

Ken MacMillan. *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576–1640*.

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Sovereignty and Possession in the English New World illuminates the extent to which the courts of Elizabeth I and her Stuart successors utilized a wide range of available juridical tools to assert and secure their claims to and possession of territories in the New World. MacMillan effectively accomplishes both his stated purposes, demonstrating that the limited extent of the crown's territorial ambitions was not accompanied by an abandonment "of their sovereign rights and responsibilities . . . [or] their authority to various trading companies and commercial interests" or a lack of care for the "welfare of their colonies and subjects," and also amply illustrating how the varied means through which the "crown expressed sovereignty and possession (*imperium* and *dominium*) . . . helped to establish the legal foundations" of what would become the First British Empire (6–8). While this juridical bedrock clearly included "precedents of English law . . . in many aspects of colonial settlement [which] certainly helped to establish central legal institutions in America, [MacMillan] argues that the principal legal foundations . . . were also based on the crown's imperial (rather than domestic) sovereign rights and responsibilities" (13). This resulted in a nascent imperial constitutionalism influenced by both common law jurisprudence and Roman jurisprudence that drew on "multiple, related, and 'universal' legal resources

[which] provided the crown and its advisors with a corpus of supranational material that could help it develop legal strategies in favour of imperial pursuits that would be recognized by the broader European community” (13).

While acknowledging the many cogent arguments that have been made for the primacy of the English common law’s influence on the development of land tenures and other colonial institutions of law and governance in early America, the discussion in chapter 1 brings into clear focus that, juridically, “newfound lands were outside of the realm of England and, therefore, outside the jurisdiction of the common law and ordinary prerogative” because “[u]nlike Roman law, common law possessed no doctrines for the acquisition of sovereignty over territory because the doctrine of tenures held that no land subject to the common law could be outside a state of sovereignty.” The English common law was indeed the closed insular system its seventeenth-century proponents claimed it to be. The crown therefore needed to adopt many Roman law principles “to legitimize and oversee [their colonial] activities” in order “to govern its foreign territories in a manner consistent with natural laws and liberties, and that would also enable it to gain the recognition of the supranational community” (33). Ample resources of Roman jurisprudence were available in the thriving and influential community of civilian lawyers of “Doctors’ Commons” who practiced in the many English prerogative courts. Drawing on the seventeenth-century works of Coke and Hale as well as many recent works in Pocockian ‘new’ British history, MacMillan makes a credible argument that although the forms and style of common law jurisprudence were often used for reasons of familiarity and convenience, the new American colonies were in fact “part of the composite monarchy, ruled by the King alone through his royal prerogatives” (37).

The remaining chapters provide illustrative proofs of this central thesis of juridical pluralism. In chapter 2, MacMillan provides the full historical context for his previous invaluable edited translation of John Dee’s 1578 *The Limits of the British Empire* (with Jennifer Abeles, 2004) and demonstrates that the influence of Dee’s works transcended mere antiquarianism to lay “the foundation for the English claiming territory by occupation rather than mere discovery, recognizing that in Roman law possession was not simply an act of will or intent (as the Spanish tended to see it) but also of physical presence and effective control” (52). This recognition that physical occupation and improvement of territory was more legally significant than mere discovery accompanied by proclamations of possession is shown to be of great importance in the drafting of the colonial letters patent discussed in chapter 3 in that “the nature and extent of the mental intention to hold land and the physical settlement of the regions claimed under the patents provided a virtually unassailable right to possession according to Roman law” (120). These letters patent also illustrate the juridical pluralism of these early colonial efforts of the English crown in that such letters needed to be authoritatively comprehensible to both English subjects more familiar with the language of the common law and to other European powers accustomed to the language of Roman law.

Chapter 4 shows the extent to which the crown's emphasis on fortifying and defending the new territories as the first duty of settlers further supported such claims to lawful possession against other European powers and in conjunction with carefully controlled and officially sanctioned "printed maps, the subject of [chapter 5], had the effect of communicating to English and European communities that the English empire in America was larger, more powerful, and more united than it was in reality" (147). The case studies of early seventeenth-century Anglo-Iberian and Anglo-French negotiations in chapter 6 emphasize the degree to which juridical pluralism was "not merely employed retroactively to justify English activities in America once they had begun, [but] also helped to define how England should continue to express its sovereignty and possession during the first important decades of permanent settlement" (202). Mindful throughout of the need to "distinguish . . . between the language of empire that defines a sovereign's superior, independent status and the existence of the entity that would become known as the 'British Empire'" (24), MacMillan's exploration of the earliest origins of the British transatlantic imperial constitution is a valuable study that enables us to see the full range of jurisprudence that ultimately became the foundation of British-American constitutionalism in the eighteenth century.

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