

## Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640

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As social history's highest tides recede, certain of its presumptions are exposed for reargument. In the case of the early-modern Atlantic, one such comes in the shape of Karen Ordahl Kupperman's long-held view that the decisive truths of England's first New World colonizings are properly learned from the autoptically authoritative settler—'the English who actually spent time with Americans' (1). The contention breeds two consequences: first, confronted by the 'truths' of the eyewitness, the metropolis's texts of colonizing (its geographies and chorographies, its maps and charters, treatises and instructions) become 'false'—or at best empirically unfounded speculations, armchair fantasies; secondly, historical inquiry becomes oriented to producing the experiential moment in which the encounter between settler and colonized object actually occurs. Here lies the fount of authenticity, the contact point that identifies what is to be explained and provides the evidence. Thus are set down markers that peg the historian's subject in historical time. Measured by the first moment of encounter, England came late to colonizing. John Wood Sweet writes in his introduction to the recent Kupperman-inflected essay collection, *Envisioning an English Empire*, that, 'it was only around the 1580s that the horizons of English leaders, merchants, intellectuals, and adventurers began to broaden' (2).

Why would one argue with a literature that has achieved so much? After all, it is not that long since the settler eye-witnesses invoked by historians saw nothing but others like themselves doing nothing but building Englishness anew on the edges of a spacious emptiness that they would later penetrate and

‘modernize’ (3). Into their midst Kupperman and her peers tersely inserted the absent indigenous subject and made it the incontrovertible point of departure for an American history that we should affirm (but for our own reasons) as ‘colonial’ rather than the anodyne ‘early’ of current choice. To the existential encounter of Indians and English that furnished this history’s first moment of truth, moreover, Kupperman’s subtitle—*Facing Off*—added an elemental moral referent. For the other is unknowable, Emmanuel Levinas insisted, save only that *facing* reveals the other’s face, hence humanity. In that instant the other becomes unconditionally our ethical responsibility, to be accepted (justice) or refused (death). Kupperman’s eyewitnesses, she finds, agreed on the ‘essential humanity’ of those they encountered, suggesting that a history of acceptances might lie muffled beneath the more familiar tale of refusals (4). Not incidentally, the suggestion plants the historian’s third marker, contingency.

We should not, though, take *facing* too literally: facing can occur anywhere and any time. Its morality is realized in revelation, not line of sight. Arguably, indeed, the ethics of responsibility came far closer to realization in the metropolis than on the frontier (5). And other claims for the eyewitness are as problematic. To write off metropolitan texts because they do not comport with what an eyewitness purports to ‘see’, for example, is epistemologically naïve. Who is to say that the objectives of author and eyewitness are commensurate? So also, to create a narrative that produces at its climax the moment of the eyewitness’s encounter is to pick one’s way through an array of temporal and contextual standpoints that, in different combinations, would produce different outcomes. In Sweet’s narrative, English horizons do not broaden until the 1580s. But one can frame the breadth of horizons differently by looking at them in different ways.

Ken MacMillan’s *Sovereignty and Possession in the English New World* exemplifies precisely the difference choice can make. In MacMillan’s hands the colonizing process is removed from the social history of settler experience and indigenous contact, and reestablished as an intellectual-doctrinal product founded upon Roman law and upon conjectural histories of English sovereign claims to an ancient North-Atlantic empire predating Iberian-Columbian landfall by a millennium. The merit is obvious. There was a colonizing impulse before there were settlements, and in self-justification and legitimation that impulse marshaled and employed what was, at its time, ‘known’. MacMillan’s considerable achievement, in other words, is to explain the expressive logic (legal, historical, textual, and iconographic) of English sovereign possession in the New World. He grasps the sense (and indeed the sensibility) conveyed in metropolitan texts and crown strategies that examined, defined, claimed, defended, mapped, and negotiated a Tudor-Stuart empire in North America. Metropolitan texts were not fantasies to be overridden by ‘experience’; nor were they adventitious reconstructions of facts established on the ground by the opportunistic adventurings of freebooters, gentry speculators and a few imaginative merchants. They fashioned an intellectually coherent order of things that began long before, persisted after, and was overall generally unaffected by the moment of the eyewitness. In the service of the crown they founded—authored and authenticated—an English Empire in the New World in a fashion not one whit less significant than the social historian’s materiality of settlers struggling in unfamiliar forests and swamps.

MacMillan’s account of English colonizing discourse is grounded on two important assertions. First, from the outset the crown was an active participant rather than passive enabler that stamped formal imprimaturs on others’ initiatives. The crown acted in its imperial capacity; it took the position that it had ‘a legal, sovereign, prerogative, and imperial obligation to authorize, supervise, protect, and proclaim its overseas holdings, particularly when faced with challenges from other European colonizing monarchs’ (p. 6). It was ‘especially concerned to ensure that its imperium, or independent and absolute sovereignty, and its dominium, or right to possess and rule territory under its jurisdiction, were fully and legally expressed’ (p. 6). Second, and related, Roman law and its derivatives, not English common law, furnished ‘the principal legal foundations’ for English claims of New World sovereignty and possession (p. 13). This is a particularly important contention. Scholars examining the role of law in early-modern transoceanic colonizing have generally described a process in which distinct European legal systems framed processes of transoceanic acquisition particular to their own vernacular practices, clashing where they competed, sharing little in common. In the English case, vernacular (common law) practice and ideology furnished a potent technology—a discourse of waste (crudely, uncultivated, deserted land) and of rightful possession by

inhabitation, use and improvement—for claiming and absorbing overseas territory (6). MacMillan does not dispute the salience of common law analogies and institutions in organizing settled jurisdictions, but does question the implication that European colonizing took place in a supranational legal vacuum. International law was not invented by the Treaty of Westphalia (1648)—the laws of nature (*ius naturale*) and nations (*ius gentium*) had long provided norms of decisive importance to the ordering of supranational spaces. Roman law furnished a common vocabulary for interstate relations among sovereigns, one that historians of English colonizing have thus far tended to pay relatively little attention to, precisely because they have taken the common law to be the only legal expression of English colonizing, and have attended to the crown from a domestic common law perspective as (effectively) enabler of others' adventures rather than imperial claimant on its own behalf. Roman law's 'multiple, related, and "universal" legal resources', MacMillan argues, 'provided the crown and its advisors with a corpus of supranational material that could help it develop legal strategies in favor of imperial pursuits', and territorial acquisitions, 'that would be recognized by the broader European community' (p. 13). As this underscores, in MacMillan's account the crucial audience in English claims to sovereignty and possession is rival European sovereigns, not indigenous possessors. His subject is not the legal mechanics of dispossession but how sovereign claims were made and with whom in mind. His achievement is to show that English New World colonizing occurred not as a halting series of ill-planned, commercially-motivated, crudely justified lunges into the unknown, but within a dense and carefully-parsed, historical-legal tradition (7).

*Sovereignty and Possession* makes its case in six substantive chapters. Successively, these discuss: (i) the supranational Roman Law context of sixteenth-century English and European state formation—notably the crucial distinction between internal (domestic) and external sovereignty and their differential legal means of expression, and, equally important, the dual (mental and physical) components of sovereign possession; (ii) the extraordinarily fecund geographic and historical imaginaire that, particularly in the works of John Dee, invoked an extended array of North-Atlantic territories (islands and continents) long penetrated by a millennium of English voyaging and conquest dating to an Arthurian sixth century in the comprehensive legal-historical rebuttal of Iberian claims to the American mainland north of Florida; (iii) the active exercise of royal prerogative by the crown in the significant form of letters patent authorizing successive adventurers, trading companies, and palatine proprietors to implement by occupation the crown's rights of acquisition and distribution of claimed territories (8); (iv) the fear of European rivals in motivating colonial militarization (selection and organization of personnel, choice of settlement sites, construction of fortifications, resort to martial law) and cultivation of 'images of dominance' (p. 122)—all instancing judicious apprehension of interference from without at least as much as a desire to intimidate or defend against indigenous inhabitants; (v) the importance of reading maps for their strategic and political content vis-à-vis European rivals (English manuscript maps, MacMillan observes, displayed superior geographic knowledge and cartographic capacity in comparison to their printed counterparts, evidencing the desire of both crown censors—acting through the Stationers' Company—and map makers to guard secrets while still conveying representations 'of imperial sovereignty and territorial possession': p. 175). MacMillan's last chapter (vi) presents an analysis of the lengthy negotiations between 1604 and 1632 with the Iberian and the French crowns that secured their acquiescence in and recognition of the English empire in America.

It is a pity that this original and important study resorts to a rather jaded cliché to convey its author's basic purpose—'to bring the crown and empire back in' (p. 7). Scholars have brought so much back in since Theda Skocpol et al pioneered the phrase twenty years ago, one wonders whether anything remains left out (9). This small infelicity notwithstanding, MacMillan's success is considerable. The tight narrative of the first four chapters decisively plants both the crown and the discourse of imperium and dominium squarely in our field of vision. Structurally, the narrative falters slightly thereafter: Chapter Five, 'Mapping the English Empire,' is a fine piece of work but reads somewhat as a distinct essay, and instead of a two-page 'Epilogue' tacked onto the end of Chapter Six, one might have preferred a more elaborated overall conclusion. In particular it might have served the author to situate his mapping research in closer proximity to his fascinating second chapter on the geographer John Dee, for, apart from their related substance, both address questions of considerable epistemological importance: namely, the historical conditions for formation of knowledge (what knowing is, what counts as known, by whom, when), and the purposes and ends for

knowledge formed. Dee's *Limits of the British Empire* (prepared in manuscript, 1577–8) compiled extensive geographical and historical evidence that established a record of English presence and voyaging in the North Atlantic sufficient to ensure that the queen of England could lay claim to imperium and dominium throughout the North Islands and the American mainland 'from Florida to the Circle Articke'—as the younger Hakluyt would put it in the *Discourse of Western Planting* —'more lawfull and righte then the Spaniardes or any other Christian Princes' (10). Later historians would of course dismiss Dee's history—of the empire of Britain founded by Brutus, its extension by Arthurian voyaging and conquest in the sixth century, of Madoc's American landfall in the twelfth—as absurd myth-making. Might we not instead treat Dee's efforts as the exhibition of an expertise that established (in the strategic service of the crown) what could, at that point, be advanced as known? In other words, MacMillan's work suggests that we consider seriously the 'means to know' that enabled the *Limits of the British Empire* to be written.

Why the actual product of Dee's expertise was strategically significant is best addressed under the banner 'legal pluralism', which also is my preferred candidate for the most important substantive contribution MacMillan makes. In recent years the legal history of English colonizing has attended to legal plurality, but primarily as a situational phenomenon. Pluralism lies in the migration of regionally-specific common law cultures from England; it lies in the subsequent divergence of common law cultures—both from each other and from their English template(s)—once implanted in regionally varied New-World environments; it lies in the consequences of encounters between common law cultures and indigenous jurisprudences; it lies, finally, in the comparison of English legal cultures with those of other European colonizers. From these common law pluralisms scholars have begun to tease an overarching 'Atlantic' common law culture that, piecemeal and inchoate, begins to become recognizable as a form of constitutionalism for the early Anglophone imperium (11). To this common law history of English colonizing, as we have seen, MacMillan adds (and Dee expresses) the further pluralism of Roman law. Historians have already established that a domestic Roman law culture was actively represented in an English civilian tradition that complemented common law, and, more generally, was enshrined in the universalist *studia humanitatis* of sixteenth-century humanism (12). In this study MacMillan demonstrates quite precisely how Roman law inflected English colonizing, furnishing an overall animating structure (which common law could not do) through its discourse of imperium and dominium, while also providing common terms of competition and conciliation with European rivals, all of them operating within the same intellectual structure. Dee's *Limits of the British Empire*, then, becomes virtually a case study of the employment of geography and history to put this Roman law inflection into instrumental effect by establishing the whereabouts and the lineage of prior possession and intent to possess, necessary conditions of sovereignty and acquisition (13).

Amid all MacMillan's achievements one false note sounds—his rather casual resort to the terminology of *terra nullius* (literally, 'no one's ground') as if this too were a routine Roman law concept (for example at pp. 106, 115, 120). It is not. No one would dispute that *terra nullius* has been invoked by many scholars to stand for colonizers' claims that the New World was effectively 'empty' of possession. But the provenance of the term is now a matter of some controversy, particularly in recent debates over English colonization of Australia in which the concept of *terra nullius* is bitterly contested (14).

MacMillan sources *terra nullius* to Justinian:

The Roman legal precedents for the acquisition of territorial sovereignty and possession of *terra nullius* were the most clearly expressed in Justinian's Digest (book forty-one) and Institutes (book two), texts which all civilian lawyers in England and Europe would have studied in detail. As the drafters of [crown letters patent] were undoubtedly aware, inserting the legal language of Roman law could help to ensure that these claims would receive either acquiescence or recognition among the broader European community. The failure of the English crown to receive such concessions for its New World territories meant that its claims could continue to be subject to diplomatic entanglements and threats of belligerency (p. 106).

In fact, the words themselves appear nowhere in the *Digest* or the *Institutes* as such. Certainly in discussing acquisition under the law of nations the *Digest* notes that such as ‘presently belongs to no one’ may become ‘by natural reason the property of the first taker’. But the examples, grouped under the generic term ‘things’ (*rerum*), are virtually all animate—‘all animals taken on land, sea, or in the air, that is, wild beasts, birds and fish’. These are things that may ‘escape from our custody and return to their natural state of freedom’. When they do so, ‘they cease to be ours and are again open to the first taker’. To its pronounced emphasis on beasts, birds, and fish (also swarms of bees, which ‘are wild until we house them in hives’, but which, upon leaving, cannot be claimed as property once out of sight) the *Digest* adds, ‘things captured in war, islands arising in the sea, and gems, stones, and pearls found on the seashore’. Islands arising in the sea (‘a rare occurrence’) refers not to newly-discovered lands appearing on the horizon but to outcomes of geological events—volcanic or tectonic. This is the only example in the *Digest* of land that is *res nullius* and open to possession by a ‘first taker’. All other discussion of apparently new or vacant land in book forty-one deals with islands arising in rivers (‘a frequent occurrence’) created by alluvium or by natural changes in water courses, none of which can be analogized to a conception of *terra nullius* or of land open to possession by a first taker, in that the principle determining possession of the island is not who takes it first but the already-existing structure of ownership of adjacent or proximate land. Indeed, the term used in the *Digest* to refer to land is not *terra* but, most commonly, *fundus* or estate, that is land that is already the property of someone. The *Digest* does consider how possession of land that has been abandoned or left derelict may be lost and taken up by others, but again this is *fundus*—land that has been owned rather than ‘new land’ never before taken (15).

Andrew Fitzmaurice has recently identified (*terra nullius* as a twentieth-century latinized formulation or tag invented in the wake of the more specific term (*territorium nullius* (no sovereign’s land) which was itself coined by late-nineteenth-century international lawyers, Fitzmaurice argues, ‘to codify rules for the carve-up of Africa’ (16). But although a recent invention, Fitzmaurice believes (*terra nullius* can appropriately be used to stand in for European colonizers’ deployment of the ancient natural law conception of the first taker’s right of possession to justify their expropriations of indigenous inhabitants deemed too barbarous or uncivilized in customs and practices to manifest conceptions of property that colonizers were bound to respect. The debate is complex and—in the Australian case—furious. It is also dogged by a failure fully to distinguish between claims of sovereign possession and their basis, and property claims advanced by settlers and *their* basis.

If MacMillan’s excursion into the fraught world of (*terra nullius* seems a little ill-judged because of the plethora of debates and confusions in which the term is entangled, little of real consequence for his argument actually hangs on it. So it would be a shame if the term’s controversies were to obscure his real achievement, which is precisely to create a basis to understand the distinction in the legal technology of English colonizing between the language of sovereign possession ((*imperium* and (*dominium*) advanced in the metropolis and the language of property in land used in situ. MacMillan does this by reinserting the crown as actor into the legal narrative of English colonizing, and by establishing an overarching Roman law context for the terms of English crown claims to New World jurisdiction in competition with other European sovereign claims. His book suggests that careful study of Roman law will greatly amplify legal historians’ comprehension of the discourses of early modern English colonizing, richly embellishing a scholarship that has, hitherto, scrutinized English colonizing’s legalities more or less exclusively in common law terms.

Once we have absorbed those lessons and followed their implications perhaps we will want to return once more to Karen Kupperman’s autoptic moment. We will return better equipped to appreciate that the momentous interaction that her work has emphasized took place in an extraordinarily dense metropolitan context.

## Notes

1. K. O. Kupperman, *Indians & English: Facing Off in Early America* (Ithaca and London, 2000), p. x;



- and see also her *Settling with the Indians: The Meeting of English and Indian Cultures* (Totowa, N.J., 1980). [Back to \(1\)](#)
2. J. W. Sweet 'Introduction: Sea Changes,' in *Envisioning an English Empire: Jamestown and the Making of the North Atlantic World*, ed. R. Appelbaum and J. W. Sweet (Philadelphia, 2005), p. 12. On truth and falsity, see J. Edwards 'Between "Plain Wilderness" and "Goodly Corn Fields": Representing Land Use in Early Virginia,' in *idem*, pp. 217–35, at p. 234. [Back to \(2\)](#)
  3. See for example J. P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British colonies and the Formation of American Culture* (Chapel Hill, 1988); J. W. Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1956). [Back to \(3\)](#)
  4. Kupperman, *Indians & English*, pp. x, 239–40. For the tale of refusals, see for example R. A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York and Oxford, 1990). [Back to \(4\)](#)
  5. See for example P. Karsten, *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600–1900* (Cambridge, 2002); S. Banner, *How the Indians Lost their Land: Law and Power on the Frontier* (Cambridge, Mass, 2005). [Back to \(5\)](#)
  6. On the deployment of waste, see P. Seed, *American Pentimento: The Invention of Indians and the Pursuit of Riches* (Minneapolis and London, 2001), pp. 29–44. [Back to \(6\)](#)
  7. So doing, MacMillan follows, and develops, themes suggested in the work of Anthony Pagden, for example, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (New Haven, 1995), and David Armitage, for example, *The Ideological Origins of the British Empire* (Cambridge, 1998). Also of interest are A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2004), notably pp. 1–31, and Williams, *The American Indian*, pp. 3–225. [Back to \(7\)](#)
  8. We should note that the letter patent—preeminent instrument of prerogative—was consistently the means of authorization for expeditions of acquisition from the Cabot patent of 1496 through to the Restoration. In addition to MacMillan, pp. 79–120, see M. S. Bilder 'English Settlement and Local Governance' in *The Cambridge History of Law in America: Volume 1. Early America, 1580–1815*, ed. M. Grossberg and C. Tomlins (Cambridge and New York, forthcoming 2008). [Back to \(8\)](#)
  9. *Bringing the State Back In*, ed. P. B. Evans, D. Rueschemeyer and T. Skocpol (Cambridge and New York, 1985). [Back to \(9\)](#)
  10. R. Hakluyt (the younger), *Discourse of Western Planting*, in *The Original Writing and Correspondence of the Two Richard Hakluyts*, ed. E. G. R. Taylor (London, 1935), ii. 213, and generally pp. 290–7. [Back to \(10\)](#)
  11. See M. S. Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass, 2004); D. J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill, 2005). [Back to \(11\)](#)
  12. B. P. Levack, *The Civil Lawyers in England, 1603–1641: A Political Study* (Oxford, 1973); A. Fitzmaurice, *Humanism and America: An Intellectual History of English Colonisation, 1500–1625* (Cambridge and New York, 2003). [Back to \(12\)](#)
  13. For a pioneering account of legal pluralism in colonizing see L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge and New York, 2002). Benton argues that the state-oriented law of colonizing is primarily the product of the nineteenth century's era of high colonialism. MacMillan's case for 'bringing the crown ... back in' to early-modern English New World colonizing modifies Benton's account. [Back to \(13\)](#)
  14. See for example M. Connor, *The Invention of Terra Nullius* (Sydney, 2005). [Back to \(14\)](#)
  15. See for example *The Digest of Justinian*, Latin text edited by T. Mommsen with the aid of P. Krueger, English translation edited by A. Watson, 4 vols (Philadelphia, 1985), iv. 41.1.3, 41.1.5.2, 41.1.7.1–5, 41.1.29, 41.1.30.1–4, 41.2.3.6–7. [Back to \(15\)](#)
  16. A. Fitzmaurice, 'The Great Australian History Wars' [online]. [2006] [URL: <http://www.usyd.edu.au/news/84.html?newsstoryid=948>] [2] [accessed 24 March 2007]. In contrast, Patricia Seed has credited the invention of terra nullius to William Blackstone in 1765, citing his *Commentaries on the Laws of England*. See Seed, *American Pentimento*, pp. 155–6, also Benton, *Law and Colonial Cultures*

, p. 168 n. But Seed does not provide a reference to the passage she has in mind. A search of the *Commentaries* fails to disclose any reference to terra nullius as such, although Blackstone does refer (ii.7) to a natural right to migrate to ‘desart uninhabited countries’. On the historical usage of territorium nullius in international law, see M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London, 1926; repr. New York, 1969). Lindley’s treatise (see pp. 32–40) does not support Fitzmaurice’s contention for the origins of territorium nullius. [Back to \(16\)](#)

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