attorneys-in-fact and those in-law seems a later development. Female attorneys may have often had the same knowledge and skill as male legal literates, although they could not serve in political office. The social response to female practice is unclear. In Maryland in the 1650s, Margaret Brent famously served as an attorney while a single woman. She litigated cases, served as executrix for the previous proprietor, and, in that capacity, unsuccessfully sought to vote in the assembly as the proprietor’s attorney. In 1658, a Maryland proclamation barred wives from acting as attorneys for their husbands. The eventual spread of licensing procedures may have significantly limited the number of female attorneys. Women nonetheless continued to serve as executors, suing to collect debts, arranging property transfers, and defending estates against claims.

After 1660, a new generation of legal practitioners arose, many of whom acquired their legal training in the colonies. Law schools did not exist, and the colleges that had been established, like Harvard, did not train lawyers. Attorneys were, in essence, home-schooled: sons learned from fathers, aspiring practitioners served as clerks or studied with prominent attorneys, and practicing attorneys shared English law books and commonplace books of notes. Some practitioners continued to seek English legal training. Men from Massachusetts and Virginia on occasion traveled to England to spend time at the Inns of Court. Though the Inns no longer provided a comprehensive educational experience, attendance provided an opportunity to purchase English law books, observe at the courts, and learn about the law through available avenues. Barristers, members of the Inns of Court, attorneys, solicitors, and clerks could also be found among the waves of new English and Scottish migrants. Some started colonial practices; others served in the offices of the expanding royal governments, for example, as judges in the vice-admiralty courts.

Although the colonies never acquired the hardened barrister-solicitor distinction of English legal practice, colonial legal practice did have a hierarchy. By the late seventeenth and early eighteenth centuries, a small group of attorneys in each colony monopolized practice in the superior courts. In Maryland, five or six attorneys handled most legal matters, with several attorneys arguing 90 to 100 cases apiece. Perhaps to prevent litigants from literally monopolizing such attorneys, Rhode Island and New York had statutes attempting to limit parties from hiring more than two attorneys. Colonies set fees based on the court and the type of legal work. The superior court practice involved appeals and disputes over the application of the laws of England – and generated higher fees. In the early eighteenth century, prominent attorneys advocated for even higher fees for cases argued on appeal and with numerous pleadings on matters of law. These men also began to consider forming associations to seek fee and attorney regulation. In 1709, six prominent “practisers of the law” in the City of New York formed an association to lobby for fee alterations. The ability to acquire higher fees permitted some of these attorneys to earn their living from legal practice.²⁰

Provisions barring attorneys were few. Of the laws that were passed, most focused on fees. In Massachusetts’ *Body of Libertyes* (1641), number 26 stated that “Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to employ any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.” The provision, however, was not included in the 1648 printed *Laws and Libertyes*. Carolina’s *Constitutions* stated that “it shall be a base and vile thing to plead for money or reward,” but the *Constitutions* were never adopted. In the 1640s and 1650s Virginia did bar attorneys from receiving fees – but it also repealed these laws and at times insisted that parties be permitted to have men plead their case when necessary. It is unclear, in short, whether fee prohibition had any real impact.

Instead of prohibiting attorneys, colonies began to regulate their behavior. Statutes sought to prevent misuse of the legal system. The Massachusetts *Laws and Libertyes* discouraged the “common barrater” who was “vexing others with unjust, frequent and endles sutes” and permitted treble damages against litigants who had “willingly & wittingly done wrong” to the defendant. Virginia and Maryland made early efforts to license attorneys; after 1670, several colonies required that attorneys be admitted by the governor or the courts. In 1666, attorneys in Maryland took the oath of attorney before admission to practice. In 1686, Massachusetts adopted a

²⁰ Paul Hamlin and Charles E. Baker, *Supreme Court of Judicature of the State of New York, 1691–1704* (New York, 1959), 1: 273 n. 27.

version of the fifteenth-century English attorney oath, and over the next three decades New Hampshire, New York, Pennsylvania, Delaware, Rhode Island, Connecticut, and South Carolina followed. The colonies also occasionally sought to regulate attorney argument. A 1682 Maryland statute insisted that attorneys should “speak distinctly to one Error first” before proceeding to the next. In 1736, Rhode Island attorneys tried to bar those from Massachusetts in part because they “tire the ears of the judges with their needless repetitions, and sometimes confound and perplex the juries with their circumlocutions and sophistry so as to obscure and darken the case more than if it had not been pleaded at all.” In 1718 the colony had required that at least one retained attorney be a colony resident.²¹

Several colonies provided attorneys for defendants who appeared disadvantaged by self-representation. In 1647, Virginia permitted courts to appoint a man to plead a cause if the party might otherwise lose the case by his “weakness.”²² That same year, Rhode Island allowed litigants to plead their own case or use the town attorney. Some statutes even required that an attorney take any case for which a fee was presented. Although English law barred defendants in felony cases from retaining attorneys, Rhode Island in 1669 and Pennsylvania in 1701 authorized indicted defendants to retain attorneys. Although colonial legislatures understood the problems with attorneys – excessive litigation, excessive fees, excessive talking – they also seem to have understood that attorneys could aid people in negotiating authority and protesting illegitimate governance.

Colonial Law

In 1701, the anonymous “American” author of *An Essay upon the Government of the English Plantations* noted, “It is a great Unhappiness, that no one can tell what is Law, and what is not, in the Plantations.” The relationship between the laws of England and the laws of the colonies was uncertain. Some thought that the law of England was “chiefly to be respected.” Some “are of Opinion, that the Laws of the Colonies are to take the first place.” Others “contend for the Laws of the Colonies, in Conjunction with those that were in force in England” at the time of settlement and those where the “Reason of the Law” is applicable to the colonies. A final group held that no acts of Parliament

²¹ *Archives of Maryland: Proceedings and Acts of the General Assembly*, October 1678–November 1683 (Baltimore, 1889), 7: 361; Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, 2004), 118 (quoting 1736 Petition).

²² *Colony Laws of Virginia*, ed. John D. Cushing (Wilmington, 1978), 2: 349.

bound the colonies unless particularly named. The author suggested that “some Rule be established, to know what Laws the Plantations are to be subject to” and how far Parliamentary acts not mentioning the colonies did “affect them.” Until then, “we are left in the dark.”

People had been in the dark about what was “law” in the colonies for a century. The existence of the question itself was proof of the ambiguity over the location of lawmaking authority. Non-English areas controlled by England certainly existed before settlement of the American colonies, but there was no uniform approach to when English laws governed. In Ireland, the English Crown essentially could write laws for Ireland. Under Poyning’s law (1495), legislation was to be approved by the English Crown and Privy Council before being passed by the Irish Parliament. In Wales, an English statute in 1535 replaced Welsh laws with the laws of England and authorized the King and Council to reenact any necessary divergent Welsh customs. In the Channel Islands of Jersey and Guernsey, customary Norman law was followed, but the Privy Council had the right to hear appeals.

The requirement in the patents and charters that laws be “as near as conveniently they may be, agreeable” or not repugnant to the laws of England created a foundation for debate. What this constitutional limit meant in practice was unclear. Very early arguments over the application of English law in the New England colonies approached the question as one of corporate law and discussed the authority under the patent. There was little else to discuss. For most of the seventeenth century, English case law on what law governed the colonies was largely unhelpful. Two cases discussing the rights of Scots over land in England seemed to bear on the issue, but provided little if any guidance. In *Calvin’s Case* (1608), Chief Justice Edward Coke established a set of categories (inherited versus conquered kingdoms), but did not explicitly discuss the question of the law in future American colonies. The awkward fit of these categories for the mainland colonies was apparent by 1624 when Coke and others considered the application of “conquest” to the New England patent.²³ Decades later, in *Craw v. Ramsey* (1670), Chief Justice John Vaughan referred to the now existent “plantations”; however, the case involved the ability of a dominion to alter English law in England, not the application of English law in the colonies. Through the 1660s, the focus of the colonial law question was whether a colony’s passage of plausibly repugnant laws was sufficiently outside the colony’s charter to justify *quo warranto* proceedings. In the 1670s, the Crown’s effort to write colonial laws rendered the question almost moot.

²³ *Proceedings and Debates of the British Parliaments respecting North America*, ed. Leo Francis Stock (Washington, 1924), 1: 58–61.

In the early 1680s, the Crown's acceptance of colonial assembly lawmaking and the passage of new property laws in England shifted the focus to whether new English statutes applied in the colonies. Of particular importance in the colonies, the Statute of Frauds (1677) altered the requirement for a valid will from two to three witnesses. In the colonies where wills had long been made with two witnesses, the new English statute threatened to invalidate two-witness wills. The relationship of the requirement to the colonies would be litigated repeatedly. In 1683, a Virginia case addressed the issue of whether the Statute of Frauds applied. Virginia attorney William Fitzhugh argued for invalidation of a 1681 two-witness will because the "Laws of England are in force here, except where the Acts of Assembly have otherwise provided, by reason of the Constitution of the place & people."²⁴ In England, however, Attorney General William Jones reached a different conclusion, which was apparently shown "to all the then Judges of England, Who declared the same to be the Law." Jones stated that the colonies were only bound by new statutes if expressly named. Jones explained that Parliament could not have considered "the particular circumstances and conditions of the plantations, especially considering no Member" came from there to Parliament. Moreover, the Atlantic meant that colonists would not know of the law until after it took effect. In short, Parliament was not expected to include the colonies in ordinary legislation, and the colonial legislatures were the more appropriate lawmaking authorities.²⁵

The common law was an even trickier matter. In the 1690s, cases involving English colonial officers in the Caribbean continued to debate when the laws of England applied. In King's Bench, *Blankard v. Galdy* involved the sale of the Provost Marshal of Jamaica's office for seven and a half years and whether a sixteenth-century English statute barring the practice applied in Jamaica. Chief Justice John Holt concluded that Jamaica had been conquered, and therefore the laws of England were not in force until so declared. Because Jamaica had been conquered from the Spanish, the case's application to the seemingly not conquered mainland colonies was unclear. The House of Lords appeal, *Dutton v. Howell*, involved a dispute between the governor of Barbados, Richard Dutton, and the executors of John Witham, his deputy governor, for Dutton's alleged false imprisonment of Witham. Among other arguments, Dutton claimed that the action could not lie because the laws might be different in Barbados. The executors responded that Barbados was a "colony or plantation" and that the common law must

²⁴ Richard Beale Davis, ed., *William Fitzhugh and His Chesapeake World, 1676–1701* (Chapel Hill, 1963), 107 (Fitzhugh to Ralph Wormerly, Feb. 26, 1681/1682).

²⁵ *Virginia Colonial Decisions: The Reports by Sir John Randolph and by Edward Barrandall . . .*, ed. R.T. Barton (Boston, 1909), 2: B1–2.

apply in a “new Settlement” of Englishmen. The executors lost, despite elaborate argument and without explanation. The cases did not provide an answer, but confirmed the contemporary difference of opinion.

Into the eighteenth century, as the anonymous author had complained, no one in the colonies or England could “tell what is Law, and what is not, in the Plantations.” Given the lack of clarity, certain colonies sought their own rules as to when laws of England would apply. One approach is probably best referred to as an introduction statute, authorizing English law in appropriate circumstances. For example, in 1700, the Rhode Island assembly declared that, where the colony’s laws or customs did not reach or comprehend a matter or cause, it was lawful to put into execution the laws of England. The introduction of English laws then could be made on a case-by-case basis by courts and officials depending on local conditions. A second approach adopted in South Carolina in 1712 and North Carolina in 1715 resembled later reception statutes. Here, the colony transferred various English statutes into its own law and thereby ensured that certain laws could be pleaded in the courts.

The idea that colonies might be more properly considered new settlements than conquered territories gathered support in the early eighteenth century. A new publication of *Blankard* in William Salkeld’s *Reports* (1718) claimed that Holt had declared that in “an uninhabited Country newly found by our English Subjects,” the laws in England were in force. A 1720 opinion by Richard West, counsel for the Board of Trade, agreed that the common law and statutes in affirmance prior to settlement were in force as well as later statutes that mentioned the colonies. A 1722 memorandum recounted a Privy Council determination of a colonial appeal apparently from Barbados that similarly distinguished conquered countries from uninhabited countries found out by English subjects who brought their laws with them.²⁶ Nonetheless, a report of *Smith v. Brown and Cooper*, a slavery case, contained a statement by Holt that “the laws of England do not extend to Virginia, being a conquered country.” As debates between the proprietor and the Maryland assembly and the instructions from Connecticut to its agent in the 1720s demonstrate, people continued to disagree over the cases, the rules, and the factual history of the colonies – whether they were plantations in countries found out by English people or conquered lands.

²⁶ Mr. West’s opinion on the admiralty jurisdiction, in the *plantations* (1720), George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (1814; New York, 1971), 2: 202; Memorandum (1722), Peere Williams, *Reports* (London, 1740), 2: 75–6.

In 1729, an opinion by the English Attorney General further complicated matters. Earlier comments had implied that a colony assembly had to enact post-settlement English law before it applied. The opinion concluded that a colony could introduce such an English statute by assembly act or receive it by “long uninterrupted usage or practice.” Colonial custom and practice, in particular, the degree to which English laws had been followed, became an additional debatable issue.

These arguments about the application of the laws of England to the colonies, as well as the requirement that colonial lawmaking be not repugnant to the laws of England, depended on knowledge of the laws of England. Desirable English law books, therefore, were those that described the “laws of England.” The phrase was broad and ambiguous, but seemed to include at its core the Magna Carta, English statutes, and the principles and terms of English common law. In selecting law books, colonial legal attorneys favored texts that provided comprehensive overviews of English law and were designed for general practitioners. Treatises, particularly on such subjects as property and inheritance, offered comprehensible discussions. Statute collections such as Pulton’s *Sundry Statutes* or Keble’s *Statutes at Large* provided convenient access to English statutes. Guides for justices of the peace and jurors succinctly described the court system. Form books such as the *Compleat Clerke* provided necessary models for legal documents, and law dictionaries explained vocabulary. More popular than case reports themselves were abridgments of reports; a unique interpretation of an English case had little value. More unusual books related to legal issues of particular interest in the colonies: for example, charters, oaths, the liberties of Englishmen, and divergent English customs. Early colonial publications emphasized these same areas and included a book on indictments brought against the Duke of York; a treatise on Parliamentary laws and customs; a book including Magna Carta and the charter to William Penn; and reprints of books on the right to juries, on inheritance, and guides for constables and sheriffs. In the early 1720s, Boston and Philadelphia printers both published *English Liberties; or, the Free-born Subject’s Inheritance*, a volume including the Magna Carta, fundamental laws, and comments relating to the “Constitution of our English Government.” As these books were bought, borrowed, and copied into commonplace books, a colonial vision of the laws of England spread.

Adding to the uncertainty over the nature of colonial law was ambiguity over the lawmaking authority present in the colonial legislatures. We tend to gloss over the words used in colonial lawmaking – acts, ordinances, laws, statutes – but they could convey subtle and important differences. The Massachusetts *Body of Liberties*, for example, noted that the laws were “expressed onely under the name and title of Liberties, and not in the exact

forme of Laws or Statutes.” However, it “intreate[d]” authorities to “consider them as laws.” As the author of *An Essay upon the Government of the Plantations* pointed out, it was uncertain “how far the Legislature is in their Assemblies.” Were the colonial assemblies little more than corporations or did they have the power of “Naturalization, Attainder of Heirs, cutting off Intails, settling Titles to Lands, and other things of that nature”? Colonial criminal laws seem to have been of particular concern, and a better understanding of this issue may help explain the tendency of New England assemblies to cite biblical sources for criminal laws. The author also wanted to know whether “they may make Laws disagreeable to the Laws of *England*, in such Cases, where the Circumstances of the Places are vastly different, as concerning Plantations, Waste, the Church, &c.” Colonial assemblies accepted this justification. The South Carolina “Negro-Act” (1740) thus explained that crimes that gave a “Slave, Free-Negro, Mulatto, Indian or Mestizo” the death sentence were “peculiar to the Condition and Situation of this province, [and] could not fall within the Provision of the Laws of England.”²⁷

The form in which colonial laws appeared similarly reflected shifting uncertainties about authority. A printed collection of laws testified publicly and permanently as to the location of government and lawmaking authority. Although most colonies required laws to be read publicly or sent to towns and churches, a printed volume offered constant access for literate readers on both sides of the Atlantic. This accessibility thus also posed a danger – a printed law book could provide evidence that colonial laws were repugnant to the laws of England and bring about *quo warranto* proceedings. Before 1648, the only authoritative collection of printed colonial laws was *For the colony in Virginea Britannia. Lavves diuine, morall and martiall, &c.* (London, 1612), a collection written and imposed by the governors. Although John Cotton’s *An Abstract or the Lawes of New England* (London, 1641) appeared with extensive biblical citations, the collection represented his own draft and was never adopted by the assembly. The code bearing a closer resemblance to the assembly’s laws, Nathaniel Ward’s *Body of Liberties* (1641), remained in manuscript and was never technically adopted.

The corporation colonies’ growing confidence in their lawmaking authority resulted in printed law collections that testified to that authority. Massachusetts Bay was the first and only colony that domestically printed its laws before the 1670s. *The Book of the General Laws and Libertyes* (Cambridge, 1648) appeared the year before Charles I’s execution as English

²⁷ “An Act for the better ordering and governing negroes and other slaves in this province,” [Acts passed by the General Assembly of South-Carolina, May 10, 1740–July 10, 1742] [Charleston: Printed by Peter Timothy, 1740–1742], 3, 9 (Early American Imprints, Series I (Evans), nos. 40211, 40286).

politics shifted away from Crown authority. The volume emphasized the general court's authority. Yet, the edition had a short life, as by 1651 legislative changes left it judged "unvendible," largely turned to "wast pap'r" and burnt.²⁸ The assembly published a new version of the *Laws and Liberties* in 1660 and continued to print later session laws. In 1672 and 1673, the corporate governments of Massachusetts, Plymouth, and Connecticut had Samuel Green of Cambridge print their laws with title pages that emphasized the "General Court," not the Crown or England, and opening pages that addressed the "Inhabitants" and "Freemen" of the colonies. In Virginia, the Crown-appointed governor used printed laws to promote a different authority. His collection for Crown officials, *The Lawes of Virginia Now in Force* (London, 1662), prominently displayed the King's name on the title page and proclaimed Crown as well as assembly authority. Amidst controversies over colonial authority, printed laws declared legislative authority to inhabitants and to England. Edward Randolph used the printed laws to demonstrate repugnancies to Crown officials, and the Connecticut edition was sent to London as evidence. To avoid such scrutiny, Rhode Island never printed its laws in the seventeenth century.

In the 1690s, colonial law printing began to flourish as the relationship between Crown and assembly became clarified. The Crown's requirement that colonies send laws to England for review and acceptance of assembly lawmaking authority combined to produce the laws of their "Majesties" provinces: New York (1694) New Hampshire (1699), and New Jersey (1709). As the threat to the charters receded, corporation and proprietary colonies also printed laws. Early editions of proprietary laws appeared in Maryland and Pennsylvania in 1700–1. Between 1714 and 1720, these two colonies, along with Massachusetts, Connecticut, New Hampshire, New York, New Jersey, and Rhode Island, published official versions. The Rhode Island, Connecticut, and Massachusetts editions carefully acknowledged both English and local authority. With the title pages declaring in small print his or her "Majesties Colony," the charter appeared as the first document. Rhode Island nonetheless remained wary and silently altered certain laws to conform to current English laws. The southern royal colonies were curiously slow in printing official collections: Virginia (1733), South Carolina (1736), and North Carolina (1751). Despite the growth in printed collections, as the author of *An Abridgement of the Laws in Force and Use in Her Majesty's Plantations* (London, 1704) noted, gentlemen concerned with the plantations had "great Difficulty" in procuring copies of the laws to compare "the Laws and Constitutions of each Country, or Province, one

²⁸ Petition of Richard Russell (1651), *The Laws and Liberties of Massachusetts* (Cambridge, 1929), viii (Max Farrand introduction).

with another.” The question, what is law in the colonies, remained difficult as a theoretical and practical matter.

CONCLUSION

A century and a half after the question was asked, “What manner of government is to be used,” the settlements had produced one answer. In the two corporation colonies, two proprietaries, and remaining royal colonies, a governor served as translator for Crown policies, an assembly held the law-making authority limited by the requirement of non-repugnancy to the laws of England, and the Crown through the Privy Council supervised the boundaries of colonial authority.

What manner of government was this system? English settlement practices had created a government of dual authorities, legitimizing both Crown and colonial legislative authority. Acceptance of these dual authorities permitted colonial governance to successfully negotiate the geographic problem of the Atlantic. Although these dual authorities were in tension, they were not perceived as incoherent. By the mid-eighteenth century, however, as William Blackstone demonstrated, English political thought had become rhetorically intolerant of dual authorities. He wrote that “there is and must be” in all governments “a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside.” Blackstone placed this “sovereignty of the British Constitution” in Parliament – the King, the Lords, and the House of Commons.²⁹

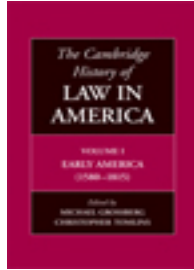
For colonial lawyers, this construction threw into confusion two hundred years of settlement governance. As James Wilson, in *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (1774), wrote, “Dependence of the Mother Country” – of allegiance to the Crown – was understood “by the first planters of the Colonies, and also by the most eminent Lawyers, at that time, in England.” It was, however, a “dependence founded upon the principles of reason, of liberty, and of law”; not the “slavish and unaccountable” dependence and “unlimited authority” contended for by the Parliament. This understanding of dependence – dual authority created by supervised, constitutionally limited lawmaking – produced the Revolution and the commitment to federalism. Perhaps in this sense, institutional history helps us better understand an American manner of government.³⁰

²⁹ William Blackstone, *Commentaries on the Laws of England* (1765–1769; reprint, Chicago, 1979), 1: 49, 51.

³⁰ James Wilson, *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (Philadelphia, 1774), 29, 31, 34.

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Chapter

Bibliographic Essays, English Settlement and Local Governance pp. 602-614

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them to Native American practices. Alvin Josephy, *The Patriot Chiefs: A Chronicle of American Indian Resistance* (New York, 1961), is also somewhat dated, but its complex explanation of conflict touches on legal concerns. Many of these books are regional and therefore have small sections on native customs that enter the legal arena: Nancy Bonvillain, *Hiawatha: Founder of the Iroquois Confederacy* (1992), gives a chronology, whereas Dennis Brindell Fradin, *Hiawatha: Messenger of Peace* (1992), focuses on the Iroquois Confederacy and includes the debate about whether or not the Confederacy had an influence on the U.S. Constitution. Other regional histories include general books, such as Esther K. Braun and David P. Braun, *The First Peoples of the Northeast* (Lincoln, NE, 1994), that touch briefly on law. Local nonfiction books for secondary-school readers such as Keith Egloff and Deborah Woodward, *First People: The Early Indians of Virginia* (Charlottesville, VA, 1992), have sections on Virginia's ethnohistory. Few books on Native Americans written for general audiences or high-school students touch on law, but those that do almost always deal with it only in the modern period.

Methodology

In few fields is methodology as important or diverse as in the study of Native American legal history. Of significant importance to many scholars of Native America is a book in legal anthropology, Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, NJ, 2000). Indeed, much of Merry's work, including earlier books that had nothing to do with indigenous peoples, has had an influence on the way legal historians of Native America have conducted their research. Nancy Shoemaker, ed., *Clearing a Path: Theorizing the Past in Native American Studies* (New York, 2002), is a substantial addition to how to do Indian history.

Emerging from studies of law and politics are also inquiries into the colonial period's usefulness to understanding the present; for example, Kirsten Matoy Carlson, "Is Hindsight 20–20?: Reconsidering the Importance of Pre-Constitutional Documents," *American Indian Law Review* 30 (2005).

Conclusion

One finds a growing literature on Native American law in the colonial period appearing in journal articles, but books on the subject are still few. No book has considered Native American law in its broad spectrum for the colonial and revolutionary periods. It is therefore necessary to turn to scholarly journals, collections of essays, and collections of primary sources to find materials.

CHAPTER 3: ENGLISH SETTLEMENT AND LOCAL GOVERNANCE

MARY SARAH BILDER

The scholarship addressing the early settlement and governance of the early colonies is very extensive. The following works provide good general discussions

or bibliographies of more specific relevant materials or are particularly worthy of attention. Many of the scholars mentioned here have written so widely and prominently that space precludes discussion of more than a fraction of their work. Readers are urged to use this essay as a point of departure for their own more extensive bibliographic research.

The best starting point for colonial institutional history remains Charles M. Andrews, *The Colonial Period of American History*, 4 vols. (New Haven, 1934–1939). Herbert L. Osgood's work – *The American Colonies in the Seventeenth Century*, 3 vols. (1904; Gloucester, 1957) and “England and the American Colonies in the Seventeenth Century,” *Political Science Quarterly* 17 (1902), 206–22 – contains useful details. Merrill Jensen's introductions in *American Colonial Documents to 1776* (New York, 1955) deserve wider attention. W. Keith Kavenagh's *Foundations of Colonial America*, 3 vols. (New York, 1973), contains an excellent collection of primary documents and introductions, and Donald S. Lutz's *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis, 1998) offers a nice shorter collection. Good overviews of colonial institutional history appear in T. H. Breen & Timothy Hall, *Colonial America in an Atlantic World* (New York, 2004); Richard Middleton, *Colonial America: A History, 1585–1776* (2d ed., Oxford, 1996); and Alan Taylor, *American Colonies* (New York, 2001). For particular colonies, the volumes of *A History of the American Colonies* (1973–1989) have excellent bibliographies.

Overviews of the historiography can be found in Christopher L. Tomlins, “Introduction,” in Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America* (Chapel Hill, NC, 2001), 1–23; William E. Nelson, “Legal History before the 1960's,” in William E. Nelson and John Phillip Reid, eds., *The Literature of American Legal History* (New York, 1985), 1–32; and Stanley N. Katz, “The Problem of a Colonial Legal History,” in Jack P. Greene and J. R. Pole, eds., *Colonial British America* (Baltimore, 1984), 457–83. Two region-specific articles are Richard J. Ross, “The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History,” *William and Mary Quarterly*, 3d Ser., 50 (1993), 28–41, and Warren M. Billings, “Seventeenth-Century Virginia Law and its Historians, with an Accompanying Guide to Sources,” *Law Library Journal* 87 (1995), 556–75. Good bibliographic essays appear in Peter Charles Hoffer, *Law and People in Colonial America* (rev. ed., Baltimore, 1998) and Kermit L. Hall, *The Magic Mirror: Law in American History* (New York, 1989).

On the trading companies, see Cecil T. Carr, ed., *Select Charters of Trading Companies (1530–1707)* (London, 1913); George Cawston and A. H. Keane, *The Early Chartered Companies (A. D. 1296–1858)* (London, 1896); and Maud Sellers, ed., *The Acts and Ordinances of the Eastland Company* (London, 1906). Vol. I, ch. 8 and Vol. II of William Robert Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720* (1910–1912; New York, 1951) have a fine analysis of the organization of the joint-stock company and the early settlement companies. For background on the forms, see Shelagh Bond and

Norman Evans, "The Process of Granting Charters to English Boroughs, 1547–1649," *English Historical Review* 91 (1976), 102–20; R. E. Latham, "Hints on Interpreting the Public Records II Letters Patent," *The Amateur Historian* 1 (1952–1953), 47–51; Charles Deane, "The Forms in Issuing Letters Patent by the Crown of England," *Proceedings of the Massachusetts Historical Society*, 1869–1870, 11 (1871), 166–96. On corporate governance in England, useful recent discussions include Paul D. Halliday, *Dismembering the Body Politic: Partisan Politics in England's Towns, 1650–1730* (Cambridge, 1998); Catherine F. Patterson, *Urban Patronage in Early Modern England: Corporate Boroughs, The Landed Elite, and the Crown, 1580–1640* (Stanford, 1999); and Patrick Collinson and John Craig, eds., *The Reformation in English Towns, 1500–1640* (New York, 1998).

Most colonial charters are in the seven-volume *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States*, ed. Francis N. Thorpe (Washington, DC, 1909; online version available through Yale University's Avalon site). For an interesting discussion of charters and prerogative powers, see Elizabeth Mancke, "Chartered Enterprises and the Evolution of the British Atlantic World," in Elizabeth Mancke & Carole Shammas, eds., *The Creation of the British Atlantic World* (Baltimore, 2005), 237–62. On specific charters, see Tim Thornton, "The Palatinate of Durham and the Maryland Charter," *American Journal of Legal History* 45 (2001), 235–55, and Albert Carlos Bates, *The Charter of Connecticut: A Study* (Hartford, 1932). On repugnancy, see Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal* 116 (2006), 502–66, and Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* (Athens, GA, 1986), 19–42.

Published official English materials relating to the colonies appear in *Acts of the Privy Council of England, Colonial Series* (1908–1912; Buffalo, 2004), vol. I, 1613–1680; vol. II, 1680–1720; and vol. VI, certain unbound papers; *Calendar of State Papers, Colonial Series* (1860; reprint, Vaduz, 1964; available on CD-ROM), vol. I, 1574–1660; Clarence S. Brigham, ed., *British Royal Proclamations Relating to America, 1603–1783* (Worcester, 1911); Leo Francis Stock, ed., *Proceedings and Debates of the British Parliaments Respecting North America* (Washington, 1924; vols. I–III cover 1542–1727). The *House of Lords Journal* and *House of Commons Journal* are available online. For unpublished materials, Charles M. Andrews, *Guide to the Manuscript Materials for the History of the United States to 1783, in the British Museum, in Minor London Archives, and in the Libraries of Oxford and Cambridge* (Washington, 1908) and Grace Gardner Griffin, *A Guide to Manuscripts Relating to American History in British Depositories Reproduced for the Division of Manuscripts of the Library of Congress* (Washington, 1946) remain invaluable.

On the early settlement period, David Beers Quinn's work remains the standard, in particular, *England and the Discovery of America, 1481–1620* (New

York, 1974); *The Voyages and Colonising Enterprises of Sir Humphrey Gilbert* (1940; Nendeln, 1967); *Set Fair for Roanoke: Voyages and Colonies, 1584–1606* (Chapel Hill, NC, 1985); *The Roanoke Voyages, 1584–1590*, 2 vols. (London, 1955); and, with Alison M. Quinn, *The English New England Voyages, 1602–1608* (London, 1983). The documents in his five-volume *New American World: A Documentary History of North America to 1612* (New York, 1979) are particularly fine. Recent work on the English in Ireland includes the scholarship of Nicholas P. Canny, most recently, *Making Ireland British, 1580–1650* (Oxford, 2001), as well as John McGurk, *The Elizabethan Conquest of Ireland: The 1590s Crisis* (Manchester, 1997). The relationship of the Irish experience to colonial law is elucidated in David Thomas Konig, “Colonization and the Common Law in Ireland and Virginia, 1569–1634,” in James A. Henretta et al., eds., *The Transformation of Early American History* (New York, 1991), 70–92.

Of law and governance in the colonies, Virginia and Massachusetts have received the most sustained scholarly attention. For a summary of older work, see George Athan Billias, ed., *Law and Authority in Colonial America: Selected Essays* (1965; New York, 1970). On Virginia, see the scholarship of Warren M. Billings and David T. Konig: Warren M. Billings, “The Transfer of English Law to Virginia 1606–50,” in K. R. Andrews et al., eds., *The Westward Enterprise, English Activities in Ireland, the Atlantic, and America, 1480–1650: Essays in Tribute to David Beers Quinn*, (Liverpool, 1978), 215–44, and David T. Konig, “The Virgin and the Virgin’s Sister: Virginia, Massachusetts, and the Contested Legacy of Colonial Law,” in Russell K. Osgood, ed., *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692–1992* (Boston, 1992), 81–115. On Plymouth, see George L. Haskins, “The Legal Heritage of Plymouth Colony,” in David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill, NC, 1969), 121–6; George D. Langdon, Jr., *Pilgrim Colony: A History of New Plymouth, 1620–1691* (New Haven, 1966), ch. 7; and, for primary sources, see David T. Konig, ed., *The Plymouth Court Records, 1686–1859* and William Bradford’s *Of Plymouth Plantation, 1620–1647*, ed. Samuel Eliot Morison (New York, 1952). The materials on the Massachusetts Bay colony are voluminous. On the companies and the vote, see Frances Rose-Troup, *The Massachusetts Bay Company and its Predecessors* (New York, 1930) and Ronald Dale Karr, “The Missing Clause: Myth and the Massachusetts Bay Charter of 1629,” *The New England Quarterly* 77 (2004), 89–107. On law and governance, classics include David Thomas Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629–1692* (Chapel Hill, NC, 1979) and George L. Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York, 1960). The extensive scholarship is discussed well in Daniel R. Coquillette, “Introduction: The ‘Countenance of Authority,’” in Daniel R. Coquillette, ed., *Law in Colonial Massachusetts, 1630–1800* (Boston, 1984), xxi–lxii. The struggles over power in the 1630s in Massachusetts Bay are analyzed in the works of Francis J. Bremer and Edmund S. Morgan; for example,

Bremer, "The County of Massachusetts: The Governance of John Winthrop's Suffolk and the Shaping of the Massachusetts Bay Colony," in Francis J. Bremer and Lynn A. Botelho, eds., *The World of John Winthrop: Essays on England and New England, 1588–1649* (Charlottesville, VA, 2005), 187–236, and Morgan, *The Puritan Dilemma: The Story of John Winthrop* (Boston, 1958). For a focus on the relationship of covenants to government, see John Witte, Jr., "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism," *Emory Law Journal* 39 (1990), 41–64.

Other less successful settlements have drawn less attention. On Newfoundland and Nova Scotia, older scholarship should be consulted: D. W. Prowse, *History of Newfoundland from the English, Colonial and Foreign Records* (2d ed., London, 1896); St John Chadwick, *Newfoundland: Island into Province* (Cambridge, 1967); Thomas H. McGrail, *Sir William Alexander, First Earl of Stirling: A Biographical Study* (London, 1940), chapters 5 and 6 on Nova Scotia; George Pratt Insh, *Scottish Colonial Schemes, 1620–1686* (Glasgow, 1922), ch. 2; and George Bourinot, *Builders of Nova Scotia; A Historical Review* (Toronto, 1900; includes the charter). On the Piscataqua settlement, see Genevieve Cora Fraser, "David Thomson: The Scottish Founder of New Hampshire," *The Scottish Genealogist* (June 1999, Sept. 1999, Dec. 2000) and Charles Deane, "Indenture of David Thomson and Others," *Proceedings of the Massachusetts Historical Society, 1875–1876* (1876), 358–85. On Providence Island, see Karen Ordahl Kupperman, *Providence Island, 1630–1641: The Other Puritan Colony* (Cambridge, 1993). On the ubiquitous Ferdinando Gorges, see the fine book by Richard Arthur Preston, *Gorges of Plymouth Fort* (Toronto, 1953); *Sir Ferdinando Gorges and His Province of Maine, comp. James Baxter Phinney*, 3 vols. (Boston, 1890); and Henry S. Burrage, *The Beginnings of Colonial Maine, 1602–1658* (Portland, 1914).

Recent legal histories of individual colonies contain helpful materials. On Connecticut, see Cornelia Hughes Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639–1789* (Chapel Hill, NC, 1995) and Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill, NC, 1987). On Delaware, see William M. Offutt, Jr., *Of "Good Laws" & "Good Men": Law and Society in the Delaware Valley, 1680–1710* (Urbana, IL, 1995). On Georgia, see Jack P. Greene, "Travails of an Infant Colony: The Search for Viability, Coherence, and Identity in Colonial Georgia" in Jack P. Greene, ed., *Imperatives, Behaviors & Identities: Essays in Early American Cultural History* (Charlottesville, VA, 1992), 113–42. On Maine, see John G. Reid, *Acadia, Maine, and New Scotland: Marginal Colonies in the Seventeenth Century* (Toronto, 1981) and *Maine, Charles II and Massachusetts: Governmental Relationships in Early Northern New England* (Portland, 1977). On New York, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, NC, 2005). On Rhode Island, see Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA, 2004), and Sydney V. James, Sheila L. Skemp, and

Bruce C. Daniels, eds., *The Colonial Metamorphoses in Rhode Island: A Study of Institutions in Change* (Hanover, NH, 2000). Wesley Frank Craven's *The Southern Colonies in the Seventeenth Century, 1607–1689* (Baton Rouge, LA, 1949) and *The Colonies in Transition, 1660–1713* (New York, 1968) are indispensable.

The dimensions of the relationship between the colonies and England have been the subject of reinterpretation. Imperial school works such as Oliver Morton Dickerson, *American Colonial Government, 1696–1765* (Cleveland, 1912); George A. Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776* (New York, 1923); G. H. Guttridge, *The Colonial Policy of William III in America and the West Indies* (Cambridge, 1922); and Lawrence A. Harper, *The English Navigation Laws: A Seventeenth-Century Experiment in Social Engineering* (New York, 1939) remain useful. Books on Anglo-American imperial relations appearing in the 1970s and 1980s, often emphasizing a “center-peripheries” model, include the following: David S. Lovejoy, *The Glorious Revolution in America* (1972; Middletown, CT, 1987); James A. Henretta, “Salutary Neglect”: *Colonial Administration Under the Duke of Newcastle* (Princeton, NJ, 1972); Philip S. Haffenden, *New England in the English Nation, 1689–1713* (Oxford, 1974); Richard Johnson, *Adjustment to Empire: The New England Colonies, 1675–1715* (New Brunswick, NJ, 1981); Jack M. Sosin, *English America and the Restoration Monarchy of Charles II: Transatlantic Politics, Commerce, and Kinship* (Lincoln, NE, 1980), *English America and the Revolution of 1688: Royal Administration and the Structure of Provincial Government* (Lincoln, NE, 1982), and *English America and Imperial Inconstancy: The Rise of Provincial Autonomy, 1696–1716* (Lincoln, NE, 1985); Stephen Botein, *Early American Law and Society* (New York, 1983), ch. 4; Stephen Saunders Webb, 1676: *The End of American Independence* (New York, 1984); Jack P. Greene, *Peripheries and Center*; Robert M. Bliss, *Revolution and Empire: English Politics and the American Colonies in the Seventeenth Century* (Manchester, 1990); and Alison Gilbert Olson, *Making the Empire Work: London and American Interest Groups, 1690–1790* (Cambridge, MA, 1992). For recent work influenced by Atlantic history, see Bilder, *The Transatlantic Constitution* (2004) and Hulsebosch, *Constituting Empire* (2005).

On the governors, classics are Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (1930; New York, 1958; also contains excellent bibliography for primary sources); Evarts Boutell Greene, *The Provincial Governor in the English Colonies of North America* (1898; Gloucester, 1966); and J. F. Burns, *Controversies Between Royal Governors and Their Assemblies in the Northern American Colonies* (1923; New York, 1969), chapters 1, 4–6. Stephen Saunders Webb, *The Governors-General: The English Army and the Definition of the Empire, 1561–1681* (Chapel Hill, NC, 1979), and Bernard Bailyn, *The Origins of American Politics* (New York, 1968), ch. 2, are also helpful. For instructions, see Leonard Woods Labaree, ed., *Royal Instructions to British Colonial Governors, 1670–1776*, 2 vols. (New York, 1935); Charles M. Andrews,

“List of Commissions, Instructions, and Additional Instructions Issued to the Royal Governors and Others in America,” *American Historical Association Annual Report for the Year 1911* (1913), 393–528. On correspondence, see Gertrude S. Kimball, *The Correspondence of the Colonial Governors of Rhode Island, 1723–1775*, 2 vols. (Boston, 1902–1903); David Cressy, *Coming Over: Migration and Communication Between England and New England in the Seventeenth Century* (Cambridge, 1987), ch. 9. Lists and bibliographies appear in David P. Henige, *Colonial Governors from the Fifteenth Century to the Present* (Madison, 1970), and John W. Raimo, *Biographical Directory of American Colonial and Revolutionary Governors, 1607–1789* (Westport, 1980).

On assemblies, see Michael Kammen, *Deputies & Liberties: The Origins of Representative Government in Colonial America* (New York, 1969), and the scholarship of Jack P. Greene, including *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689–1776* (Chapel Hill, NC, 1963); *Peripheries and Center; Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville, 1994), particularly chapters 6–8; and *Imperatives, Behaviors & Identities: Essays in Early American Cultural History* (Charlottesville, 1992). Warren M. Billings’s *A Little Parliament: The Virginia General Assembly in the Seventeenth Century* (Richmond, 2004) is an outstanding recent contribution. J. M. Sosin, *English America and Imperial Inconstancy* and Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (1943; New York, 1971), ch. 1, contain additional useful details and analysis. Additional relevant discussion appears in Bruce C. Daniels, ed., *Power and Status: Officeholding in Colonial America* (Middletown, CT, 1986), and Marchette Chute, *The First Liberty, A History of the Right to Vote in America, 1619–1850* (New York, 1969). On popular sovereignty, see Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York, 1988), chapters 2 and 8.

On the Privy Council, invaluable for organization, is Charles M. Andrews, *British Committees, Commissions, and Councils of Trade and Plantations, 1622–1675* (Baltimore, 1908), and for names, John C. Sainty, *Officials of the Board of Trade, 1660–1870* (London, 1974). On the 1660s commissioners, see John G. Reid, *Maine, Charles II and Massachusetts, 54–123*. On Edward Randolph, see Michael G. Hall, *Edward Randolph and the American Colonies, 1676–1703* (Chapel Hill, NC, 1960); Robert Noxon Toppan, ed., *Edward Randolph*, 7 vols. (Boston, 1899–1909). On the review of legislation, Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York, 1915) remains outstanding. On colonial revision, see Erwin C. Surrency, “Revision of Colonial Laws,” *American Journal of Legal History* 9 (1965), 189–202. A list of disallowed and confirmed acts is in the appendices of *Acts of the Privy Council, Colonial Series*; additional discussion can be found in Charles M. Andrews, ed., *Reports of the Laws of Connecticut by Francis Fane* (New Haven, 1915). Lists of acts sent to English officials appear in Charles M. Andrews, “Lists of the Journals and Acts of the Councils and Assemblies of the Thirteen Original

Colonies . . . Preserved in the Public Record Office, London," *American Historical Association Annual Report for the Year 1908 I* (1909), 399–509. Appeals are discussed most recently in Bilder, *The Transatlantic Constitution* (2004) and exhaustively in Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (1950; New York, 1965) and "Administrative Control of the Courts of the American Plantations," *Columbia Law Review* 61 (1961), 1210–53 (also in *Essays in the History of Early American Law*, 281–335). Two earlier articles remain helpful: Harold D. Hazeltine, "Appeals from Colonial Courts to the King in Council, with Especial Reference to Rhode Island," *American Historical Association Annual Report of the Year 1894* (1896), 299–350, and Arthur Meier Schlesinger, "Colonial Appeals to the Privy Council," *Political Science Quarterly* 28 (1913), 279–97, 433–50. Sharon H. O'Connor is completing a forthcoming publication that will contain the list of all colonial appeals and relevant documentary information.

Attorney and Solicitor General opinions on colonial law appear in George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain* (1814; New York, 1971), and R. T. Barton, ed., *Virginia Colonial Decisions: The Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia, 1727–1741* (Boston, 1909), vol. 2, B1–B30 (1681–1726). English decisions usually discussed with reference to early colonial law can be found in multiple locations. *Calvin's Case* (1608) appears in 7 Coke 1a (1608), *English Reports*, vol. 77, 377. *Craw v. Ramsey* (1670) appears in [E. Vaughan], *Reports and Arguments in the Common Pleas* (London, 1677), 274–76, *English Reports*, vol. 124, 1072–85; *The Reports of Sir Peyton Ventris* (London, 1696), vol. 2, 1–8, *English Reports*, vol. 86, 273–7. *Blankard v. Galdy* (1693) appears in *Modern Reports*, vol. 4 (London, 1703), 215–26, *English Reports*, vol. 87, 356–9, 359–62; William Salkeld, *Reports . . .* ([London], 1718), vol. 2, 411–2, *English Reports*, vol. 91, 356–7; [Roger Comberbach], *The Reports of Several Cases* (London, 1724), 228–229, *English Reports*, vol. 90, 445; *Reports of Cases Determined by Holt* (London, 1738), 341, *English Reports*, vol. 90, 1089. *Dutton v. Howell* (1693) appears in Bartholomew Shower, *Cases in Parliament* (1698), 24–34, *English Reports*, vol. 1, 17–24 and *House of Lords Journal* (1771), vol. 15, 353–4. *Smith v. Brown and Cooper* (no date) appears in Salkeld, *Reports*, vol. 2, 666–7, *English Reports*, vol. 91, 566–7; *Reports of Cases determined by Holt*, 495, *English Reports*, vol. 90, 1172. The Memorandum of 9th August 1722 relating to the Privy Council appeal determination was printed in Peere Williams, *Reports*, vol. 2, 75–6 (London, 1740). *An Essay upon the Government of the English Plantations . . .* (1701) (ESTC T033473; reprinted edition edited by Louis B. Wright; San Marino, 1945) contains contemporaneous observations.

Older scholarship struggled with the precise application of Parliamentary statutes and common law in the colonies. For examples, see Paul S. Reinsch, *English Common Law in the Early American Colonies* (Madison, 1899); Julius

Goebel, Jr., "King's Law and Local Custom in Seventeenth Century New England," *Columbia Law Review* 31 (1931), 416–48 (also in *Essays in the History of Early American Law*, 83–120); Richard B. Morris, *Studies in the History of American Law* (New York, 1930), ch. 1; Robert Livingston Schuyler, *Parliament and the British Empire: Some Constitutional Controversies Concerning Imperial Legislative Jurisdiction* (New York, 1929); St. George Leakin Sioussat, "The Extension of English Statutes to the Plantations," *Select Essays in Anglo-American Legal History* (Boston, 1907), vol. 1, 416–30 and *The English Statutes in Maryland* (Baltimore, 1903). Of particular value is Elizabeth Gaspar Brown, *British Statutes in American Law, 1776–1836* (Ann Arbor, 1964), 1–46. Charles M. Andrews, *The Connecticut Intestacy Law* (New Haven, 1933; see also 1894 and 1907 versions) has a fine, clear discussion of various views held by contemporaries regarding the relationship between English law and colonial law. For Jack Greene's excellent work on colonial constitutionalism, see Jack P. Greene, "The Colonial Origins of American Constitutionalism," in *Negotiated Authorities*, 25–42, and *Peripheries and Center*, chapters 1–4. More recent discussions with varied interpretations appear in W. Hamilton Bryson, "The Prerogative of the Sovereign in Virginia: Royal Law in a Republic," *Legal History Review* 73 (2005), 371–84, and "English Common Law in Virginia," *Journal of Legal History*, 6 (1985), 249–56; James Hart and Richard J. Ross, "The Ancient Constitution in the Old World and the New," in Francis J. Bremer and Lynn A. Botelho, eds., *The Worlds of John Winthrop: Essays on England and New England, 1588–1649* (Boston, 2005), 237–89; William M. Offutt, "The Atlantic Rules: The Legalistic Turn in Colonial British America," in Elizabeth Mancke and Carole Shammas, eds., *The Creation of the British Atlantic World* (Baltimore, 2005), 160–81; Bilder, *The Transatlantic Constitution*; Daniel S. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21 (2003), 439–82, and *Constituting Empire*, chapters 1 and 2; and Ernest G. Mayo, "Rhode Island's Reception of the Common Law," *Suffolk University Law Review* 31 (1998), 609–24. For early American discussion, see Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1833), Book 1, and James Wilson, *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (Philadelphia, 1774).

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CHAPTER 4: LEGAL COMMUNICATIONS AND IMPERIAL GOVERNANCE

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Historians of the early modern English, French, and Spanish empires have long discussed how distance and slow, irregular communications affected metropolitan oversight of New World colonies. They commonly treated communications as one factor among many explaining the character of imperial governance and colonial society. In the past fifteen years, some scholars have made communications the primary subject of study. They have traced the routes through which messages passed; asked how the methods and personnel of information exchange influence the creation, framing, and dissemination of knowledge;