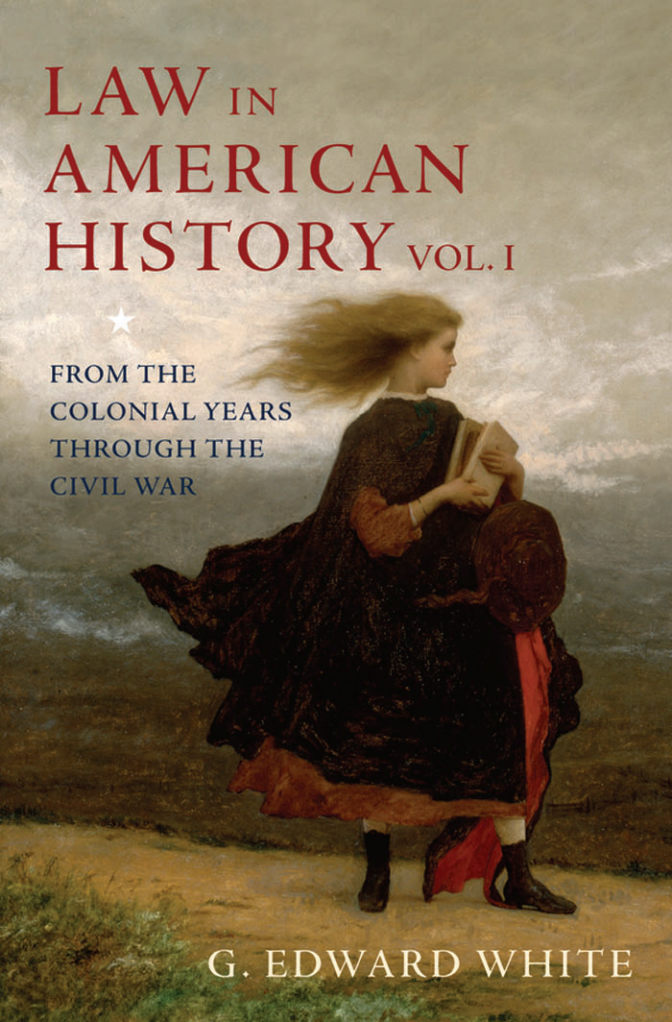
LAW IN AMERICAN HISTORY VOL. I

FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR



G. EDWARD WHITE

Law in American History, Volume 1

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From the Colonial Years Through the Civil War

G. EDWARD WHITE

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This book has taken quite a long time to complete, and I am grateful for the publisher's patience. As in one other instance, the idea for the book did not begin with me, but with Stanley N. Katz of Princeton University, whose instincts, from time to time, have told him that I would enjoy writing a book even though I had not come to that conclusion. As before, Stan was right: I have learned a lot in the course of working through this volume, and now plan to write two more along similar lines, taking the topic of law in America through the conclusion of the twentieth century.

I offer my thanks to two other persons who have supported my work for a very long time: Jerome A. Cohen of New York University Law School and Andrew L. Kaufman of Harvard Law School. But for the efforts of those two individuals, and Professor Katz, I might have ended up doing something quite different from what I have done. I'm not sure what that might have been.

I have had help from several persons who read the book manuscript in its entirety and gave me extended critical comments. Alfred S. Brophy provided characteristically prompt and helpful suggestions on a range of topics. Tomiko Brown-Nagin and Risa Goluboff reminded me that there are many ways to research and write about topics in legal history, and pushed me in the direction of some topics and themes that I had not initially given prominence. Barry Cushman held my manuscript draft up to his impeccably exacting professional standards and found it wanting in helpful ways. John Witt provided me with a series of thoughtful "big picture" observations. Alfred S. Konefsky, who has helped me with several previous books, once again demonstrated why is he is one of the gifted commentators and editors in the American legal academy. And Julia Mahoney managed to get beyond my lapses, infelicities, and occasional descents into tedium to give me the benefit of her characteristically incisive and vividly expressed criticism. Thanks also to Robert G. Schwemm, who read chapter 9,

which contains a discussion of the 1851 U.S. Supreme Court decision in *Strader v. Graham*, a case about which Professor Schwemm's knowledge is unparalleled.

The University of Virginia School of Law's reference desk compares favorably, in my view, with any other research library in the nation, and although I attempted to confound the group at "refdesk" with questions about arcane and obscure sources, they came up with them as always. Thanks to Kent Olson, Ben Doherty, Amy Wharton, Cathy Palombi, and their staffs. Thanks as well to three research assistants who helped research and edit the book in various stages, as well as showing indulgence when someone from an analog world with virtually no diagnostic ability with computers got stuck in some unknown path, directory, or whatever. Stewart Ackerly, Douglas Hance, and Jacob Gutwillig: you know the scope of your contributions.

In addition to the above, I have hundreds and hundreds of scholars in early American history, law, and other disciplines to thank: their work is cited in the notes. Although this book's perspective seeks to be "revisionist," its narrative mode is synthetic. It rests on the scholarship of others.

In some of my other Oxford University Press books I have "treated" readers to accounts of various animals in the White family household. I will not do so in this instance. Suffice it to say that the number of "pack members" has grown since individuals were singled out, calling to mind some invidious stereotypes about persons of a particular ethnic heritage that I quite properly repudiate.

Animal populations in the White household have tended to increase as adult children and grandchildren have moved farther from Virginia. There may be no causal connection between the two developments, but the adult children and grandchildren are missed. The dedication page to this book reverts to an older practice of designating loved ones by their initials.

G.E.W.
Charlottesville
October 2011

Law in American History, Volume 1

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Introduction

The title of this book suggests that its author may be engaged in a quixotic undertaking. But the scope and focus of this book are not as broad as might first appear. Only the twenty-first-century ethos of entitling scholarly works prevents me from calling this book what it might have been called in the late eighteenth century: "Some Arguably Central Themes of American History and How Law Is Seen to Relate To Them, Offered With Deference, and My Compliments, To the Gentle Reader."[1] With that option foreclosed, some serious issues of terminology, scope, and methodological emphasis are raised by the title, which this introduction seeks to address.

* * *

This book is not a conventional history of American law. Its primary purpose is not to trace legal doctrine, or the positive enactments of officials, or the careers of members of the legal profession, the judiciary, or other branches of government, over time. Along the way it refers to developments in common or statutory law, sketches some of the history of the Supreme Court of the United States, and discusses several judicial opinions. But those references are subordinate to more general concerns. The book is concerned with how "law," in the multiple senses in which I will be using that term, was connected to themes that I am claiming helped define particular periods of American history. The book's chapter titles identify those themes, and in each chapter I seek to trace the relationship of law to them.

I also will be advancing a general view of that relationship over the course of the book's coverage. To flesh out that view, it is necessary to say more about what I mean by "law," by "American history," and, most crucially, what I mean by "in." The first of those definitional inquiries produces, for me, an expansive conception of "law." The second produces a selective conception of "American history." The third produces a particular perspective on the causal relationship between law and the historical setting in which it operates. I take up each of the inquiries in turn.

My conception of "law" in this book is broad but at the same time particularistic. "Law" does not merely refer to the decisions of courts, or the enactments of

legislatures, or the rules made by executive officers or representatives of administrative agencies. It also refers, necessarily, to the provisions of the Constitution of the United States and the constitutions of states. And in some places the term "law" incorporates cultural customs or traditions or practices that were deeply and broadly enough held to amount to legal rules or guidelines.[2]

I am also treating law as culturally "special" in America. I associate law's special role in American culture with an attitude that ascribes a role for law as a binding social force, an embodiment of authoritative guidelines for human activity to which residents of a nation adhere, and which are taken as transcending current individual preferences. The shorthand way of describing that attitude is adherence to the "rule of law." Law is taken to be a mechanism for resolving social disputes, and its resolutions of those disputes are taken as binding not only on the persons who favor them, but on those opposed to them. In American history the ideal of adherence to the rule of law has been regularly articulated, but not invariably followed. In this volume we will see illustrations of defiance of settled law as well as adherence to it.

This book does not take that proposition to mean, however, that adherence to law, or even a tacit commitment to the rule of law in a society grounded on some version of democratic theory, has been the only defining theme of American civilization. Instead it seeks to identify episodes in American history where legal solutions to contested social issues failed, as well as ones in which they succeeded. In this volume law interacts with its historical setting for worse as well as for better. Nonetheless, the rule-of-law ideal has been a foundational part of American culture.

What exactly, however, have Americans meant by "law"? In ordinary parlance, we understand such states of being as war, procreation, and eating to be distinct from law, and we also understand domains such as economic markets, politics, the arts, and the sciences to be distinct. We thus speak of "law and literature," "law and economics," "law and politics," as if those phrases were describing different regimes. The problem is that the relationship between law and those regimes is not binary. War is different from law, but there is a "law of war," and that law both affects and is affected by the conduct of military operations. Eating is different from law, but legal regulations shape what Americans eat and do not eat. In short, law is both constitutive and reflective of the culture that surrounds it at any moment in time.

In emphasizing the historical contexts of law, however, I am not seeking to portray law in American history as merely a cultural artifact that can be fully understood as a product of its historical setting, as some studies of popular fiction or works of art have done.[3] In this volume law is presented as occupying a unique, and central, role in American history. Law has been perceived by Americans, since the founding of the nation, as intimately connected to the destiny of

the American republic. It has been thought of as the mechanism for holding the nation together as a polity, the ultimate source for the resolution of deeply contested issues. It has served as an aspirational force. But, paradoxically, the fact that law in its aspirational capacity has been afforded so much cultural weight in American history has resulted in its authority being seriously challenged as well. In the United States, since its founding, there have been recurrent appeals from the positive enactments of officials holding power to conceptions of "natural justice"—an ideal regularly identified with foundational human rights that transcend positive law and to which, at times, that law must conform.

Thus sometimes over the course of American history, when contested social issues have been presented as legal issues, the cultural stakes have been extremely high. In some of those episodes law in America has teetered on the brink of disintegration as a binding social force, and the nation's collective identity has been imperiled. Episodes in which that potential disintegration has stared Americans in the face have been as much a part of the history of the United States as episodes in which Americans have collectively rallied round the ideal of the rule of law in a republican democracy. This book's coverage includes both sets of episodes.

* * *

In contrast to the broad conception of "law" that animates this work, I have adopted a comparatively narrow, selective conception of "American history." That phrase encompasses two terms of art, and both require definition. It has become fashionable, in a world in which global barriers are receding, to emphasize the comparative dimensions of U.S. history, to eschew "American exceptionalism," and to attempt to situate the ideas and events that formed part of the story of America's past within a global context. I have adopted that approach on occasion. My initial chapter intentionally seeks to avoid seeing the "colonial period of American history" as a precursor to the United States becoming an independent nation, the Revolutionary War, and other events that helped define America as a distinctive state. Instead I emphasize indigenous and transatlantic themes in my account of the years from the first European settlements in North America to the middle of the eighteenth century. In addition, I have given attention, in several other chapters, to some of the international dimensions of America's growth, development, and internal tensions.

On the whole, however, I have assumed that one of the foundational themes of American culture in the period covered by this volume was a widely shared perception by inhabitants of the United States that America was a unique place and polity, fundamentally "different" from other sovereign lands. Moreover, the actual conditions of life on the North American continent, for the years covered by this study, reinforced that perception. British America was seemingly blessed with abundant natural resources, vast, potentially bountiful, "uncultivated" lands, the relative absence of competing European nations, and an apparently

tractable, or conquerable, aboriginal population. America, in short, was perceived of, and—from the point of view of most of its nonaboriginal inhabitants—was, exceptional. By American exceptionalism I mean a singular combination of optimism, self-confidence, parochialism, and insularity. I also mean the awareness of living in a distinctively promising physical and spatial environment.

So by "American" history I mean, on the whole, the playing out of themes connected to American exceptionalism, taking that term to include its insular as well as its buoyant dimensions. When I introduce international or comparative elements into my narrative, they are folded into a largely domestic story. In my view, that emphasis captures the sensibilities of most of the historical actors in the narrative, actors who for the most part believed that they were living "different" and "better" lives than their foreign counterparts. A focus on American exceptionalism also allows the introduction of themes connected to its darker sides. Early American emigrants from Europe managed to avoid replicating many of the social hierarchies, religious controversies, and ethnic tensions of their ancestors, but at the same time they developed two "exceptional" practices—the dispossession of aboriginal tribes from their land and the introduction of African-American slavery—that would help to characterize the American nation as it evolved in the nineteenth century. Any account of law in early America needs to recognize the defining cultural role of those practices.

As to the term "history" itself, any precise definition is, of course, elusive. Because practicing historians recognize the vastness and complexity of historical data, as well as the abundant difficulties in retrieving the lives of past actors without simultaneously making those actors into the historian's contemporaries, it is not uncommon to find confession and avoidance among authors of historical works.

Historians not only consciously select topics from the vast database of history; they choose topics that, consciously or unconsciously, resonate with them personally, and perhaps with their contemporaries.

Then there is the limited shelf life of historical interpretations. Revisionist history, in the long term, is the norm, rather than, as it is typically pictured, a cutting-edge critique of conventional wisdom. The limited shelf-lives of historical interpretations is not primarily the result of their cogency. It is because established interpretations, over the course of time, are seen as no longer addressing questions that current scholars, and their contemporaries, deem vital and absorbing.

I choose to respond to the above conundrum by thinking of historical scholarship as a challenge to re-create the ways in which actors in a slice of time in the past experienced their world.[4] Since the contemporary writer, by definition, no longer thinks and feels as those actors did, the challenge is to re-create the sensibilities of

those actors—what they cared about, what they feared, how they thought of themselves in relationship to the world they observed around them—without having the contemporary writer's current predilections overly intrude on the re-creation process.[5] A search for "objectivity" in historical scholarship does not adequately capture the challenge. I have not sought to take an "objective" stance toward the material I discuss in this volume, nor do I claim that the explanatory portions of my narrative are the "best possible" ways to understand what I have recounted. I have simply tried to emphasize themes from the American past to which actors, at the time those themes surfaced, attached great significance, and to show why the themes were important to them. I have selected the themes, thereby emphasizing some data from the past at the expense of other data. I believe the themes were central to contemporaries at the time, but the burden is on me, as it is on anyone who does historical scholarship, to persuade others.

* * *

At this point, having attempted to sketch out the ways in which "law" and "American history" are being conceived in this book, I turn to the deceptively unobtrusive term "in." Making causal connections between the existence of noteworthy historical phenomena, such as the Declaration of Independence, the Revolutionary War, the drafting and ratifying of the Constitution, the Louisiana Purchase, and the Civil War, and other "forces," "attitudes," official decisions, or events has been a recurrent self-appointed task for historians ever since the genre of historical writing came into being. The term "in" might be thought of as anticipating some causal relationship between law and its historical setting over time. Moreover, the term might be thought of as presaging a particular approach to the writing of history itself, one which emphasizes causal attribution as distinguished from interpretation or forms of description.[6] Both inferences require some attention.

There has been a long-standing, and shifting, debate among twentieth- and twenty-first-century American legal historians about the appropriate way to conceptualize the relationship between law and its social context. It does not do full justice to the intricacies of various positions in the debate to reduce them to three perspectives, but for present purposes boiled-down versions will suffice. One perspective has emphasized the distinctive structures of thought, modes of analysis, and linguistic formulations that have been consistently associated with the Anglo-American legal profession, both in its educational institutions and its practicing attorneys. So distinctive have been those "legal" modes of thought and discourse, proponents of this perspective maintain, that legal decisions, in their varied forms, need to be understood as being driven largely by intraprofessional criteria, such as fidelity to authoritative legal texts or established judicial doctrine, that track extralegal currents in the larger culture only sporadically and imperfectly.

An "internalist" perspective can risk being ahistorical. In 1973, in the first major one-volume history of American law, Lawrence Friedman openly rejected the theory that law and legal institutions in America had any overriding professional characteristics that isolated them from, or complicated their relationship with, their social context. Using "the development of modern social science" as "a way of looking at the world of law and legal history," Friedman proposed to treat "American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone," but "as a mirror of society." He was prepared, in investigating the relationship between law and its social context, to take "nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society."[7] Friedman's view was by no means idiosyncratic at the time, nor is it at present. A good many American legal historians, and perhaps even more American legal scholars as a whole, assume that despite the distinctive modes of training, analysis, and discourse associated with the legal profession, in the end courts and legislatures and administrative agencies "mirror" contemporary social mores.

Most of the scholarship produced by legal historians sharing the perspective of Friedman has been concerned with establishing connections between the policy outcomes reached by legal decision-makers and social and economic trends in American history. If that is the focus, the "mirror of society" perspective can appear intuitively attractive. If one finds, for example, a trend in late nineteenth-century judicial decisions in industrial accident cases toward limiting the scope of employer liability for on-the-job accidents suffered by employees, it seems natural to ask whether there were more such accidents in the late nineteenth century, and whether the judges who wrote decisions limiting employer liability might, because of their social and educational backgrounds, have been sympathetic to the owners of railroads or factories rather than their employees. In fact there were more accidents as railroads and factories expanded in the last half of the nineteenth century, and the social and educational backgrounds of judges far more closely resembled those of industrial employers than their employees.[8]

Thus if one focuses on policy outcomes in cases, or on doctrinal trends over time, the capacity of law to "mirror" society may appear evident. But if one focuses on the actual reasoning of cases, the relationship between law and its social context becomes more opaque. Rarely do judicial opinions, or even legislative enactments, openly declare their policy objectives in a fashion helpful to social historians. Judicial opinions virtually never announce, as a justification for reaching a doctrinal outcome, that they want to protect one social class or interest against another, and legislators are often silent on the purposes of legislation or resort to euphemisms. Judicial opinions characteristically reason within an assumed doctrinal framework in which a case is taken to be situated, distinguishing

or adhering to precedent, advancing or rejecting established policy justifications, and emphasizing the distinctive facts or issues in a case. To translate that reasoning into a series of policy justifications "mirroring" contemporary social attitudes requires imaginative filling of gaps. Sometimes it requires the attribution of motives to judges or legislators for which there is no extant historical evidence. In short, a claim that "nothing is autonomous" in legal decision-making not only requires the historian to engage in imaginative gap-filling; it fails to provide a way of analyzing the intraprofessional reasoning accompanying many judicial or legislative decisions.

It would therefore seem that a third perspective on the role of law and legal institutions in their historical settings offers the most fruitful vantage point for investigation. One of the benefits of that perspective is that it allows historians to read legal materials from the past simultaneously as intraprofessional documents and historical artifacts. Although the intraprofessional reasoning employed in Chief Justice John Marshall's opinions could readily have been discerned and analyzed by Chief Justice Charles Evans Hughes a century later, Marshall's style of presenting his legal arguments, his choice of language, and the background assumptions about the nature of law or political economy that informed his decision-making were very far from those that characterized and informed Hughes's decisions.[9]

It can be illuminating to investigate judicial opinions as historical documents. But they nonetheless remain legal documents as well: documents designed to serve the purpose of resolving disputes and exhorting citizens to engage in one form of conduct rather than another. In that latter capacity they have a unique quality: they are not like songs or paintings or medical treatises. That quality is emphasized by an internalist historical perspective. But that perspective needs to be accompanied by one that recognizes that legal documents are also products of their historical moments. As such they are time-bound, even though, in their exhortatory and prescriptive dimensions, they have the capacity to endure beyond the context in which they were created. Marshall spoke of the Constitution being "adapted to the various crises of human affairs." He did not mean, by that statement, that the Constitution was intended constantly to change. On the contrary, he meant that it was intended to endure.

Such has been my general approach throughout this volume. Whether the subject has been ritualistic exchanges between Europeans and Amerindian tribes in the seventeenth century, or late eighteenth-century agricultural husbandry, or developing ideas of sovereignty among British colonial American elites, or the financing of the Revolutionary War, or the disposition of public lands in the 1820s and 1830s, or the emergence of the Supreme Court of the United States as a cultural icon, or the inability of any branch of American government, or any configuration in American politics, to confine or resolve the

contested issue of African-American slavery, or the legal architecture of the Confederacy, I have treated the relationship between law and American history as reciprocal and sought to explore the simultaneous effect of historical themes on law and law on those themes.

* * *

Finally, some matters of narrative design and coverage, as well as some brief observations on methodologies used by scholars in the legal academy and the discipline of history. For more than a half century various writers interested in the history of historiographical trends and the philosophy of history have debated whether historical writing is necessarily directed toward deriving general causal explanations of the past, or whether it simply involves the re-creation of the motives, attitudes, values, and shared understandings of past actors.[10] If historical writing is necessarily causal, history would be best placed among the social sciences; if it is essentially concerned with describing how past actors thought and felt and understood their worlds, it might be best placed among the humanities.[11] I find the distinctions too stark; historical writing strikes me as containing both causal and descriptive components, sometimes ordered and sometimes not. I have been less interested, in this book, in imposing some causal order on the material being presented than in using it to recover themes and attitudes from the American past. Much of the research for this volume has been in secondary works, and I have sought to underscore its descriptive emphasis by keeping notes to a minimum and seeking to avoid the more overtly argumentative tone of many legal and some historical monographs. On the other hand this volume has not been designed solely as an exercise in "thick," or even thin, description. It advances a number of interpretations, sometimes explicitly, more often implicitly. The subjects and topics emphasized in this book, selected out of a myriad of alternatives, constitute an argument for their historical centrality and significance. The style in which those subjects and topics are presented represents a choice. "Descriptive" historical writing is not the equivalent of telling unvarnished stories.

My selection of chapter themes represents an implicit argument for the centrality of those themes in the periods of American history with which they are associated. One might think of those themes, connected over time, as forming a narrative sketch of the years of American history covered by this volume. The first chapter, which begins in the late sixteenth century and extends through the first half of the eighteenth, introduces the theme of contacts between aboriginal tribes on the American continent and European settlers. The principal setting of those contacts was the vast gap between the social institutions, and cultural attitudes, of tribes and settlers, and the ways in which "law," in the form of ceremonial interactions influenced by the tribal principle of reciprocity and the settler principles of possession of land and the exclusion of competing occupants from

it, sought to respond to that gap. By the second half of the eighteenth century, the cumulative effect of those interactions had been to displace tribes from large areas adjacent to the Atlantic Coast, enable European settlements to gain footholds and grow in colonial America, and set in motion one of the major themes of early American history, the progressive dispossession of Amerindian tribes from land they once occupied, combined with their progressive retreat to the western regions of the American continent, and their progressive marginalization as members of colonial European communities.

Chapter 2 thus can be seen as taking up the narrative of distinctively American forms of landownership and use at the point where European control of large areas of land had become established, the last half of the eighteenth century. The emphasis of the chapter is on the forms of landownership and use that had become characteristic of British colonial America by that time, forms of agricultural householding. The independent farm or plantation household, produced by the acquisition of large tracts of land that were suitable for agriculture and were once occupied by tribes, had become a ubiquitous economic and social unit. In some regions of colonial British America agricultural households took the form of staple-crop plantations that relied upon African slave labor, traded extensively with Europe, and, in their larger versions, represented self-sufficient household communities, producing and consuming a variety of tasks and services. In other regions agricultural labor was wage-based, and farm households relied upon a combination of family members and hired workers for production and service. The conspicuous success of agricultural husbandry in America in the last half of the eighteenth century encouraged immigration, the rearing of large families, and the development of commerce centered around agricultural households. When, after the 1760s, British policies reduced the opportunities for colonial Americans to acquire more tracts of land suitable for agricultural housing, increased taxes on households, and threatened to tighten restrictions on the domestic and international commerce of those households, residents of both plantations and farms found themselves united in a set of grievances against Great Britain.

The next two chapters take up the legal ideas that fueled those grievances, and led, successively, to the British colonies in America declaring themselves independent of the British Empire, fighting a war with Great Britain, establishing a confederated form of government, and revising that government in the 1789 Constitution. The principal ideas that played a dominant role in the creation of an independent American nation, and of that nation's structure of government, were sovereignty and republicanism. The disengagement of the American colonies from the British Empire was fueled by a transformation in the relationship among citizens of colonial British America and Parliament and the British Crown, the two entities which they had traditionally recognized as

their sovereigns. Between the 1760s and the mid-1770s, the locus of sovereignty in colonial British America was reformulated, and Americans successively cast off their allegiances to Parliament, which they felt was oppressing them without allowing them representation, and the king, whom in the Declaration of Independence they associated with the cumulative grievances that had estranged them from Great Britain over the past decade.

Having established a government without a king, and in which states were the primary units of sovereignty, Americans then struggled with the implementation of republican institutions, particularly with the problem of confining factionalism and provincialism at the state level, which was serving to undermine the efficacy of the Articles of Confederation government that had been established during the Revolutionary War. Eventually a group of delegates met at a convention in 1787 to consider revising the Articles of Confederation. They produced a fundamentally altered structure of national government, premised on the separation of executive, legislative, and judicial branches, checks and balances among the federal branches and between the federal government and the states, and a written Constitution in which sovereignty was vested in the people of the United States, and in which the preservation of republican institutions, each checked by oversight from the others, was designed to endure as the size and population of the American nation expanded. By the framing and ratification of the Constitution it was clear that distinct regional interests, centering around the competing forms of wage and slave labor, had surfaced, and that the practice of slavery was theoretically incompatible with the human rights premises of republican forms of government, but those tensions were not addressed in the Constitution, which acknowledged the legitimacy of slavery.

Of comparatively little concern to the framers of the 1787 Constitution had been the role of a federal supreme court. The Constitution had established that court, and anticipated that Congress would create lower federal courts, but its judicial article, Article III, was silent on the relationship of the Court to other branches of the federal government. The power of the Court to review the actions of those other branches under the Constitution was not alluded to in the Constitution, and in its early years the Supreme Court heard few cases, had considerable turnover in its personnel, and showed little evidence of becoming a prominent institution in American law and politics. Chapter 5 describes how, by the time of Chief Justice John Marshall's death in 1835, the role of the Court had dramatically changed, plunging the Court and its justices into the very center of American politics. Despite the Court's involvement with nearly all of the major legal issues of the early nineteenth century, and its establishment of itself as the authoritative expositor of the Constitution, it remained an institution apart from ordinary early-nineteenth-century political life, its internal deliberations and protocols, and its collegial style of reaching decisions and issuing opinions,

largely unknown to other members of political communities and the general public.

Over the course of Marshall's tenure, which extended from 1801 to 1835, massive changes took place in American culture, and the pace of change further increased in the 1840s. Chapter 6 suggests that the principal impetus driving change in the first half of the nineteenth century was entrepreneurship, which took multiple forms and was facilitated by law. The territory of the United States expanded dramatically over the first half of the nineteenth century; the American population grew significantly and dispersed westward; major developments in the transportation sector, such as turnpikes, canals, and railroads, sprang up; vast amounts of public lands were acquired, creating new areas for settlement, new population centers, and eventually new states in the Union; the number of lawyers greatly increased, furnishing a market for expanded sources of legal authority, such as treatises and reported judicial decisions. Law, whether in the form of treaties acquiring territory from other nations, state franchises for transportation companies, congressional legislation dispersing public lands, or ventures in legal education or publishing, was involved in each of those developments.

As America was growing rapidly, doubling its size, and expanding its population westward, some themes of its colonial and Revolutionary past shadowed those trends. The acquisition of vast public lands, beginning with the Louisiana Purchase of 1803 and extending through the Gadsden Purchase of 1853, had opened up for settlement areas principally occupied by Amerindian tribes. It was apparent that the filling up of the American Midwest and Far West by prospective agricultural households presupposed the continued displacement of tribes. That displacement became a common feature of the opening up of public lands, and the eventual creation of new states, over the first half of the nineteenth century. Part of the history of every "public lands" state that joined the Union during that time frame included the seizure of aboriginal land and the marginalization or displacement of tribes that had once lived within the borders of the state. By the 1830s the Supreme Court of the United States had declared that tribes were "domestic dependent nations," and that their relationship to the U.S. government resembled that of a ward to a guardian.

In the same time frame the institution of African-American slavery also shadowed territorial expansion, population growth, and the westward migration of settler populations. In that instance the relationship among slavery, westward expansion, and the emergence of new states into the Union was placed front and center in American politics, rather than existing, as did the displacement of Amerindian tribes, around the edges. Once it became apparent that portions of the trans-Appalachian and trans-Mississippi west were suitable for the growth of staple crops, such as cotton, using slave labor, the Revolutionary generation abandoned their vision of American slavery as fated soon to die out in the United

States. Slavery could accompany settlers west, and profitable plantations could be established west of the Appalachians and even west of the Mississippi.

While the prospect of slavery's remaining indefinitely profitable in nineteenth-century American emerged, so did the prospect of wage labor, yoked to improved transportation and communication. As new states in the upper Midwest were formed out of public lands, their economies were built on wage labor, even in regions where staple crops were grown. Railroad networks made possible the shipping of staple crops from the prairie states to eastern markets. European immigrants overwhelmingly settled in wage-labor regions, since in areas with slave labor the prospects for hired workers were reduced. The population growth of the United States took on a regional character, with larger population centers, and more new states, likely to come from areas outside the South.

Congress, and a succession of presidents, were well aware of the explosive combination of competition between slave and wage labor and territorial expansion. For over thirty years, between 1820 and the mid-1850s, Congress sought to carefully calibrate the balance between slave and nonslave states in its membership, and to pass legislation that accommodated the interests of the competing state blocs and to retain the proposition that slavery was a matter of state law. Congress, however, had previously outlawed slavery in federal territories, beginning with the Northwest Ordinance of 1787, and the possibility that it might do so in newly acquired territories was a source of anxiety for slave states. Chapters 7 and 8 describe the efforts of the principal American legal institutions—Congress, the presidency, the major political parties, and the Supreme Court—to confine, defuse, or resolve the cultural tensions emanating from the interaction of slavery with westward expansion, and their collective failure to do so. The result, by 1857, was the open declaration by the Supreme Court of the United States that the federal government had no power to abolish slavery in federal territories, and the defiance of that ruling by one of the major political parties. Three years later that party had won the White House and majorities in both houses of Congress, members of southern states had concluded that the South was destined to become a minority region and that the abolition of slavery by a northern-dominated Congress and executive was inevitable, and the Union was dissolved. Legal institutions had been at the heart of its dissolution.

Chapters 9 and 10 conclude the narrative by exploring the role of law in the Civil War. Chapter 9 focuses on the legal rationales for secession and the legal architecture of the Confederacy, including the role of the Confederate Congress and the courts of the Confederacy. Chapter 10 takes up the major legal issues of the wartime years, among them the transformation of the Supreme Court under Lincoln and a newly composed Congress; the Court's decision in *The Prize Cases,* in which the constitutionality of Lincoln's blockade of Southern ports without an explicit recognition of the Confederacy as a belligerent, was at issue,

and with it the future of the Union's war strategy; the roles of martial law, the suspension of habeas corpus, and conscription in the war; and the status of freedom of speech and the press in the wartime years. The chapters conclude by suggesting that with the defeat of the Confederacy in the war, the abolition of slavery, the emergence of a philosophy of "total war," embracing volunteer civilian populations as well as professional soldiers, and the continued efforts of a wartime Congress dominated by members from northern and midwestern states to pursue the expansion of wage-based, commercially oriented enterprise across the continental United States, a stage in American history, rooted in the defining themes of colonial British America, had come to a close.

* * *

Specialists in American legal history, and some generalist readers, will recognize from the above summary that although the book's first two chapters focus primarily on private-law topics, chapters 3, 4, 5, 8, and 10 are mainly devoted to public law, including statutory as well as constitutional law and interpretation. In contrast to some other studies of early American legal history, it is fair to say that the balance struck between coverage of private and public law in this volume is tilted toward public-law issues. Some readers may be struck by the absence of detailed coverage of some issues in family law, such as divorce, adoption, and child custody; of criminal law and penal institutions; of bankruptcy and debtor-creditor relations; and, perhaps most glaringly, of the changing state of contract and tort law in the years covered by chapter 6, given that the author and other legal historians have previously addressed the last set of topics in some detail.[12]

I have chosen to strike the balance between private and public law illustrated by this volume for two reasons. First, I intend to take up all the topics listed above in the forthcoming second volume of this work, but to do so retrospectively, comparing late nineteenth- and early twentieth-century developments in those areas with the legacy of earlier developments.[13] I think that each of the areas can be better understood through attention to the established antebellum doctrinal legacy that was altered after the Civil War. Second, the conventional historiographical wisdom places antebellum private-law developments at the very center of that period's legal history, and I want to suggest that such an approach is incomplete.

1

The Colonial Years

In a short span of time in the late eighteenth century the United States of America fought a war with England, achieved independence, and witnessed the creation and ratification of a federal Constitution. Although the nation in which those developments occurred still only occupied a comparatively small portion of space on the North American continent, stretching from the Atlantic Ocean to the Mississippi River, it had some defining characteristics. Its population was overwhelmingly English in origin.[1] The number of its European settlers had increased astonishingly in the past hundred years. Its economic growth in the eighteenth century had rivaled that of its population. Its environment, when compared to those of western Europe, was unprecedentedly abundant. And its legal institutions and practices, and the professional organization of its legal system, mainly resembled those in England.

The "Englishness" of American culture in the years of the Revolutionary War, independence, and the drafting of the Constitution has been a powerful shaping force in the approach of historians to the American colonial period. The impulse to search, within the nearly three centuries of the colonial era, for evidence of the English ideas, institutions, and social practices that distinguished Revolutionary America has been virtually irresistible. But that impulse needs to be resisted if the colonial years of American law are to be accurately recovered. The challenge in reconstructing colonial history, including its legal dimensions, is to forbear thinking of the colonial period as one foreshadowing developments that later helped define the distinctiveness of America as a civilization. Consequently this chapter will begin by addressing some topics that might initially seem quite remote from the legal history of colonial America.

Perhaps the greatest danger in looking back at American colonial history from the perspective of later decades is that a whole set of actors who figured prominently in the colonial landscape may be overlooked. By the last quarter of the eighteenth century the Amerindian tribes residing within the borders of what was to become the American nation had been reduced to a marginal existence. Their numbers had diminished, they had ceased to be important

participants in economic networks, and their remnants had largely retreated westward to areas where European settlement remained sparse. Those Amerindians that remained within the boundaries of what became the United States occupied, for the most part, roles on the fringes of social organization, congregating in the spaces west of the Appalachian mountain range, where European settlement had not reached, or eking out an existence in urban populations.

The tribes no longer controlled access to the interior of the American continent, or to regions that were a source of goods for European markets. The lands they had inhabited and used for hunting, fishing, and agriculture had been occupied by white settlers. By the 1770s Amerindians on the east coast of the American continent had begun to assume a status which was eventually to characterize all tribes within the continental United States over the course of the eighteenth and nineteenth centuries. Those tribes would become, as Chief Justice John Marshall put it in a Supreme Court decision in the 1830s, "domestic dependent nations,"[2] wards of the U.S. government who were perceived as incapable of either becoming fully assimilated into American society or surviving without government assistance and control.

Amerindians had already become marginal figures within the territory of the United States when it became a nation, and their marginality helped produce a dominant interpretation of American colonial history for late eighteenth- and nineteenth-century white residents of America. In that interpretation the "civilizing" forces of white European settlement displaced the "savage" aboriginals who originally dominated the North American continent. But the relationship between colonial white Europeans and Amerindian tribes was far more complex. Recovering the colonial period of American history, and colonial American law, cannot be accomplished without an accurate understanding of that relationship.

Arriving at that understanding is no easy task. The role of settler-Amerindian relations in shaping the concerns and content of colonial American law has largely been lost to all but a handful of specialist scholars. Many historical accounts have also ignored the relationship between Amerindian tribes and the European nations, other than England, that were once established on the North American continent. Had those nations remained important elements in the culture of North America, and had the history of North American aboriginal tribes taken other directions, the nation that declared independence from Great Britain in 1776 would have been a very different entity.

Consequently this chapter will be composed of narratives that seek to recover a lost world. The narratives will take up some themes that at first glance might seem tangential to an understanding of law in colonial America. Those themes will, however, eventually circle back to the years in which North America became an overwhelmingly "English" culture, not only because of the large numbers of

English natives who had settled there, but because of the displacement of other groups that had once shared the North American continent with those English settlers. Looking back from the Anglicized character of colonial American settlement at the time of the Revolutionary War and independence, that displacement might seem natural, even inevitable. This chapter suggests that it was far from that. To understand the marginalization of Amerindian tribes in the nation that became the United States of America, one needs to focus on the distinctive interactions of those tribes with a particular group of European voyagers to the North American continent, seventeenth- and eighteenth-century emigrants from England who came to the "New World" as permanent settlers.

This chapter thus seeks to trace the influence Amerindian cultures had on colonial American history, including colonial law, and then to advance explanations for why that influence became fleeting. It proceeds from the premise that colonial American history, including legal history, is best understood not as a precursor of later historical themes but as an epoch unto itself, whose distinctiveness we are just beginning to recover. It begins by reviewing some historical details that may seem familiar, but, in light of recent research, are now susceptible to fresh interpretations.[3]

* * *

Re-creating the interactions between Amerindian tribes and European visitors to North America in the sixteenth and seventeenth centuries will invariably be hampered by the one-sided character of records. A recent effort to analyze those interactions began by admitting that "[a]ll we have to go on are oral traditions of Indians who lived generations after the events described, written accounts by European explorers who misunderstood much of what happened in brief face-to-face meetings with Native people, and mute archeological artifacts that raise more questions than they answer."[4] Into this vacant chasm of evidence have come anthropologists, ecologists, and ethnohistorians, and as a result of their contributions we have an enhanced understanding of how Europeans and Amerindians interacted in the two centuries before independence.[5]

Any effort to reproduce the world in which sixteenth- and seventeenth-century European visitors to the North American continent encountered Amerindian tribes needs to recognize that Amerindian languages did not take written forms. This is not to say that Amerindian tribes were incapable of written communication. They regularly drew images of the natural world, including maps and representations of the physical features of their environment and the creatures that populated it. Their emphasis, however, was on oral and ritualistic mediums for communicating information, establishing laws and policies, and passing on the lore and history of their tribes. They made speeches; they danced; they feasted; they smoked ceremonial pipes; they exchanged gifts. In short, they engaged in a multitude of precise rituals that signified attitudes about a host of

social activities, ranging from which tribal members were to serve as leaders to which sexual practices were encouraged or tabooed. Amerindian "law" was a set of practices communicated through such rituals.

European visitors to the North American continent, from Columbus's voyages on, were immediately confounded by their ignorance of Amerindian languages and Amerindians' inability to "read or write." For much of the sixteenth century, as European contacts in North America remained limited to commercial adventurers and the occasional voyage of exploration and discovery, Europeans sought to "solve" the language barrier in two ways. One was by developing "pidgin" languages, blends of some Amerindian and some European words, in order to facilitate commercial exchange. Possibly the earliest of those languages illustrates the fortuity of European-Amerindian interactions in the New World. The first major European commercial ventures to North America came in the sixteenth century, when fishermen from Spain, Portugal, France, and England, who already had an interest in the whale population of the Atlantic Ocean, became aware of the great cod spawning grounds off of Labrador and Newfoundland, discovered by explorer John Cabot in the 1490s. Many of the commercial fisherman drawn to Atlantic fishing grounds came from the Basque regions of Spain and spoke the Basque language. On arriving off the coast of Newfoundland they encountered tribes who spoke various Algonquin dialects. The Basque language bears no resemblance to most other European languages, and Algonquin languages had virtually no roots or forms common even to other Amerindian languages. The result was that the European fishermen and Amerindians who met each other, and who for the most part had peaceful relations, communicated in a mixture of Basque and Algonquin words. Hundreds of years later French commercial traders in Canada noted that the language of the Native tribes contained a large proportion of Basque words.

A second European response to the language barrier was interpreters. Since the position of an interpreter presupposed some exposure to tribal languages, Europeans could hardly find such persons in their own population. Their response was to take advantage of the Amerindians' strong predisposition to ceremonial exchanges designed to signify mutual respect and goodwill. This belief in the values of reciprocity was exemplified, by some tribes, in the "lending" of children of high-ranking tribal personages to Europeans.[6] Once a tribal child was "loaned," he or she was typically taken back to Europe and taught the local language, then returned to America on a subsequent voyage. This practice proved so beneficial to European commercial venturers that some simply kidnapped members of tribes.

As European visitors became acquainted with Amerindian languages, and particularly as they began to stay in North America for longer periods, they

began to record their encounters with tribes, including the communications tribal members made to them. Some of those recorded contacts have survived. But the authors of the written accounts were always Europeans. Even when early settlers and missionaries in North America, such as John Smith, Roger Williams, and various Jesuit French missionaries in Canada, compiled "dictionaries" of tribal languages in their vicinity, the authors were in no position to understand the subtleties of tribal linguistic usage.[7]

The difficulty of making sense of records written by Europeans about Amerindian tribes and their attitudes is illustrated by a speech delivered by Miantonomi, a sachem (chief) of the Narragansett (Rhode Island) tribe, to the Montauk tribe (eastern Long Island) in 1642. Minantonomi's speech has frequently been cited by historians as illustrating the awareness of New England Amerindians, by that date, that their world had been transformed by the arrival of European colonists. By the middle of the seventeenth century, the Plymouth, Massachusetts Bay, Connecticut, and New Haven colonies had begun to reach a sufficient level of population growth and economic self-sufficiency that they began to feel a need to expand their boundaries, typically into adjacent regions traditionally occupied by tribes. Minantonomi was purportedly seeking the assistance of the Montauks in a campaign to violently resist the colonies' encroachments. His speech was recorded by Lion Gardner, an officer of a commercial company in Saybrook, Connecticut that was concerned about Indian threats to its activities. Gardner reported Miantonomi as saying,

> For so we are all Indians as the English are, and say brother to one another; so we must be one as they are, otherwise we shall be gone shortly, for you know our fathers had plenty of deer and skins, our plains were full of deer, as also our woods, and of turkeys, and our coves full of fish and fowl. But these English having gotten our land, they with scythes cut down the grass, and with axes fell the trees; their cows and horses eat the grass, and their hogs spoil the clam banks, and we shall all be starved.[8]

Miantonomi added, according to Gardner, that all the tribal "Sachems from east to west" were planning a joint attack on the English, in which they would "kill men, women, and children, but no cows, for they will serve to eat till our deer be increased again."[9]

Although the eloquence of Miantonomi's description of a lost Amerindian paradise may have motivated Lion Gardner to record his 1642 speech to the Montauks, Gardner may not have fully understood Miantonomi's remarks. He had been made aware of Miantonomi's presence among the Montauks by an informant in that tribe who wanted to continue its friendly relations with the

Connecticut colony, with which Gardner's company was affiliated. The informant may well have translated the speech for him. Although it seems clear that Miantonomi and the Narrangansetts were feeling besieged by English settlers—Roger Williams, a friend of the Narrangansett tribe, was in London in 1642, seeking a charter for what would become the colony of Rhode Island, centered on Narragansett Bay—we cannot be sure that Miantonomi explicitly tied the idea of a pan-Indian union to the loss of an arcadian past. In short, it is important to remember, in digesting accounts of life in colonial America, that the authors of those accounts were not only Europeans, but Europeans who, for the most part, were unable to communicate readily with the aboriginal inhabitants of the American continent, and as such likely to supply explanations for the conduct of those inhabitants that were incomplete, self-serving, and sometimes wrongheaded.

* * *

At the opening of the seventeenth century the Spanish, French, and Dutch had established outposts in North America and were actively engaged in commercial trade with the Native tribes. The English presence was insignificant. A hundred years later, former residents of England were the dominant European group on the continent, and by the 1770s the influence of the Dutch and Spanish could have been described as negligible, although the French remained a significant presence. The American Revolution, when it came, was a revolt against England by English subjects. By the 1770s it would have been absurd for North American colonists to revolt against Holland, Spain, or even France, because those nations exercised no control over colonial affairs.

Why did the colonization of the region of North America that became the United States end up as an English venture? Consideration of this question does not merely include an exploration of the contrasting attitudes of European nations toward the "New World." It also includes an investigation of the effect of English approaches to land use in North America on its Amerindian inhabitants. One cannot know to what extent the history of the North American continent in the seventeenth and eighteenth centuries would have been different had the principal European voyagers with which its aboriginal tribes interacted during that time frame come from nations other than England, and had those voyagers been primarily interested in the commercial trade and exploitation of North America, as distinguished from erecting permanent settlements there. But some of the historical details of North American voyages undertaken by Europeans before the establishment of English settlements suggest that the culture which emerged on the North American continent between 1600 and 1750 might have taken a quite different form had those settlements not become established.

The late fifteenth- and sixteenth-century Spanish, English, and French visitors to North America had been primarily interested in exploration, discovery,

and the extraction of valuable resources. The concentration of Spanish visitors in the Caribbean, Latin and South America, and Florida, and of French and English visitors in Canada, was largely fortuitous. Columbus's expedition had acquainted the Spanish with the islands and land masses around the Caribbean and Gulf of Mexico; the voyages of John Cabot and Jacques Cartier had enabled the English and French to gain access to Labrador, Newfoundland, the St. Lawrence estuary, and eastern Canada. None of those expeditions was interested in establishing permanent settlements in North America. Spanish successes in "conquering" Indian tribes in Mexico and Peru, and in extracting gold, silver, and other minerals from those regions, had encouraged them to seek comparable riches in the southeast United States: Hernando de Soto's ill-fated expedition in that region in the 1540s was an effort to duplicate the plundering of Cortés and Pizarro. Cabot and Cartier were looking for the "northwest passage," the reported sea route to India and China that allegedly began with the St. Lawrence River; that search would continue to preoccupy French and English explorers until the 1790s, when the passage was finally deemed not to exist.

Once it became clear that gold and silver were going to be hard to find in the American Southeast, and that no navigable northwest passage had been located, the late-sixteenth-century successors of de Soto, Cabot, and Cartier sought to identify other products to extract from North America. For a time the Spanish in Florida attempted to institute an "encomienda" system of land use such as that installed in Mexico, in which a relatively small number of Spaniards who had been given vast land grants sought to organize labor forces, composed of Indian tribes, to discover and extract precious metals and establish farms, all for the purpose of producing items that could be transported back to Europe. The effectiveness of Spanish "conquistadores" in subduing much more numerous Indian populations in Latin America was not duplicated in Florida, and this and the apparent absence of minerals resulted in Spain's concentrating most of its North American ventures south of what would become the borders of the United States. The indigenous inhabitants of Mexico and Latin America were exposed to the same devastating effects of European microbes as North American tribes: one study has estimated that between 1500 and 1620, when Spanish visitors were coming into regular contact with the native tribes of Mexico, the tribes lost between 85 and 97 percent of their populations.[10]

The expeditions of Cabot and Cartier may not have found a northwest passage, but they found large numbers of whales and huge supplies of codfish. The result was that English, French, Portuguese, and Basque fishermen began to make regular trips to the waters off of Newfoundland, making contact with coastal tribes in the process.[11] By the 1530s, when Cartier sailed down the St. Lawrence and circled back past the Maritime Provinces, tribes had become

accustomed to trading goods with Europeans. The original European traders were probably cod-fishermen, and it may have taken both them and the Amerindians some time to discern what each group valued. Although Europeans possessed metal utensils and firearms superior to those of the tribes, those items initially sparked no interest, the tribes preferring small pieces of metal they could use as decorative objects or brightly colored glass beads. Eventually a particular bright-colored shell, found in clam grounds in the Narragansett Bay region in what is now Rhode Island, would become a currency that circulated throughout colonial New England. It was known as wampum. Wampum shells were regularly used by tribes as badges of honor when worn, or presents that could convey an attitude of respect when offered to others in reciprocal gift-giving rituals.

In exchange for the "trinkets" coveted by tribes, European fisherman and other sixteenth-century visitors wanted furs, especially those of the beaver. Europeans occasionally suggested, in the course of describing the exchange of trinkets and furs between themselves and tribes, that both parties believed that they were trading with fools. Objects such as glass beads were of little value in Europe, and beaver furs were highly coveted (beaver hats being a symbol of high fashion), so the European traders thought they had the far better bargain. They also reported, however, that the tribes regarded parting with beaver skins as a trifling concession. Beavers were plentiful in North America and easy to kill, and their fur, which tribes used to make the equivalents of blankets or shawls for protection from the cold, was extremely durable. Blankets and shawls were stock features of Amerindian dress, and garments made from beaver skins retained the fat layers of the animal as additional protection. Traders reported that beaver blankets and shawls were infrequently washed, so they rarely wore out.

Over time the fur trade provided an independent reason for Europeans to visit North America. The French regularized it, establishing trading outposts (called "drying stations" because furs were stocked there to dry before being purchased by Europeans) on rivers throughout the interior of eastern Canada. As an increasing number of tribes came to the drying stations to trade, a form of competition among tribes developed, and the interest of tribes in European goods subtly changed. Some European utensils, such as arrowheads and pots, made hunting and cooking easier for tribes, and the demand for furs meant that tribal hunters devoted more time to the killing of fur-bearing animals. The result was that the "hunting and gathering" subsistence economy of the tribes, with its emphasis on migrant agriculture and foraging, became more dependent on trade. Eventually, as tribes competed with one another to stockpile furs for the trade, they found that European goods, especially arrowheads and guns, could advantage them in warfare with their aboriginal competitors. Meanwhile the regular trading contacts tribes had with Europeans facilitated the spread of lethal microbes among tribal populations. Eventually this pattern of Euro-Amerindian

trading contacts, with its economic and physical effects on the tribes, was replicated throughout the east coast of the American continent.

Although the traders' influence on Amerindian life was significant, it was by no means as profound as the influence of English settlers that arrived in the early seventeenth century. The Spanish, French, and English traders of the late sixteenth and early seventeenth centuries had borne as transient a relationship to the drying stations where they exchanged ironware for furs as had the tribes who journeyed to those outposts. The traders had no intention of establishing permanent settlements in North America. They were simply stopping by to engage in mercantile transactions. Although the traders and tribes regularly participated in ceremonies designed to underscore the Amerindian belief that the exchange of goods was part of a larger circle of reciprocity and mutual respect, for many of the traders it was simply a business deal. Neither group concerned itself with the "ownership" of the land on which a drying station had been erected. Neither thought of itself as "residents" of the area. Neither was interested in appropriating the drying station for itself by establishing a fortress, or permanent buildings, on the site. Permanent structures of any kind were not part of the culture of Amerindians; their dwellings were designed to be easily disassembled and reassembled as tribes moved from place to place, following the cycles of the seasons and the hunt. Permanent structures were, of course, part of the culture of Europeans. But the traders of the sixteenth and early seventeenth centuries did not think of outposts in North America as part of that culture.

In the early years of the seventeenth century, however, residents of England began to come to North America with a different purpose in mind. The reasons that the first European settlers of North America were from England, rather than the other nations which had made contacts with the American continent, were complex. England had actually lagged behind Portugal, Spain, and France in dispatching voyages of exploration and discovery to the Americas and in seeking to exploit their contacts through the subordination of Native tribes and the exploitation of resources. But when the English began to embark upon journeys to North America in the early seventeenth century, they did so not only with the goals of making commercial contacts and developing trade routes, but with the additional goal of establishing settlements. Neither Portugal, Spain, France, nor Holland, which also commissioned trading voyages to North America at the same time, had shown much interest in having their citizens establish permanent residency on the North American continent. In contrast, when a substantial number of English citizens began journeys to the "New World," they were coming as settlers.

One set of reasons for the distinctive English approach to North America was connected to the political economy of England in the sixteenth and early seventeenth centuries. The political and economic order of feudalism had begun to

break down earlier in England than in other European nations, creating a class of persons who were no longer indentured or otherwise attached to feudal lords and who had begun to derive their subsistence from their participation as market actors, traders in goods and services. Commodities markets were a major source of income for that class. As those markets fluctuated in sixteenth- and early seventeenth-century England, and as Europeans made regular contacts with the North American continent, the lucrative potential of Western Hemisphere commodities increased. The model of Barbados seemed instructive to English entrepreneurs. A relatively small island in the Caribbean had turned out to be a rich source of sugar. As sugar evolved from a luxury to a necessity in English and continental diets, the English commercial traders who had established outposts on Barbados found themselves wealthy enough to own sugar plantations on the island.[12]

The English citizens who journeyed to North America in the early seventeenth century, however, were not expecting to become wealthy plantation owners. They were hoping to raise their comparatively low standard of living in a nation marked by an unstable economy and, for them, comparatively little political influence. They were also hoping to escape two other sets of pressures. One was the increasingly crowded and impoverished conditions of life that accompanied a surge in population growth in postfeudal, urbanizing England. As feudalism decayed, the subsidies provided by lords to the classes of persons tied to their land and their service shrank, and large numbers of the growing English population needed to find a way to put roofs over their heads and food on their tables. Over the course of the sixteenth century, the increase of land that was cultivated for agricultural purposes reduced forests, and with them the availability of wood for dwellings. The "middling" class found itself struggling for habitation and, in those periods when trade and commerce became depressed, for ways to keep afloat economically. A "surplus" of impoverished individuals began to cluster in English towns and cities, stimulating proposals for emigration to British "colonies" such as Ireland, where English expeditions in the sixteenth century had subdued the indigenous population and established plantations.

The second set of pressures affecting English settlers was connected to religious conflict. For nearly a hundred years, from the middle of the sixteenth to the middle of the seventeenth century, religious affiliation was a flashpoint for civil strife. Various kings embraced Catholicism or Protestantism and fought against nations holding beliefs opposed to theirs, and a variety of oppositional religious sects emerged whose members were regularly sanctioned by officialdom. In particular, certain Protestant sects who opposed the practices of the Church of England were "persecuted" by authorities. For those sects, emigrating to North America became associated with the opportunity to worship free from

official sanctions. The "Pilgrims" who founded Plymouth Colony were an example of "persecuted" religious separatists.

The earliest English expeditions to North America in the seventeenth century embodied the economic and religious pressures associated with sixteenth-century English culture. The expedition to Virginia, which landed at Jamestown in 1607, was a "plantation" venture, designed to establish a profitable colony modeled on Barbados. It consisted primarily of persons of the "middling sort," who neither were experienced in New World trade nor had military backgrounds. They were not so much seeking to avoid religious strife as searching for better economic and social conditions than the ones they had experienced in England. The utopian quality of their goals resulted in their being, on the whole, ill-prepared to deal with the task of scratching out an existence in a wilderness. But for some help from Amerindian tribes, the Jamestown settlement would probably have not survived its first winter, and the Jamestown settlers were preparing to abandon their effort and return to England when additional ships and provisions fortuitously arrived. Forty years later, however, the Barbados model had taken effect in Virginia, with tobacco, rather than sugar, emerging as a highly desirable commodity in European markets, and plantation settlements becoming established.

In contrast, the early seventeenth-century expeditions to New England were efforts to establish sectarian colonies that blended religious belief, political organization, and economic activity. The Plymouth colony nonetheless had an early history comparable to the Jamestown settlement: an impoverished, subsistence existence in its early years, privations related to harsh winter weather, and the necessity to rely upon the good auspices of local tribes to avoid starvation. But by the time the Puritan colony of Massachusetts Bay was launched a decade or so later, Plymouth had become established, and intelligence had filtered back to England about the requirements for North American settlement. The Massachusetts Bay settlers arrived in ships carrying larger numbers of people and provisions, prepared themselves for heavy winters, and organized their ranks, while in transit, into a distinctive polity. The rules of Massachusetts Bay, and those of other New England colonies in the seventeenth century, incorporated many practices inspired by the religious convictions of Protestant sects, such as restrictions on the size of towns and the uses of land, regulations on sexual conduct, and a tolerant treatment of women involved in domestic disputes.[13]

The English settlers who had eked out an existence in North America in the early years of the seventeenth century then found themselves the beneficiaries of "virgin soil" microbe epidemics that swept through the eastern coastal Amerindian tribes between 1618 and 1620 and again in the early 1630s.

The importance of the microbe epidemics in helping English settlers to populate the American continent has only recently been recognized. For years

historians uncritically accepted the estimates of the population of colonial-era Amerindian tribes made by James Mooney in a 1928 publication, *Aboriginal Population of America North of Mexico*. Mooney's figures were based on fragmentary records left by sixteenth- and seventeenth-century European observers. He estimated a total of 1,000,000 Amerindians living north of Mexico in 1600, with approximately 25,000 living in New England (the great preponderance of those in Massachusetts, Connecticut, and Rhode Island). The current consensus among scholars is that Mooney's estimates amounted to somewhere between 10 and 25 percent of the actual number of inhabitants. Among other errors, Mooney relied on sources that only counted adult male "heads of households," rather than the total number of persons living in a household, dismissed sources whose estimates exceeded his figures, and, most significantly, relied on observers who were counting Indian populations after the waves of epidemic diseases that decreased the Amerindian population in the early seventeenth century.[14]

The interaction of the first wave of European visitors with Amerindian tribes produced one of the world's most devastating pandemics. The scattered observations of late fifteenth- and early sixteenth-century explorers suggest that most tribal members could expect long and healthy life spans. Reconstruction of tribal diets, which consisted mainly of fish, venison, squash, corn, and beans, indicates that they were far healthier than those in Europe at the time, and observers noticed that Indian families were exceptionally large, apparently averaging between seven and ten members. But natives of the North American continent had had no exposure to the viral microbes that had swept through Europe in the fourteenth and fifteenth centuries, the most lethal of which were bubonic plague and smallpox. By the time Europeans reached North America, the European population had developed immunities to those microbes, but the North American environment amounted to "virgin soil" for them.

The result, after French traders began having regular contacts with certain tribes in the late sixteenth century, was outbreaks of smallpox, mumps, measles, and possibly plague in the tribes. The pattern of the outbreaks, which virtually eliminated some tribes and did not affect others at all, matched closely with French contacts. Between 1616 and 1618 the Abenaki and Massachusett tribes, who occupied areas near the New England coast, and the Pokanoket tribe, who inhabited the eastern and northern sides of Narragansett Bay, had their numbers reduced, according to one estimate, by 90 percent.[15] In contrast the Narragansett tribe, who lived on the western side of Narragansett Bay and whose contacts had largely been with Dutch traders operating from New York, was not affected.[16]

The epidemics did more than affect the numbers of tribes. They also tended to reinforce tribal perceptions that the European visitors were an utterly different, mysterious class of beings. From the perspective of tribes, Europeans

seemed unaffected by the same diseases that ravaged tribal communities. The eyewitness accounts of Europeans described the diseases as most virulent in the younger adult members of tribal populations. This meant that as those members sickened, Amerindian children and elderly members were deprived of potential caretakers when they became infected, making it more difficult for them to recover. On being confronted with the devastation of their own people, juxtaposed against the apparent invulnerability of the Europeans they encountered, tribes may have concluded that they had somehow lost favor with the spirit beings who controlled the destiny of all peoples. Thus a rapid decrease in tribal numbers may have been accompanied by a newfound sense of uncertainty and insecurity in those who survived.

Microbe epidemics surely have to be included among the forces that contributed to the eventual displacement of coastal American tribes by European settlers. During the sixteenth century, Amerindians vastly outnumbered Europeans on the North American continent. One estimate has over 2,000,000 Amerindians living in the region between the Atlantic Coast and the Mississippi River at the opening of that century. At the opening of the seventeenth century there were no English settlers in North America, and only a few explorers and traders. When the Plymouth, Massachusetts Bay, and Virginia colonies first became established in the second decade of that century, their inhabitants were outnumbered by adjacent Indian tribes on a scale of about ten to one: Massachusetts Bay, the largest of the seventeenth-century English colonies, had 4,000 inhabitants in 1634. But soon after the arrival of English settlements diseases began to take their toll on tribal populations. After that the English population of North America grew at a remarkable rate. By 1690 there were approximately 194,000 English citizens in the area between the Atlantic Coast and the Mississippi, and by the framing of the Constitution, a hundred years later, there were more than 3 million.[17]

It seems no accident that significant population growth in the initial areas of English settlement came on the heels of two microbe epidemics in the early seventeenth century, the latter in 1632 and 1633. The epidemics had so affected some tribes that their remnants had joined other tribes, sometimes their former enemies. Both of those epidemics were followed by sizable migrations of English settlers.[18] Those migrations, which in New England resulted in the formation of the New Haven, Connecticut, and Rhode Island colonies—all spin-offs from Massachusetts Bay—created a demand for additional land that could be settled upon. As a result, land use in North America began to change dramatically.

* * *

When Amerindians first encountered English settlers in the early years of the seventeenth century, the two groups held dramatically different conceptions of landownership and use. The idea that land could be "owned" exclusively by humans, who could then exclude other humans from it, was incompatible with

Amerindian beliefs and practices. The Amerindian tribes practiced territoriality, returning to particular areas to hunt or to plant and harvest agricultural crops. They resented the invasion of other tribes into preferred areas, sometimes engaging in wars with the invaders. But tribes also roamed about as hunting and agricultural conditions changed, and their attitude toward the animals they killed and ate, the forests they burned, and the fields they planted was more one of joint membership in a cosmic community than one of possession or dominance.[19]

Amerindians were not simply hunters and gatherers, foraging in a wilderness without seeking to transform it. They carefully burned the lower branches and underbrush of forests twice a year to facilitate travel through wooded areas. In the grassy portions near forests they planted corn, beans, and squash in an efficient symbiotic arrangement. Beans were planted at the bases of corn plants, with the residue of bean plants adding nitrogen to the soil. Squash plants were added to the mix, serving both as a source of nutrients and ground cover, preventing weeds from developing. Through those methods tribes were able to preserve soil for crops far longer than it was preserved under the European system of plowing and repeated planting of the same crops.[20]

Amerindians did not, however, enclose the areas they used for agriculture, nor seek to change the shape of those areas. When an agricultural area exhausted itself, the local tribe would simply seek out another promising location. Amerindian agriculture was seasonal and required the storing of produce, in dried form, for consumption in the late fall and winter seasons. Hunting and fishing took place in winter when conditions made it possible, but the cycle of Amerindian life often included "starving times."[21]

Amerindians did not domesticate animals, with the exception of dogs, and even that species was not "owned" by individual members of a tribe, but rather attached itself to a village because of the availability of leftover or discarded food. Moreover, the animals indigenous to North America were either hunted or ignored by Amerindian tribes, and animals better suited to performing work for human communities, such as oxen, cattle, horses, sheep, pigs, goats, or horses, were not found on the North American continent. The animals that were hunted by tribes, such as moose, deer, and beavers, were not sufficiently tractable to be attached indefinitely to tribal villages until ready to be killed and eaten.

The "working" functions of domestic European animals were part of an approach to the use of land that was not replicated in Amerindian tribal culture.[22] By the sixteenth and seventeenth centuries Europeans were using animals in the process of enclosing and cultivating land. They used oxen and horses to plow fields; horses to provide transportation around estates; cattle as a source of milk and meat, and also to keep fields and meadows grazed; sheep and goats for similar, though not identical, functions. Europeans had begun to think of land as a commodity that could be possessed, "improved," and sold. Plowing land and

planting crops on it, enclosing it with fences, building "permanent" structures on it, and excluding others from it, were steps in the commodification process. Except for planting, Amerindians had not used land in those ways, and did not understand the land uses of Europeans in North America. In particular, the tribes did not think of "owning" land, "selling" land, or having "rights" in land in European terms. The only Amerindian conception of land use that was replicated in the English legal system was the equivalent of what English law referred to as "usufruct" rights: the belief that those who worked on land were entitled to the "fruits" of their agricultural labor.

Europeans and Amerindians also had different views on the role of animals in the use of land. A defining feature of indigenous animals in North America was that they were not enclosed in any human-constructed spaces. In contrast, "domestic" animals, confined to settlements, were quickly identified as important features of the English colonies in North America. Cattle were particularly valued: the founders of the Massachusetts Bay colony immediately sought to increase their supply of cattle after arriving, and English publicists for North American colonization treated news that a colony's cattle stock had grown as evidence of its prosperity. Once domestic animals had arrived in North America, however, the vastness of the terrain and the absence of enclosed land posed immediate problems. Cattle, sheep, goats, and pigs wandered away from European settlements, trampling on grounds frequented by tribes and foraging among their food supplies. Pigs, with their voracious appetites, their ability to root vegetables, fish, and clams from under the earth, and their resourcefulness, were a particular problem. The solution, for Europeans, was to enclose land. They chopped down large amounts of trees for fences, and cleared large areas in forests in order to establish fields for planting. They also used wood for the construction of houses and as fuel to heat those houses. Amerindians had used wood as well in those capacities, but their dwellings required less of it. Amerindians did not clear whole pastures for crop growing. Nor did they enclose fields. Nor did they use animals to perform domestic tasks.

European animals also brought with them European weeds, which they deposited on North American soil in their droppings, and European insects that nurtured themselves on plant life and animal waste. Sometimes newly arrived weed or insect species, not encountering their European competitors, proliferated in the New World. The result of this transatlantic migration of new animal, plant, and insect forms to North America was, over time, a transformation of the ecology in regions where English settlements became established. Deforestation resulted not only in increased soil erosion and flooding, but in hotter temperatures in summer and colder ones in winter. Animal species that lived on the edges of forests found their habitats exposed and retreated to other areas. Over time, in place of the dense forests that greeted European travelers to the Atlantic

Coast in the seventeenth century (it was said that those travelers could smell the pines well before they could sight land), there emerged, around English settlements, an environment of cleared, plowed, and "cultivated" land, separated from forests, filled with domestic animals, and dominated by fences.[23]

Who owned that land? Western European nations, by the time of the first expeditions to North America, had developed doctrines that equated the "ownership" of territory with possession and conquest. When the idea of North American settlement first occurred to Europeans in the sixteenth century, it was premised on the belief that the Amerindian tribes who inhabited areas of North America did not "own" the land they occupied, because they had not enclosed it, cultivated it, or erected permanent structures on it. When English stock companies and the Crown began to charter North American expeditions in the early seventeenth century, they assumed that access to land in the "New World" would not present any difficulties.[24] This may have been because earlier reports of the military prowess of Amerindian tribes made them believe that settlers could conquer the tribes without difficulty, or it may have been because they did not recognize tribal "ownership" of North American land since the tribes, who appeared in European eyes to be living a seminomadic existence, did not seem to be using land in a way consistent with taking permanent possession of it.

In any event, the English charterers of prospective colonies in North America granted land in particular regions of the continent, without any reservations, to those designated as the colony's founders. Sometimes those grants were very extensive, stretching from the Atlantic Coast as far westward as settlement could progress. It is not clear where the charterers, whether royal or private, derived their authority to grant North American land, but they may have associated that authority with conquest. An early ritual of English and other European expeditions to North America had been the planting of some structure, such as a large cross, in territory that was to serve as a place of embarkation for a commercial venture or, later, a colony settlement. The erection of such structures was designed to signify a claim to the land, typically on behalf of a European monarch.

English voyagers to North America thus arrived with a goal of acquiring "ownership" to land. In contrast, the tribes that encountered them appeared comfortable, up to a point, with sharing access to territory. They initially treated the emergence of strange beings in their vicinity in the same manner they treated the arrival of another tribe. Gifts were exchanged, ritual ceremonies were held, and newcomers were implicitly invited to share the natural resources of an area. Sometimes tribal interactions turned hostile, and occasionally the reason for the hostilities was one tribe's access to resources that another tribe coveted. But a more common pattern was for tribes to move from place to place in their hunting and agricultural pursuits, sometimes encountering other tribes in the process.

There seem to have been understandings that particular tribes tended to frequent certain areas, and could hunt or grow crops in those areas without interference. On occasion, however, tribes might seek to make use of territory frequented by their neighbors, and this action was sometimes regarded as grounds for warfare.

When English settlers first arrived in Virginia and New England in the early seventeenth century, they found the places where they sought to establish themselves surrounded by tribes. It became clear to them, in the initial years of their settlements, that their having been granted land by a private or royal charterer had little practical import, given the overwhelming numerical superiority of the tribes living adjacent to their settlements. Although the tribes that encountered Jamestown and Plymouth settlers were not as welcoming to them as some tribes had been to earlier North American explorers, they did not attempt to drive the English off their land, kill them, or make prisoners of them. Instead they treated the English newcomers as if they were the equivalent of another Amerindian tribe that had strayed into regions they traditionally inhabited.[25]

The numerical imbalance between the first English settlers and the tribes in their areas, along with the difficulties the settlers encountered in adapting to life in North America, retarded the development of English models of land use in the New World. The first English settlements were marked by the building of fortifications designed to wall off the settlement from hostile invaders and by the communal use of land. Clashes between English and Amerindian uses of land would not occur until later in the seventeenth century, when a confluence of the developments described above resulted in English settlers coveting land outside the original boundaries of settlements that was occupied by tribes.

The settlers' interest in acquiring land beyond the borders of the initial English settlements was stimulated by the decimation of tribal populations in areas where the tribes came into contact with arrivals from Europe. When additional English expeditions arrived in New England and Virginia in the 1620s and 1630s, they found the numbers of neighboring Amerindians dramatically reduced. In that same time period colonies in Massachusetts and Virginia, aided by the arrival of additional ships from England carrying more prospective settlers, provisions, and livestock, had gained a foothold on the North American continent, and their success had begun to attract still more settlers. The result of those developments was to change the numerical balance between coastal tribes and English settlers, making it possible for settlements to put up some military resistance to hostile tribal attacks should they materialize. Once established in a settlement, English colonists began to resort to the traditional patterns of land use they had known in England, clearing forests and plowing fields, keeping domestic animals for food and farming, and growing crops not only for consumption but for marketing, either domestically or internationally.

Early seventeenth-century English practices involving land included the notion of "fee simple" landownership, in which a person who occupied land, enclosed it, and cultivated it typically had an unencumbered title of ownership to the land, and could exclude others from it. The practice of fee simple ownership was, however, far from universal: many persons occupied land who did not own it in fee simple. Landownership was correlated with social status, with most freeholders, as those who owned land in fee simple were termed, coming from the nobility or gentry classes. When the companies that were granted land in New England established settlements, they apportioned land among the members of a colony on the basis of social status, with "gentlemen" receiving land before "common folk." Not all the members of a colony became landowners: sometimes residents of the New England settlements "worked land" for someone else who owned it, and sometimes a family living on land had entered into a rental agreement with the owner. The first uses of land in New England settlements were communal, with those holding positions of authority in the company that founded the colony drawing boundaries for townships, marking out parcels of land, distributing them, and setting portions aside on which residents could engage in shared agricultural activity.

Over time, however, the initial communal uses of land that marked the first English settlements gave way to practices in which land was not typically shared, certainly not in the manner of Amerindian tribes.[26] Instead plots of land were owned, or occupied, by individual families, and those plots were enclosed so as to signify the resident's exclusive access to the land. The system meant that as new settlers arrived in a colony, they would eventually require new plots of land. Because "vacant" land was perceived as plentiful in North America, needing only to be cultivated in order to serve as a sustaining resource, the expansion of the boundaries of a settlement was thought to be a natural consequence of the growth of its population.

The land adjacent to English settlements was not, however, "vacant." It was occupied by Amerindian tribes. But the English did not equate that occupation with ownership because the tribes, from their point of view, were not using the land in ways that signified their "owning" it. Two common features of Amerindian land use contributed to this perception. In tribal communities women did the agricultural work, while Amerindian men hunted and fished in seasons when game was available before joining the women in villages when the seasons ended. English settlers perceived this gendered division of labor as demonstrating that Amerindian men were lazy and regarded agricultural work as trivial. They also interpreted tribal planting practices, which contrasted with the single-crop, cleared-field English practice, as evidence that the tribes were using land haphazardly, even randomly, and thus not actually claiming possession of it.

As the domestic animals brought to English settlements began to roam outside the boundaries of those settlements, and settlers began to covet undeveloped land in adjacent regions, clashes with tribes resulted. When oxen trampled fields tribes were using, or pigs and goats foraged among stored tribal provisions, settlers, who assumed they "owned" domestic animals, were outraged when Amerindians killed them. Settlers also assumed that by clearing and plowing previously undeveloped land they had acquired ownership of it, whereas tribes interpreted those activities as encroachments on their traditional hunting grounds.[27]

Sometimes tribes responded to the presence of English settlers by simply withdrawing to wilderness areas in the interior. But other tribes that had had established themselves in areas containing resources they thought valuable sought to resist English encroachments into those areas. A result of this resistance was the creation of formal legal relationships between settlers and some tribes. Among the principal forms of "law" in seventeenth-century North America were the documents embodying those relationships.

* * *

The common term for those documents was "treaties." An often-cited example of a treaty between colonial European settlers and tribes is the 1626 document in which a tribe living adjacent to the Dutch trading settlement on Manhattan Island "sold" the island to the governor of the settlement for the equivalent of twenty-four dollars. But the treaties between early seventeenth-century English settlers and tribes cannot be understood as the equivalents of modern treaties. They were, instead, documents that had multiple meanings, and were understood in quite different ways by the parties who created them.

Reciprocal gift-giving, accompanied by pledges of mutual amity and regard, was a deeply embedded feature of Amerindian culture.[28] The significance of ceremonies in which gifts were exchanged, pledges made, and feasting and dancing took place, cannot be grasped without a recognition that tribes regarded themselves and their neighbors as participants in a universe that also included animals, natural phenomena, and the spirits of those entities. Before going to war against one another, tribes typically engaged in a ritualistic ceremony, such as a feast, in which gifts were exchanged. The purpose of giving gifts, or exchanging pledges of mutual respect and amity, does not seem to have been a way of communicating the actual attitudes of one tribe to another. Instead such ceremonies seem to have been designed to signal that members of both tribes were aware of the natural and spiritual forces that would determine their fortunes in battle. Thus a "gift," among Amerindians, was something intended to reflect on the giver as well as the recipient. It may seem remarkable that tribes would "give" their children to European explorers. Why would they expose members of their families to strangers whose attitudes toward the tribes had not been discerned? The explanation is that the tribes believed that a gift ceremony had implications

for both those who made the gifts and those who accepted them. Participants in such ceremonies were expected to understand the obligations that came with reciprocal exchange. It would have been dishonorable, the tribes reasoned, for European visitors to abuse the children they had been "given." Moreover, the gifts were not intended as unconditional or permanent. They were conditional in the sense that they were made in a setting of ceremonial mutual regard, and that setting created obligations on the recipients. They were not permanent in that the transaction was taken as part of a series of ongoing interactions and exchanges between the groups.

The "sale" of Manhattan Island should be seen in a similar context. It was possible only because a tribe had acquired hegemony over the area that consisted of the island and its adjoining rivers: it was their "hunting ground," an area where they engaged in subsistence activities. The interest of Dutch visitors in "buying" the island was probably a product of its favorable location as an outpost for mercantile commerce headed for Europe and the interior of the North American continent. Manhattan Island was not "sold" for twenty-four dollars, but for what subsequent English observers regarded as *the equivalent* of twenty-four dollars; and it was not "sold" at all, at least not in the English sense of being transferred in fee simple. The tribes who allowed Dutch settlers to exercise what they thought of as "hunting rights" on Manhattan Island did so in exchange for material objects they valued very highly—functional and decorative metal objects and cloth goods which subsequent English estimates valued at twenty-four dollars.[29] That estimate simply registers what Europeans thought the Dutch gave up in the transaction: it cannot capture the value of what the tribal members thought they received. Moreover, the tribal members did not assume that in "selling" the island to the Dutch they were entirely relinquishing their access to the island, or their opportunity to use it for subsistence activities. They assumed that they were merely welcoming the presence of the Dutch as additional occupants of the area. From their point of view, the sale of Manhattan might have been perceived as just as one-sided a transaction—in their favor—as it has come to be thought of as a "steal" for the Dutch in American folklore.

"Treaties" between European nations and Amerindian tribes in the sixteenth and seventeenth centuries were documents that were often understood in incompatible ways by the parties. Most fundamentally, a treaty was written in a language that tribes did not understand; nor did they attach any legal significance to the fact that a document was signed and in writing. They did recognize that treaties were part of a reciprocal process in which each of the participants took on obligations to the other. But at the same time they very likely understood their obligations to be different from what they were described as in a document written in English, and they did not believe that a

single written document could have captured those obligations: it was only a way of solemnizing the process, akin to smoking a pipe of peace.

In addition, most of the initial treaties made between English settlers and tribes involved land, and were enacted against the backdrop of irreconcilable conceptions of land use and ownership. The English participants assumed that they already held title to lands in North America as a result of grants from chartered colonies or persons who were grantees of the Crown. The Crown's "ownership" of North American land followed from the "conquest" of that region by Englishmen or from the use of land by Amerindian tribes in a fashion that was inconsistent with "owning" it. Amerindian tribes rejected both of those rationales for English title to North American lands.

Thus when English settlers in North America entered into treaties in which tribes recognized their "rights" to land, they took the treaties to be formalizing a situation already in place, that the settlers owned the land in fee simple. The treaties, from their point of view, were merely prudential acts. Tribes interpreted the treaties as performing other functions. They were formal expressions of mutual forbearance and goodwill between the tribe and settlers, and they signified the willingness of the tribe to share hunting or agricultural preserves with Europeans.

Despite their ambiguity, treaties should be regarded as sources of "law" in colonial America, if for no other reason than English settlers ascribed to them the same importance as other compacts among different nations. From the perspective of the settlers, treaties with tribes were among the foundational legal documents of colonies, documents that defined the settlers of those colonies' rights and obligations and as such constituted a basis for governing the colony. Other foundational legal documents were the charters of colonies, which outlined the terms under which a colony had been established. There were additional types of legal documents that had foundational status. One type consisted of documents codifying the laws of a colony, such as the "codes" that were created in seventeenth-century Massachusetts Bay and Virginia. Those codes particularized rules of conduct for the colony's inhabitants, defining crimes and their punishments and establishing procedures for civil transactions.

Becoming a lawyer, in the early years of the English colonies, was associated with having access to, and being able to read, such codes. In seventeenth-century Rhode Island, for example, lawyers were typically not trained in the fashion of their English counterparts, who were divided into barristers and solicitors and were formally admitted to practice. Instead their training more resembled that of "attorneys," a lower-level category of persons working with the law, comparable to law clerks. Persons litigating matters before the Rhode Island courts were not required to have "attorneys" assist them, although many did. The primary skills of attorneys were the ability to read and to copy legal documents.[30]

In seventeenth-century Rhode Island, the codes and statutes that represented the colony's formal laws were in handwritten manuscript rather than printed form. There were few printed law books available, so those documents represented the principal authoritative written legal sources that existed in the colony.[31] Moreover, only a few officeholders were allowed access to the colony's charter and statutes: the court recorders, the clerks and treasurers of towns, and the governor of the colony. The General Assembly of Rhode Island had its own recorder, who kept a copy of the records of that body, the decisions of the colony's courts, orders of towns, and land transactions. He was also responsible for writing most of those records. He had physical custody of the records and could deny others access to them.[32]

Law in colonial America was not, of course, confined to the statutes and charters of colonies, or even to those and the rules of English common law, as understood through a reading of the few published compilations available. One study of the interaction of Algonquin tribes with colonial courts in the seventeenth century reveals that it also included a recognition, and to some extent an integration, of tribal customs and practices.[33] Algonquins decided civil disputes by appealing to the principle of reciprocity, which posited that if one tribal member damaged another's property, that member was required to give something of comparable value to the person whose property had been damaged. The Massachusetts Bay, Connecticut, and New Haven colonies allowed tribal members to apply to their courts for comparable treatment where an English colonist had done the damage. If cattle associated with an English settlement had trampled on crops grown by tribes, the affected tribal members could seek compensation in a colonial court.

Sometimes the Algonquin reciprocity principle interacted with English common law in interesting ways. An illustration can be found in a 1651 case in the colonial court of Connecticut. Uncas, the sachem of the Mohegans, a member of the Algonquin family of tribes, appeared in that court, representing an Indian from Long Island who had purchased a canoe from a Connecticut settler. The settler had stolen the canoe from a Mohegan. After buying the canoe, the Long Island Indian had returned it to its Mohegan owner. Uncas asked the court to compel the settler to reimburse the Long Island Indian the fee he had paid for the canoe. The court agreed, ordering the settler to pay the Long Island Indian nine shillings.[34]

The Algonquin and English legal systems conceptualized this episode differently but ultimately treated it similarly. The Algonquin system presupposed that if another Algonquin, or a member of a different tribe, had stolen the canoe, the Long Island Indian would have been entitled to compensation from the relevant tribe. The difficulty was that a Connecticut settler had stolen it and sold it to a third party. Under English common law, the third party—the Long Island

Indian—would have had no obligation to return the canoe to its rightful owner if he had paid money for the canoe and had no knowledge of its being stolen. Had he retained the canoe, any effort by its original owner to get it back would have pivoted on whether the Long Island Indian was a "bona fide purchaser," someone who had acquired title to property for value and without notice that the property had been stolen.

The Long Island Indian did not retain the canoe. Instead he followed the reciprocity principle, compensating the Algonquin owner by giving him back the canoe. This clearly left him worse off than he had originally been, because he now had paid money for a canoe which he no longer had. But what was his remedy? The reciprocity principle suggested that the settler's "tribe" should compensate him. English common law did not necessarily support that result. The ability of the Long Island Indian to recover the fee he paid the settler for the canoe depended on the terms of the sale. If the seller sold the canoe "as is," without representing that he was its rightful owner, the Indian could not recover against either the settler or any other member of the Connecticut colony. The fact that the Long Island Indian had voluntarily returned the canoe to its rightful owner would, under seventeenth-century English common law, have had no effect on his ability to be compensated for its loss.

But common-law rules were sometimes modified by "equity" principles in the English legal system. This was a case in point. If the Long Island Indian could establish that the settler had in fact stolen the canoe, the settler—even if he could show that he had sold the canoe "as is"—could not come before a court with "unclean hands" and expect the court to protect his right to retain the fee he had charged for the canoe. The Long Island Indian was thus eligible for equitable relief in the form of the fee, nine shillings. He had been "made whole," put back in the position he occupied before entering into a transaction with the settler.

There was one other feature of the 1651 case to be noted. The Long Island Indian had been represented by Uncas, a Mohegan sachem. The Long Island Indian was not a member of an Algonquin tribe, but Uncas chose to represent him, and to do so in a colonial court. Alternative ways of dealing with the problem existed at the time. A sachem from the Long Island Indian's tribe could have appeared on his behalf; the Indian could have sought to enlist the Mohegan owner and other members of his tribe in an effort to force the settler to return the fee; high-status representatives of the Long Island tribe could have sought an audience with Connecticut colonial officials in the hope of negotiating the fee's return. None of those avenues were chosen. Why?

Practical reasons may have dictated the choice. Uncas was a resident of Connecticut who spoke English and had developed relationships with Connecticut settlers. Long Island was some distance from Connecticut, even by water, and the Long Island and Mohegan tribes spoke different languages. No Long Island

sachem may have spoken English, and the Connecticut settlers may have had little exposure to Long Island languages, or no translators capable of surmounting the language barriers may have been available. Uncas's representation may have been primarily a matter of expediency.

Nonetheless, that representation, and the outcome it produced, had symbolic significance. A sachem of an Amerindian tribe had recognized the authority of a colonial court and had appealed for justice in that court on behalf of an Amerindian who was not a member of his tribe. In so doing, Uncas was communicating his respect for the legal system of English settlers, and was also asking that system to compel a settler to make an Amerindian whole. The Connecticut court could have declined to do so under strict rules of English common law. Instead it chose to invoke equitable principles to grant Uncas's request. The result in the case paralleled the result that would have been reached under Amerindian practice.

Damage claims such as that of the Long Island Indian were conducted against a backdrop in which both colonists and tribal members treated procedural requirements as far less important than the achievement of substantively fair outcomes. For a time, in colonies where individual members of tribes sought compensation for stolen or damaged property, they were satisfied when the court seized property alleged to be stolen, or simply entertained the action. Later they realized that if they actually appeared to prosecute the claim, they could be compensated. The idea that courts existed for the purpose of achieving something like substantive justice was consistent with tribal procedures for resolving disputes, which took the form of councils in which tribal members in authority sought to ascertain the truth of a dispute.

At the same time both colonists and Amerindian tribes understood that the colonial courts did not have jurisdiction over disputes between Indians. Nor were Indian dispute-resolution mechanisms available to colonists if they had a grievance against a tribal member. When those understandings were breached, tribes were offended. Two incidents in the seventeenth century will illustrate. One, arising out of struggles between the Narragansett tribe and a temporary alliance between the Mohegans and the colony of Connecticut, involved Miantonomi, the Narragansett sachem whose 1642 speech was previously quoted. In that incident Uncas, who had emerged in the 1630s as a Mohegan ally of the Connecticut and Massachusetts Bay colonies in their struggles with hostile tribes, had escaped the assassination attempt of a member of the Pequot tribe who had been hired by Miantonomi. When Uncas informed the Massachusetts Bay colony of the incident, one of its courts tried, and convicted, the assassin, releasing him into the custody of Miantonomi with instructions to deliver him to Uncas. Then, after Miantonomi responded by killing the assassin, Uncas captured Miantonomi and turned him over to the United Colonies of New England, whose court, in Hartford, convicted him of the assassin's murder. In both

instances, however, the colony courts ruled that they did not have power to execute Indians for murdering other Indians. Instead the Hartford court released Miantonomi into the custody of Uncas, who, once he reached Mohegan territory in the company of some Connecticut colonists, executed Miantonomi. Although the motivation of the Massachusetts and Hartford courts in entertaining the cases was understandable given Uncas's position, it was inconsistent with the expectation that colonial courts would not entertain intertribal disputes, and it placed the courts in the awkward position of not being able to implement punishments on Indians they had found guilty of murders.[35]

The second incident, which took place in 1675, involved the murder of a "praying Indian," John Sassamon.[36] "Praying Indians" were a singular group in colonial society in the seventeenth century. They were the remnants of tribes that had been reduced by disease and had become dependent on adjacent English settlements. As part of their dependence, they had been persuaded to adopt the Christian religion, and some of their members were educated in colonial schools and colleges and were encouraged to become integrated into English society. Although members of tribes who lived among the colonists of Massachusetts continued to have their own courts to try disputes among Indians (those courts had no jurisdiction over English persons), disputes among "praying Indians" were treated differently. In Cambridge, where a large number of praying Indians resided, a colonial justice of the peace was given power to hear cases involving disputes between praying Indians and between them and English colonists.

Thus when Sassamon, who had grown up in a praying Indian community in Natick, Massachusetts, and had studied at Harvard, was found dead under suspicious circumstances, Massachusetts Bay authorities began to investigate the matter. They came to believe that Sassamon had not fallen through ice on a pond, as initially reported, but had been murdered by three members of the Wampanoag tribe (also known as the Pokanokets) while he was en route to Plymouth to warn that colony of a proposed attack on them led by a Wampanoag sachem, Metacomet, known in subsequent colonial narratives as "King Philip." Reacting to the steady encroachment of English colonies onto land previously occupied by tribes, and to the increased efforts on the part of colonies to Christianize tribal members and to subject some of them to the jurisdiction of colonial courts, Metacomet had sought to create intratribal alliances against the English settlers in New England. When a Massachusetts Bay official arrested the Wampanoags thought responsible for Sassamon's murder, tried them before a jury which was composed of at least six Englishmen, convicted them, and hanged them, Metacomet vowed revenge. The result was "King Philip's War," which featured regular conflict between the allied Wampanoag and Narragansett tribes and New England colonists for the remainder of 1675 and 1676, eventually resulting in the loss of over two-thirds of the warring tribal population.[37]

The two incidents illustrate the radically different attitudes of Europeans and Amerindians toward capital punishment as a response to the crime of murder. Amerindians believed that murders outside of wartime should not be made a basis for killing the murderer. Instead those acts triggered the reciprocal gift-giving process, with the members of the murderer's tribe dispensing gifts to the members of the murdered person's. In wartime, however, tribes assumed that one killing could be met with a "revenge" killing on the other side, sometimes directed at someone who had no connection to the initial murder. Europeans, on the other hand, believed that murderers in peacetime should themselves be executed.[38] Since Sassamon, being a "praying Indian," was deemed to be under the protection of the English, his murder was treated by Massachusetts Bay as if an Amerindian had murdered an English colonist, giving a colonial court jurisdiction over the incident and making capital punishment for the murder appropriate. In the case of Uncas's "revenge" murder of Miantonomi, however, two Amerindians were involved, so colonial courts had no jurisdiction. Metacomet saw the Sassamon incident differently. He regarded the execution of Sassamon's murderers as a breach of protocol because only Amerindians had been involved, and thus a hostile act toward his tribe and its allies. He thus viewed his subsequent efforts to take revenge on colonists in "King Philip's War" as being sanctioned by Amerindian codes of war.

By the eighteenth century the accommodations to Amerindian cultural practices exhibited by the legal institutions of the colonies had eroded. Tribal members had previously come to an English court accompanied by sachems and interpreters. By the eighteenth century, one English traveler reported, a rude "bench" was created out of pumpkins in a field so that a colonial justice of the peace could try an Indian accused of having sold a stolen hogshead he received from a slave of a colonial family. Instead of an interpreter, the justice of the peace and the Indian conversed in a pidgin dialect. By this time colonial courts were regularly bringing Indians before them without consulting sachems, kinfolk, or other tribal members.[39] Colonial justice, even when it involved Indians, had increasingly become synonymous with English justice.

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The episodes related above reveal that law in seventeenth-century America was largely indigenous. Its sources included the charters and other documents that had ushered colonies and their officers into being, codes that had been written largely for the purpose of preserving a colony against hostile and disintegrative forces, and, in the English colonies, an accumulation of common-law rules and principles that were adapted to a radically different environment. Moreover, colonial courts had recognized that their procedures and outcomes needed to acknowledge the cultural traditions and practices of Amerindian tribes.

By the eighteenth century, colonial American law had increasingly taken on an English character. At the time that the United States declared its independence from Great Britain, the "Englishness" of American law had become so pervasive that the uniqueness of the earlier colonial years has often been lost. The association of colonial American law with an English heritage followed from the establishment of the entire eastern coast of North America as a British settlement. That process occurred late in the colonial period, not being formalized until only about ten years before the American Revolution. As in the seventeenth century, developments that later generations perceived as inevitable were far more contingent. As late as the middle of the eighteenth century, law in colonial America more resembled a collection of informal responses to a rapidly changing cultural landscape than a full-blown, formal system, modeled on England or anywhere else.

The law of New York, for example, had not been based on the common law of England in the early history of that colony. It was Dutch civil law, modeled on Roman law. When New Netherland was first taken over by the English in 1664, Richard Nicolls, an agent of the Duke of York (who had been given a charter from Charles II to the New Netherland region), wrote a code of laws to govern the transition from Dutch to English rule. The Duke's Laws, as the code was called, drew on Dutch legal practices far more than English ones. Attorneys did not function as public officials: notaries and clerks held those positions. Public magistrates represented all citizens with legal problems. Most disputes were resolved through arbitration; juries were uncommon. Informal procedures were the norm. The office of "barrator" was outlawed, and attorneys were generally prevented from appearing in the courts.

In 1691 the Duke's Laws regime was replaced by a system that more resembled English common law. The New York Judiciary Act of that year established a Supreme Court of Judicature and local courts throughout the colony. The courts were staffed by judges who were to perform the same functions as judges of the King's Bench, Common Pleas, and Exchequer courts in England. Attorneys were invited to practice before the courts, and an association of attorneys was founded in New York City. Between 1700 and 1712 the number of attorneys in New York doubled; many of the new attorneys had been trained in England. The proceedings of the New York General Assembly were published for the first time in 1694. New York's experience suggested that the emergence of the common law on the North American continent would closely follow English settlement.

As a colony became dominated by English settlers, groups who had come from other parts of Europe began to withdraw from its courts. Studies of New York and Pennsylvania in the late seventeenth and early eighteenth centuries have shown that after the court systems of those colonies were remodeled so that English judges and lawyers dominated them, the Dutch and Swedish

residents of the colonies began to avoid using the courts to resolve their disputes. The findings for the Dutch population are particularly striking. For more than half a century after New Netherland became New York, Dutch settlers outnumbered English ones in the New York City area, Dutch residents continued to compose large percentages of the mercantile and retail trades, and the Dutch retained significant political power, including staffing the influential Mayor's Court of New York City. Nonetheless the Dutch litigants in the Mayor's Court for the period from 1690 to 1760 declined in comparison to the Dutch population rate. An even more dramatic withdrawal of Swedes from the courts in Chester County, Pennsylvania, took place in the late seventeenth century, after Swedish justices were replaced by English ones. From 1681 to 1695 there were forty-two cases in the Chester County courts in which emigrants from Sweden sued other Swedish emigrants. Between 1695 and 1710 there was one such case. In the earlier time period Swedish plaintiffs appeared in fifty-five cases; in the latter period in only five.[40]

The Anglicization of American law was thus a product of the emergence of England as the central power in North America over the course of the eighteenth century. We have seen that when the century opened, English residents of the entire North American continent numbered approximately 250,000. By 1750, however, the British population had grown to 1,170,000; by the framing of the Constitution it had reached 3,000,000; and by the opening of the nineteenth century it numbered around 5,000,000. Pennsylvania, which had the highest population growth of all the colonies, went from 51,000 British residents in 1730 to 240,000 in 1770.[41] All the new North American colonies in the eighteenth century were British.[42] In the same time period the French, Swedish, Dutch, and Spanish populations in North America declined.

Moreover, by 1763 Great Britain owned the entire land mass of the eastern North American continent, stretching from Canada to Florida. This development had come about because of a series of wars between England and Holland as well as between Great Britain and France.[43] The wars were an outgrowth of commercial rivalries, primarily over trade between Europe and the New World. In the first of the wars, England took over the Dutch colony of New Netherland in 1664, temporarily relinquished it 1673, and reacquired it through a treaty in 1674. Holland had concluded that the colony, pressured on one side by the English colonies in New England and on the other by the Iroquois Five Nations, was unlikely to thrive.

Subsequently France and England engaged in skirmishes between 1688 and 1713, and when the Treaty of Utrecht ended the last of those in 1713, Great Britain gained title to the French possessions of Hudson Bay and Newfoundland, as well as some portions of Nova Scotia. By the 1750s Nova Scotia had become a contested province, with the British maintaining control of

some seacoast towns, such as Halifax, and the French and their Indian allies dominating the interior portions.

Meanwhile British settlers from Pennsylvania, Maryland, and Virginia began pushing westward over the Appalachian Mountains to the Ohio Valley. They recognized the agricultural potential of the Ohio Valley region, and attempted to acquire land in it from resident tribes. A treaty made in 1744 between representatives of Pennsylvania, Maryland, and Virginia and the Iroquois League conferred title to the Ohio Valley on those colonies, although the tribes apparently believed they were merely giving title to the Shenandoah Valley in Virginia in exchange for the colonists' recognizing them as overlords of the Ohio Valley region.

By the last quarter of the seventeenth century the French fur trade had moved southward and westward from eastern Canada, following the network of rivers that led from the St. Lawrence through the Great Lakes to the Wabash and eventually to the Mississippi. French trading outposts dotted those routes from the St. Lawrence to New Orleans and the Gulf of Mexico. The French, recognizing that the Ohio River provided a shorter way to ship goods from the Mississippi to the St. Lawrence, and noting the arrival of British settlers in the areas adjacent to that river, began an effort, aided by their Indian allies, to drive the British out of the region. Between 1749 and 1753 they succeeded in gaining control of the Ohio Valley, at which point they claimed the area for France and built a series of forts from Lake Erie down the Monongahela and Allegheny rivers to the Ohio.

This action, coupled with the tension between French and British settlers in Nova Scotia, resulted in a decision by Great Britain to drive the French out of North America. The result was the Seven Years' War, which began in 1754 and was not formally ended until 1763. Initially the British encountered severe problems fighting the French because the theaters of the war, in its early stages, were in regions in which the French had established a presence and formed alliances with tribes. By 1758 the British had turned the tide. They made their own alliances with tribes, notably the Treaty of Easton, signed in that year, which promised that British colonists, if allowed to enter the Ohio Valley peaceably, would respect tribal rights west of the Alleghenies. Eventually the British were able to use their naval power to move soldiers to the North American continent and, once there, to transport them up rivers to attack French settlements in Canada. They established a squadron in the Atlantic Ocean off of Brest, on the western tip of Brittany, to blockade the French fleet stationed in Brest. Because the prevailing winds in that portion of the Atlantic came from the west, it was difficult for French ships to escape the blockade, and the French fleet faced a disadvantage if it ventured out into the Atlantic to fight the British.

With the French navy bottled up, Great Britain was able to dispatch ships to North America to aid the military operations there. Eventually this combination of troops and naval support resulted in the French population of Nova Scotia being forcibly removed,[44] the British capturing the pivotal fortress town of Louisburg at the mouth of the St. Lawrence River, and the St. Lawrence being opened up for British assaults on Quebec and Montreal. With the British in control of the St. Lawrence, the French were no longer able to deliver goods to their Indian allies in the North American backcountry, and the tribes abandoned their support for France. By 1760 the French had surrendered. Under the terms of the Treaty of Paris in 1763, the French relinquished Canada to Great Britain, and Spain, which had acquired the Louisiana territory from France, gave up Florida to the British.

The defeat of the French did not fully alleviate tension in British America. Before the Treaty of Paris was signed settlers from Pennsylvania, Maryland, and Virginia began to pour into the Ohio Valley, in defiance of the Treaty of Easton. This provoked tribes in the area, and a confederation of them, led by the Ottawa sachem Pontiac, attacked British forts and trading posts along the rivers. Eventually the British were able to regain control of those outposts, and in 1763 the British government issued a Royal Proclamation, establishing a "line" of Indian territory west of the Appalachians. All the territory west of the line was reserved for Native tribes, although British fur-trading outposts were maintained in it. In addition, soldiers were stationed at each of the former French forts to ensure that settlers did not venture west of the line.

Thus by the 1760s Great Britain anticipated that it would be maintaining a colonial empire in North America for the indefinite future. British traders had taken over French operations in cod fishing and fur trading from Canada to the Gulf of Mexico. The "Proclamation Line" of 1763 was designed to establish peace between British settlers and those Native tribes that had not been depleted by previous contacts with Europeans. The land mass over which Great Britain had control now stretched from Canada to Florida. France had disappeared from eastern North America. So had Holland and Spain. The only difficulty appeared to be financing the cost of the Seven Years' War, whose operations had caused the British government to borrow almost 150 million pounds. Since the war had been fought in North America, and many of the government's continued expenses were for maintaining armies and naval vessels on or around the North American continent, the British government proposed taxing North American colonial settlers as a means of meeting those expenses. The American Revolution, discussed in a subsequent chapter, would be a direct outgrowth of the above developments.

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At the time the American Revolution began, the thirteen colonial settlements on the Atlantic Coast of North America were overwhelmingly British in their