

June 2014

Law for the Empire: *The Common Law in Colonial America* and the Problem of Legal Diversity

Lauren Benton

Kathryn Walker

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Common Law Commons](#), [European Law Commons](#), [Legal Biography Commons](#), and the [Legal History Commons](#)

Recommended Citation

Lauren Benton & Kathryn Walker, *Law for the Empire: The Common Law in Colonial America and the Problem of Legal Diversity*, 89 Chi.-Kent L. Rev. 937 (2014).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol89/iss3/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

LAW FOR THE EMPIRE: *THE COMMON LAW IN COLONIAL AMERICA* AND THE PROBLEM OF LEGAL DIVERSITY

LAUREN BENTON* AND KATHRYN WALKER**

INTRODUCTION

The singularity of the American Revolution has long separated the study of colonial America from the comparative analysis of European colonialism. Recent scholarship has chipped away at this division, emphasizing the revolution's anti-imperial character and exploring its wide-ranging influence in other parts of the British Empire—and other parts of the world not under British control. Yet despite this questioning of the standard narrative of discontinuity between the so-called first and second empires, and despite the emergence of a broadly comparative field of colonial history, the legal history of the thirteen colonies retains residual characteristics of its insular development as a subfield. In particular, it is difficult for historians to shake the habit of framing legal research about the colonial period in ways intended ultimately to explain the revolution or American constitutional debates. This forward-looking perspective sits at odd angles alongside works that seek a contemporary set of reference points such as the late-eighteenth-century legal history of the Iberian and French empires, the influence of parallel engagements in the Indian Ocean and South Atlantic, or continuities with continental jurisprudence.¹

In the two published and two planned volumes of *The Common Law in Colonial America*, William E. Nelson does not set out to bridge the divide between the familiar preoccupation with revolutionary origins and recently explored global connections.² Yet his volumes contribute to an

* Lauren Benton is Silver Professor of History and Affiliated Professor of Law at New York University.

** Kathryn Walker is a doctoral candidate, Department of History, New York University.

1. Recent contributions to the comparative legal history of the late eighteenth century are too numerous to list here; examples include, on French imperial law, see generally MALICK W. GHACHEM, *THE OLD REGIME AND THE HAITIAN REVOLUTION* (2012), on the influence of South Atlantic revolutionary currents on British imperial politics in South Asia, CHRISTOPHER A. BAYLY, *RECOVERING LIBERTIES: INDIAN THOUGHT IN THE AGE OF LIBERALISM AND EMPIRE* 42-73 (David Armitage et al. eds., 2012), and on continental influences on American federalism, see generally ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

2. See 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660* (2008) [hereinafter NELSON, *CHESAPEAKE AND NEW ENGLAND*]; 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660-1730* (2013) [hereinafter NELSON, *MIDDLE COLONIES*].

effective merger of the two projects. In analyzing legal diversity and in seeking to identify early elements of legal convergence, Nelson's series addresses questions central to the comparative history of empire and law.

Nelson has collected and sorted an impressive archive of court records from the colonies, and he draws from these records to map the patterns produced as colonists adapted the common law in colonial contexts. Nelson frames the four-volume series as a necessary correction to a flawed yet dominant approach to the study of American colonial law. Too many legal historians, he tells us, have chased the goal of understanding the degree to which law in the colonies mimicked or diverged from English law. Nelson warns that our inadequate grasp of early modern English law makes such comparisons elusive at best, misleading at worst. His goal is different: to compare colonies to one another and to document the variety of legal systems in American colonies and the differing ways that they incorporated the common law. Only this method, he suggests, can give us the materials for understanding how different colonial legal systems assembled themselves into American law, in the process underpinning the revolution and the constitutional framework it engendered.³

In pointing to this last objective—understanding legal convergence—Nelson links the history of seventeenth-century and early eighteenth-century colonial law to the more fully researched late-eighteenth-century revolutionary era's legal transformations. The American Revolution is a familiar ghostly presence, and Nelson's interest in convergence keeps the specter on stage, if in the shadows. This staging requires us to look at Nelson's texts from an odd angle to assess how his perspective contributes to comparative colonial histories. We must conduct this interpretative exercise at a level of abstraction that might make Nelson, a historian who chooses to stay close to his sources, uneasy. It is nonetheless a worthwhile undertaking because it connects Nelson's findings to puzzles of legal diversity and legal convergence in other empires, as well as in later phases of the British Empire.

The volumes of *The Common Law in America* address fundamental questions about how law constituted empire: What sets of factors, from local politics to religious differences to environmental and geopolitical pressures, forged legal diversity in empires? When and in what measure did law serve as a force of divergence or of convergence? Does it make sense to label congeries of colonies operating with desultory oversight as comprising an empire, much less as an empire of law?

3. NELSON, CHESAPEAKE AND NEW ENGLAND, *supra* note 2, at 4-6.

Our article surveys Nelson's answers to such questions and places them in the company of contrasting approaches to the relation between colonial legal diversity and the constitution of empires. The article begins by characterizing Nelson's findings about the diverse conditions and legal politics of the American colonies. It then considers historians' attempts, using two other approaches, to understand legal diversity in empires. One approach analyzes cross-colonial connections to bring into focus the ways that decentralized processes composed networks that influenced colonial law and its variations. The other approach investigates ideologies, jurisprudence, and administrative schemes in metropolitan centers and traces their impact on the creation of empires as variegated legal fields. We survey both approaches, providing illustrations mainly related to the English (later British) and Spanish empires. Together with Nelson's methodology of comparing colonial legal systems to one another, these two approaches compose a powerful triptych: trans-colonial processes, metropolitan processes, and local legal politics. Considered together, these perspectives allow us to understand Nelson's project as more than a healthy corrective for colonial legal history and a valuable survey of colonial court records. *The Common Law in America* offers a distinctive story about how law composed empires: slowly, one case and one colonial legal system at a time.

I. LEGAL DIVERSITY IN COLONIAL AMERICA

Nelson describes a startling array of emerging systems of law in colonial America. In Massachusetts, worries about the arbitrary authority of magistrates drove the colonists' urge to codify law. In Virginia, the politics of property created incentives for clear legal rules. In both places, the common law arrived late, as part of a broader search for order. In New York, within a generation of the assumption of control by the English, the common law had superseded Dutch law in the lower Hudson Valley and had largely supplanted the Puritan law of towns leading to New England. Lord Baltimore in Maryland embraced the common law for the protections that it offered Catholics and their property in the new colony. The pressures of the Indian trade, slavery, and Atlantic commerce dominated law in South Carolina. In North Carolina, the governor's autocratic hand pushed the common law into the background and turned legal forums into arenas of political conflict. Pennsylvania's Quaker elites designed a "government by judiciary" that sheltered robust common-law development.⁴ In Delaware

4. NELSON, MIDDLE COLONIES, *supra* note 2, at 100.

and New Jersey, judges found ways to apply elements of the law of England and the common law, while allowing room for the law to work to protect local norms.

Nelson constructs such generalizations by perceiving patterns in court records. Virginia cases involving harsh penalties for disrupting land and labor arrangements sat within the context of a sparse record of cases punishing adultery.⁵ Massachusetts courts seemed unable to withhold their attention from cases involving “sin” or the crime of espousing Quaker beliefs.⁶ In all the colonies, Nelson shows, the criminal law carried special burdens of representing and pursuing the policies and preferences of elites.⁷ Enforcing the peace had some unpredictable results, as when, to give one example, John and Walter Winter were found guilty and were hanged for killing Indians in their house-turned-fort on the edges of Pennsylvania settlement.⁸

Whereas Nelson relies above all on analysis of colonial court records, he does not isolate the law as a force within colonial society. Instead, legal diversity figures in his narrative as a phenomenon derived from and interacting with other differences. As he argues most explicitly in the volume on the middle colonies and the Carolinas, the common law was central in their early legal systems without, however, erasing the tendency to legal divergence. The “top-down policies of imposing the common law” bumped up against “bottom-up pressures” to preserve local norms and practices.⁹ In Massachusetts, Puritans drew from scripture in making law, but this tactic did not drive the evolution of the colonial legal system, which instead took shape as a result of legal strategies forged by local politics. In most cases, Nelson is referring to a kind of politics that intersected with law, and the term “legal politics” would apply well.¹⁰ Ruptures also come into view and crowd the volumes’ narratives: the 1720 collapse of North Carolina’s judicial system, for example, or Lewis Morris’s challenge to the legitimacy of the judiciary in East Jersey that spawned a “state of chaos.”¹¹

In this telling, legal diversity becomes an aspect of a broader phenomenon of *colonial* diversity. Without describing the full set of distinctive

5. *Id.* at 41-47.

6. *Id.* at 53-57.

7. *Id.* at 129.

8. *Id.* at 111.

9. NELSON, CHESAPEAKE AND NEW ENGLAND, *supra* note 2, at 7-8.

10. On “legal politics” as an analytic category in imperial legal history, see Lauren Benton, *Introduction: Forum on Law and Empire in Global Perspective*, 117 AM. HISTORICAL REV 1093 (2012).

11. NELSON, MIDDLE COLONIES, *supra* note 2, at 92, 136.

conditions that prevailed in each colony, Nelson highlights anomalies and portrays colonial legal systems as both reflecting and contributing to legal diversity. Yet Nelson also recognizes that his analysis must account somehow for the tendency to adopt the common law and make it central to the colonial legal order everywhere. Even as he highlights legal diversity, Nelson fits the different stories into a broader narrative of convergence. He tells us in his Introduction to Volume I that the project aims to understand why and how such radically different legal systems merge into “American law.”¹² Most of this story of convergence, Nelson explains, will come in the second half of the series, in volumes that detail colonial responses to increasingly intrusive imperial policies.¹³ In some respects, the result of this approach is to reproduce the known trajectory of attempted imperial consolidation followed by a complexly staged revolt. That is, we could read Nelson as arguing that legal diversity matters but only up to a point; local conditions created colonial differences, but imperial policies drove convergence. Yet that is a simplistic reading, one that does not do justice to Nelson’s findings or his method.

Struggling to emerge from these first two volumes is a *theory* of legal convergence—a way of understanding how we can think of such different colonial legal systems as already deeply connected and, also, linked by more than just a repeating relationship to the center. In discerning Nelson’s approach to this problem, we find that not having in print the subsequent volumes, which promise to focus more sharply on imperial policies, may be a blessing. The first two volumes lay the groundwork for Nelson’s perspective of the ways that legal convergence developed alongside legal diversity, a pairing that may extend beyond American colonies and reflect more generalized tendencies in empires. In Nelson’s telling, colonists grappled mightily to discern the relevance and utility of the common law and to design its relationship to other law. In doing so, they contributed to the discourse and structure of the imperial constitution—and, ultimately, forged what became the framework for revolt against the empire.

How have other historians approached this problem of identifying elusive elements of structure and convergence in geographically diffuse overseas territories with politically varied characteristics? The “imperial turn” that has swept historiography in the last several decades has produced not only a wealth of new studies of imperial law but also warnings against the reification of both “empire” and “state.” The “minimal nature of the early-modern state” combined with “habits of local self-government” constrained

12. NELSON, CHESAPEAKE AND NEW ENGLAND, *supra* note 2, at 6.

13. NELSON, CHESAPEAKE AND NEW ENGLAND, *supra* note 2, at 6-7.

the prospects for imperial governance.¹⁴ Certain categories of conflict—contested definitions of subjecthood, strains involving delegated authority, and tensions over jurisdiction—influenced the exercise of colonial authority and conditioned the responses of colonists and indigenous peoples to conquest, settlement, and imperial policy.¹⁵

II. CIRCUITS OF IMPERIAL LAW

Although early modern empires operated as complex and flexible frameworks for imperial ambitions and communal conflicts rather than as structures of command, their approaches to law nevertheless generated patterns.¹⁶ Some patterns reflected the tendency of imperial agents and officials to analyze and sometimes to copy one another's methods of legal administration. English designs on North America, and to some extent their visions of colonial order, were in part based on or self-consciously contrasted with the Spanish Empire.¹⁷ In some places, surprising homologies undergirded cross-imperial relations, as when merchant communities that already operated with limited jurisdiction over their own affairs inside one polity sought to establish a similar legal status within new host polities; Portuguese traders in West Africa and the Sephardic diaspora spanning Mediterranean empires are cases in point.¹⁸ European legal interactions were genuinely global in scope, and they relied on some common approaches to law. For example, Dutch and Portuguese strategies in the Indian Ocean and the Pacific world built on their own history of legal pluralism

14. DEREK HIRST, *DOMINION: ENGLAND AND ITS ISLAND NEIGHBOURS, 1500-1707*, at 156 (2012).

15. For instructive examples of this perspective, see *LEGAL PLURALISM AND EMPIRES, 1500-1850* (Lauren A. Benton & Richard J. Ross eds., 2013). On subjecthood and delegated legal authority, see LAUREN A. BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400-1900* (2010) [hereinafter BENTON, *A SEARCH*]. On jurisdictional shifts as a product of colonial conflicts, LISA FORD, *SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788-1836* (2010); see also LAUREN A. BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900* (2002) [hereinafter BENTON, *LAW AND COLONIAL CULTURES*].

16. Lauren A. Benton & Richard J. Ross, *Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, in *LEGAL PLURALISM AND EMPIRES, 1500-1850*, at 7 (Lauren Benton & Richard J. Ross eds., 2013). Jane Burbank and Frederick Cooper make law one of their categories of comparison in JANE BURBANK & FREDERICK COOPER, *EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE* (2011).

17. J.H. ELLIOT, *EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492-1830*, at 16 (2007).

18. Lauren Benton, *The Legal Regime of the South Atlantic World, 1400-1750: Jurisdictional Politics as Institutional Order*, 11 *J. WORLD HIST.* 27, 27-56 (2000); FRANCESCA TRIVELLATO, *THE FAMILIARITY OF STRANGERS: THE SEPHARDIC DIASPORA, LIVORNO, AND CROSS-CULTURAL TRADE IN THE EARLY MODERN PERIOD* (2009).

while adapting to fit with other sovereigns' understandings of fundamental legal elements such as protection and possession.¹⁹

Recently, historians have gone further in recording regional and global patterns of law, noting that some legal processes unfolding far from imperial centers gave rise to "networks" that helped, in turn, to structure law in empires.²⁰ The perspective represents legal diversity as emerging partly from the local effects of cross-regional processes that constituted empires without leading to homogenization or centralization. Kerry Ward's study of circuits of coerced labor in the Dutch overseas empire offers a particularly clear illustration of network analysis of legal diversity.²¹ Ward shows that Dutch East India Company officials banished unruly local subjects in the empire, moving them from one Dutch-claimed territory to another, often across very long distances. The Dutch East India Company transported elites from Batavia to Ceylon and the Cape Colony, and moved lower status exiles from the heart of the Cape Colony to its periphery. When threaded through a system of layered sovereignty extending from the metropolitan center to the colonies, such practices knitted together the points of the empire without requiring a single structure of command or a consistent way of categorizing subjects' legal status. Dutch officials' local legitimacy and power depended on their ability to erect and sustain circuits of coerced labor, and these circuits interacted differently with local environments to produce a fluid and variegated empire.²²

The movement of coerced labor also featured prominently in the formation of other, later imperial networks over which metropolitan officials exercised imperfect control. Denver Brunzman traces the history of impressment of sailors for service in the British navy in the long eighteenth century as such a phenomenon.²³ The navy served as a system of "colonies in motion" charged with sustaining itself through the extraction of labor.²⁴

19. On protection as an important element of Dutch relations with Japan, see ADAM CLULOW, *THE COMPANY AND THE SHOGUN: THE DUTCH ENCOUNTER WITH TOKUGAWA JAPAN*, 56-57, 174-177 (2014). On possession and Iberian empires, see Lauren A. Benton, *Possessing Empire: Iberian Claims and Interpolity Law*, in *NATIVE CLAIMS: INDIGENOUS LAW AGAINST EMPIRE, 1500-1920*, at 19-40 (Saliha Bellmessous ed., 2011).

20. See, e.g., KERRY WARD, *NETWORKS OF EMPIRE: FORCED MIGRATION IN THE DUTCH EAST INDIA COMPANY* (2008). Ward's work builds on a broader trend of imperial historians to study empires as networks. See, e.g., ALISON GAMES, *THE WEB OF EMPIRE: ENGLISH COSMOPOLITANS IN AN AGE OF EXPANSION, 1560-1660* (2008). Other historians have used a network approach to analyze cross-imperial processes. See, e.g., DAVID HANCOCK, *OCEANS OF WINE: MADEIRA AND THE EMERGENCE OF AMERICAN TRADE AND TASTE* (2009).

21. WARD, *NETWORKS OF EMPIRE*, *supra* note 20.

22. WARD, *NETWORKS OF EMPIRE*, *supra* note 20, at 5-6, 12-13.

23. See DENVER BRUNZMAN, *THE EVIL NECESSITY: BRITISH NAVAL IMPRESSMENT IN THE EIGHTEENTH-CENTURY ATLANTIC WORLD* (2013).

24. *Id.* at 6.

Latitude for impressment shifted as metropolitan needs and wartime pressures dictated incentives, and sometimes constraints, to magistrates and ship captains. The practice manufactured circuits tracing imperial interests, with concentrations of impressment activity in places where manpower needs intersected with heightened security concerns. Although present across the empire, impressment generated legal variation, on land and sea as well as in different territories, as it developed in response to “the local social, political, and economic conditions of individual . . . seaports and regions.”²⁵ At the same time, the practice was constitutive of empire by generating the naval capacity that fortified threats of British military action on a global scale and by stimulating new legal mechanisms for imperial oversight. Like British master and servant law, the law regulating press gangs had global reach and formed part of a broader pattern of “negotiated authority” over coerced and semi-coerced labor throughout the empire.²⁶

Less organized, and sometimes less well researched, circuits also influenced the nature of English colonizing and the shape of the British Empire. The movement of merchants and officials, including law-trained personnel, affected the development of policies across the “first” and “second” British empires. This circulation is often difficult to document because it had scant central direction and resulted from combinations of patronage, opportunity, and family ties. But its effects were significant. Key English “adventurers” and investors in the seventeenth century, such as Sir Thomas Smyth, Henry Myddleton, and Thomas Roe, participated in both the Virginia Company and the East India Company, and such involvement had the potential to guide legal policy, as when Sir Thomas Grantham intervened to exhort demonstrations of loyalty after both Bacon’s Rebellion and a revolt at Bombay.²⁷ Cross-regional paths became increasingly common. Law-trained Scots joined other Scottish sojourners in the Caribbean and North American colonies in the eighteenth century, and when Scottish commercial interests suffered from Atlantic upheaval, law-trained Scots looked for prospects in the Indian Ocean, playing an outsized role in drafting new plans for legal administration in the territories

25. *Id.* at 13.

26. *Id.* at 52. On the regulation of labor in the British empire as exercised through the control of subordinate jurisdictions, see Lauren Benton, *This Melancholy Labyrinth: The Trial of Arthur Hodge and the Boundaries of Imperial Law*, 64 ALA. L. REV. 91 (2012). On master and servant law, see generally MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955 (Douglas Hay and Paul Craven, eds., 2004).

27. Lauren A. Benton, *The British Atlantic in Global Context*, in THE BRITISH ATLANTIC WORLD, 1500-1800, at 271, 281 (David Armitage & Michael Braddick, eds., 2009); see ALISON GAMES, THE WEB OF EMPIRE: ENGLISH COSMOPOLITANS IN AN AGE OF EXPANSION, 1560-1660, at 6 (2009) (discussing other cases).

of the East India Company.²⁸ Abolitionists drew on knowledge about colonial law and prize law from men who had done stints in the colonies, and the movement in turn dispatched homegrown legal experts to propel the campaign against the slave trade in the colonies.²⁹ Men who had served as magistrates or judges in one part of the British Empire ended their careers in another.³⁰ Military movements influenced the shape of legal policy in the empire in far-flung colonies, too; governors drew on their knowledge to impose martial law in the face of perceived crises of order.³¹ Diasporas of legal culture were not limited to elites. African captives developed New World legal strategies based in part on experiences and political theories of law in Africa.³² Soldiers and sailors carried with them ideas about legal process, and colonial anxieties about their unruliness often drove conflicts over enforcement of the king's peace.³³

The study of such circuits shows that they sometimes formed in a search to contain local variation or in pursuit of visions of imperial order. The movement of Islamic law judges (qadis) around the Ottoman Empire, for example, responded to imperial officials' recognition that judges were easily drawn into legal politics in ways that made all law local.³⁴ The Spanish crown's program of administrative changes, grouped under the rubric of the Bourbon reforms, centered on appointments to colonial high courts while touching on all aspects of the legal order. Centralizing effects also

28. See ALAN KARRAS, *SOJOURNERS IN THE SUN: SCOTTISH MIGRANTS IN JAMAICA AND THE CHESAPEAKE, 1740-1800* (1993); see also MARTHA McLAREN, *BRITISH INDIA AND BRITISH SCOTLAND, 1780-1830: CAREER-BUILDING, EMPIRE-BUILDING, AND A SCOTTISH SCHOOL OF THOUGHT ON INDIAN GOVERNANCE* 249-254 (2001).

29. Lauren A. Benton, *This Melancholy Labyrinth*, in *COLONIAL CONNECTIONS, 1815-45: PATRONAGE, THE INFORMATION REVOLUTION AND COLONIAL GOVERNMENT* 27-30 (2005).

30. A prominent example is Francis Forbes, who served as Chief Justice of the Supreme Court in Newfoundland before becoming the first Chief Justice of the Supreme Court of New South Wales. Many other cases go undetected because it was commonplace for local elites to serve as magistrates, and their roles went unremarked in the records except when acute conflicts gained attention in London. See Lauren A. Benton & Lisa Ford, *Magistrates in Empire: Convicts, Slaves, and the Remaking of Legal Pluralism in the British Empire*, in *LEGAL PLURALISM AND EMPIRES 1500-1850*, at 173-198 (Lauren A. Benton & Richard J. Ross eds., 2013). For studies of trans-regional career movements that give short shrift to the circulation of legal personnel, see *COLONIAL LIVES ACROSS THE BRITISH EMPIRE: IMPERIAL CAREERING IN THE LONG NINETEENTH CENTURY* (David Lambert & Alan Lester eds., 2010). On "accountability and tenure" of British colonial judges, see JOHN McLAREN, *DEWIGGED, BOTHERED, AND BEWILDERED: BRITISH COLONIAL JUDGES ON TRIAL, 1800-1900*, at 5. (2011).

31. On the circulation of knowledge about martial law in the nineteenth century empires, see RANDE KOSTAL, *A JURISPRUDENCE OF POWER: VICTORIAN EMPIRE AND THE RULE OF LAW* (2005). On martial law in penal colonies, see BENTON, *A SEARCH*, *supra* note 15, at 217-221.

32. BENTON, *LAW AND COLONIAL CULTURES*, *supra* note 15, at 59-66.

33. See, e.g., Lisa Ford, *The Pig and the Peace: Transposing Order in Early Sydney*, in *LAW AND POLITICS AND BRITISH COLONIAL THOUGHT: TRANSPOSITIONS OF EMPIRE 169-196* (Shaunnagh Dorsett & Ian Hunter eds., 2010).

34. See Karen Barkey, *In Different Times: Scheduling and Social Control in the Ottoman Empire, 1550-1650*, 38 *COMP. STUDIES SOC. HIST.* 460 (1993).

could emerge from the movements of legal personnel without direction from the metropole. Proposals for strengthening the magistracy of the British Empire in the early nineteenth century took shape in similar ways in response to widely distributed colonial conflicts.³⁵ Elaborate systems for the sale of colonial posts contributed to a global “institutional revolution” in the long eighteenth century.³⁶

Networks and circuits do present some limitations to an understanding of law in empire. Most imperial networks were ragged formations with an uncertain institutional grounding. For example, we tend to think of financial networks as very fluid, with monetization of markets flowing like water to fill every available crevice. But early modern financial circuits in European empires were highly asymmetrical, and the uneven institutional landscape for credit slowed the accumulation of capital in some sectors while creating odd pockets of opportunity in other sectors.³⁷ The financial revolution of late-seventeenth-century England stimulated transfers of credit and even turned investors towards the empire, but the changes left capital and its instruments heavily concentrated in England.³⁸

If networks rarely mapped neatly onto legal institutions, it is also the case that not all geographically distributed phenomena constituted networks. One of the enduring puzzles of law in colonial America is the faint imprint of the influx of convicts and servants. Although tens of thousands of convicts were transported to Maryland and Virginia in the seventeenth and eighteenth centuries, they appear only rarely in the colonies’ court records, where for decades they seem to have been legally indistinguishable from servants and other settlers.³⁹ Historians sometimes have been tempted to confuse circulating discourse with evidence of politically and legally

35. See Benton & Ford, *supra* note 30.

36. See DOUGLAS W. ALLEN, *THE INSTITUTIONAL REVOLUTION: MEASUREMENT AND THE ECONOMIC EMERGENCE OF THE MODERN WORLD* (2011).

37. See generally JOSEPH C. MILLER, *THE PROBLEM OF SLAVERY AS HISTORY: A GLOBAL APPROACH* (2012) (suggesting that such financial asymmetry was responsible for generated large-scale slaving by undercapitalized Atlantic merchants).

38. See CARL WENNERLIND, *CASUALTIES OF CREDIT: THE ENGLISH FINANCIAL REVOLUTION, 1620-1720*, at 197-234 (2011); Benton, *supra* note 27, at 282.

39. The vast majority were transported in the eighteenth century. A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775*, at 26-27 (1987). On convicts’ shifting legal status, see Alan Atkinson, *The Free-Born Englishman Transported: Convict Rights as a Measure of Eighteenth-Century Empire*, 144 *PAST & PRESENT* 88, 89-90 (1998). In the seventeenth century, banishment from England and Ireland to the Caribbean, and in the aftermath of rebellions on St. Helena and other nodes of the East India Company generated a circuit of sorts, but perhaps one without the regularity of the Dutch circuits that Ward observed, and without the coordination from the center that occurred across European empires in the late eighteenth century. See Lauren Benton and Devin Jacob, *Imperial Circuits of Law: Dutch East India Company Sovereignty*, 2 *TRANSNAT’L LEGAL THEORY* 119-25 (2011); Benton, *A SEARCH*, *supra* note 15, at 162-221.

significant networks. Characterizations of Atlantic rebellions as epiphenomena of anti-authoritarian networks—mostly imagined based on revolutionary utterances (as reported by elites) and synchronic revolts—make this mistake.⁴⁰ Even where there is clearer evidence for cross-colonial movements, the correlation of these movements with colonial legal change can be murky. For example, studying impressments can give us a sense of the different legal character of the Caribbean and the North Atlantic but only along one dimension having to do with naval manpower and not even with regard to such related maritime legal processes as the functioning of prize courts or the local criminal law's handling of sailors in ports. Finally, a focus on the imperial dimensions of some circuits may obscure their full reach and significance—many formative networks spanned multiple empires, such as the webs of producers, merchants, and consumers of the eighteenth-century wine trade; official networks undergirding cross-imperial Caribbean campaigns to contain slave revolts; or the cross-polity relations that structured the African slave trade.⁴¹ Understanding colonial legal diversity through the study of networks and their legal impact is a delicate project, one that requires the complement of studies from other vantage points.

III. EMPIRE FROM THE CENTER

Just as questions about the contrast between law in England and the colonies has influenced the historiography of North American colonial law, an implicit comparison of the center and periphery has shaped histories of colonial projects as conceived and managed from the metropole. It is easy to imagine legal diversity resulting primarily from the gap between metropolitan designs and colonial execution. Yet administrative and jurisprudential blueprints were often as messy as colonial realities. J.H. Elliott has taught us to see Spain as a “composite monarchy,” a political frame within which crown legal authority had to contend with multiple rivals, beginning with the local laws, or *fueros*, of its constituent parts.⁴² The legal relation between England and Scotland, Ireland, and Wales developed within a field

40. John Donoghue follows Peter Linebaugh and Marcus Rediker's *THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC* (2000) in imagining revolutionary networks behind Atlantic revolts and anti-authoritarian sentiment. See JOHN DONOGHUE, *FIRE UNDER THE ASHES: AN ATLANTIC HISTORY OF THE ENGLISH REVOLUTION* (2013). For a critique of this approach, see David Armitage, *The Red Atlantic*, 29 *REVS. AM. HIST.* 479 (2001).

41. See, e.g., DAVID HANCOCK, *OCEANS OF WINE: MADEIRA AND THE EMERGENCE OF AMERICAN TRADE AND TASTE* (2009); Jeppe Mulich, *Microregionalism and Intercolonial Relations: The Case of the Danish West Indies, 1730-1830*, 8 *J. GLOBAL HIST.* 72 (2013).

42. See J.H. Elliott, *A Europe of Composite Monarchies*, 137 *PAST & PRESENT* 48 (1992).

of tension between visions of legal integration and the persistence of a “multiple kingdom” composed of separate legal systems. Within the hearts of empires, jurisdictional complexity also prevailed. In England, the unifying promise of the common law, “the most centralized legal system of its day,” coexisted with a checkerboard of legal communities that included corporate bodies, chartered towns, the northern Marches, and expansive estates under the power of aristocrats.⁴³ At the core of Catholic and Islamic empires, jurisdictional tensions between religious and secular or crown law also infused legal politics.⁴⁴ This legal landscape was an inhospitable environment for centralizing ambitions and an empirical challenge to theories of indivisible sovereignty.

In this context, the extent of legal authority of government over distant territories remained an open question. For the English empire, historians have remarked on the ambiguities of Sir Edward Coke’s opinion in *Calvin’s Case*.⁴⁵ The 1608 case was contrived to prompt a ruling about whether subjects of James VI in Scotland gained the status of English subjects when he took the throne as James I of England.⁴⁶ Coke found that a Scotsman could not sue in the English common law courts over land located in England, but his opinion did not fully resolve the question whether the English common law might extend beyond England.⁴⁷ While seeking to solidify the notion of an English common law for England, Coke found it necessary to define English legal authority in Ireland, and he might also have had the young Virginia colony in mind.⁴⁸ The result was Coke’s recognition that ties of subjecthood extended protections of property, in effect creating “a state of continuing jurisdictional accountability to the Crown” wherever subjects went.⁴⁹ This affirmation of the portability of subjecthood opened the possibility for colonists to claim that the protections of the common law extended to them.⁵⁰

Calvin’s Case illustrates a pattern of complexity that prevailed in other imperial centers. Hierarchies of legal authority were only marginally

43. HIRST, *supra* note 14, at 137; Philip Stern, *Bundles of Hyphens: Corporations as Legal Communities in the Early Modern British Empire*, in LEGAL PLURALISM AND EMPIRES, *supra* note 16, at 21-48.

44. See BENTON, LAW AND COLONIAL CULTURES, *supra* note 15, at 80-126.

45. See generally *Calvin v. Smith*, 77 Eng. Rep. 277 (K.B. 1608).

46. CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865, at 82-9 (2010).

47. *Id.*

48. *Id.*

49. HIRST, *supra* note 14, at 139.

50. See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 32 L. & HIST. REV. 439 (2003).

more transparent in the more centralized Spanish Empire, where officials never carefully proscribed such fundamental aspects of legal administration as the relationship between governors and *audiencias*, or high courts, or the legal status of Indians. Across and within the viceroyalties of New Spain and Peru, legal administration generated new variants on the familiar jurisdictional complexity of the peninsular legal order.⁵¹

The administration of law in early modern empires at any given moment resembled a cluttered field, or an asymmetrical matrix, rather than a scaffold or ordered plan. Recent studies have probed several ways to examine such complex metropolitan legal cultures. Several trends have pointed to insights especially relevant to the study of legal diversity in colonial America.

One significant and relatively recent project has been to draw attention to the degree to which Europeans drew on Roman legal concepts and terms in effecting claims to new territories. Mechanisms for acquiring private property in Roman law were used in public law contexts to establish claims by signs of occupation or possession.⁵² Instead of investigating English methods of colonizing as distinctive or assuming the centrality of the common law in English colonial projects, this approach recognizes the availability and influence of a broad legal repertoire, one that included the writing of charters and proprietary grants as claims-making instruments intelligible in a civil law context shared across European states and by their agents.⁵³

This perspective is valuable not just for debunking “national” stereotypes of styles of claims-making but also for revealing that from their inception colonial ventures were legal projects. There was no sharp break between the flexible legal arguments invoked to stake claims and the constitution of local authority. Establishing jurisdiction, after all, figured in the symbolic vocabulary of occupation or possession, and charters and related instruments “expressed both sovereign prerogative *and* the designs that projectors created.”⁵⁴

51. On legal diversity in one region reflecting the differing relation of governors to *audiencias*, see JEREMY MUMFORD, *VERTICAL EMPIRE: THE GENERAL RESETTLEMENT OF INDIANS IN THE COLONIAL ANDES* 5 (2012).

52. See Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 *LAW & HIST. REV.* 1 (2010); KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576-1640* (2006).

53. See Benton & Straumann, *supra* note 52; MACMILLAN, *supra* note 52.

54. TOMLINS, *supra* note 46, at 99; see also BENTON, *A SEARCH*, *supra* note 15, at 104-161; Benton & Straumann, *supra* note 52, at 19 (describing the exercise of jurisdiction as evidence of claims).

Creative applications of Roman law also indicated new possibilities for strengthening crown legal authority in colonies. References to Roman concepts was important in not only justifying claims to the greater European community but also in allowing royal power to be asserted using a more extensive range of sovereign and prerogative rights. For Spain, conquest and colonization opened the opportunity to assert greater power over the church and to contain ecclesiastical jurisdiction.⁵⁵ For the English crown, the “limited efficacy of the English common law” beyond England created the conditions for the king-in-council, “ruling through royal prerogatives and Roman laws of liberty and natural equity,” to advance more effective claims to be the sole vessel of sovereignty and legal authority in the empire.⁵⁶ Spanish officials, too, drew selectively from sources as diverse as statutes, the *Siete Partidas*, equity, custom, and Roman law, not to mention an extended tolerance for continuities in Indian law.⁵⁷ The crown often regarded legal diversity as an asset. Spanish officials recognized that legal complexity in New Spain and Peru kept subjects connected to the center as they searched for support against rivals.⁵⁸ In Jamaica, the English crown actively resisted allowing the colony to adopt the common law wholesale because it would limit the sovereign and prerogative rights of the king.⁵⁹

These points help to show that legal diversity was not necessarily a result of deviations from or studied ignorance about directions from the center. All empires relied on the delegation of legal authority, jurisdictional complexity, and the portability of subjecthood, and these phenomena by their nature spawned legal diversification. In writing the legal history of English colonies in America, we need not search for the moment when a colonizing project that was pan-European in origins and language turned into an English law of colonizing that centered on land and opened the door to common-law influences.⁶⁰ Legal eclecticism, together with the resulting legal diversity, was implicit in the structures and practices of overseas enterprise.

55. BENTON, *LAW AND COLONIAL CULTURES*, *supra* note 15, at 81-82.

56. See MACMILLAN, *supra* note 52, at 7.

57. CHRISTOPHER P. ALBI, *Derecho Indiano vs. the Bourbon Reforms: The Legal Philosophy of Francisco Xavier de Gamboa*, in *ENLIGHTENED REFORM IN SOUTHERN EUROPE AND ITS ATLANTIC COLONIES, c. 1750-1830*, at 235 (Gabriel Paquette ed., 2009); see generally BRIAN P. OWENSBY, *EMPIRE OF LAW AND INDIAN JUSTICE IN COLONIAL MEXICO* (2008).

58. See John Leddy Phelan, *Authority and Flexibility in the Spanish Imperial Bureaucracy*, 5 *ADMIN. SCI. Q.* 1, 47-65 (1960); see also ALBI, *supra* note 57, at 229-235; BENTON, *LAW AND COLONIAL CULTURE*, *supra* note 15, at 83.

59. Letter from Lord Vaughan to The Council for Trade and Plantations (Jan. 28, 1676) (on file with the National Archives of the United Kingdom).

60. Tomlins makes this distinction between the law of “colonizing” and the law of “planting,” though elsewhere he recognizes that there was much overlap. See TOMLINS, *supra* note 46, at 133.

At the same time, metropolitan authorities often viewed legal variation as a problem to be managed from the center. A further thrust of recent historiography seeks to describe the mechanisms designed to contain diversity. Ken MacMillan extends backward to the earliest English colonizing ventures a constitutional project of an emerging English state to erect a unifying framework for colonial law.⁶¹ Such a project becomes visible when historians adopt a sufficiently flexible understanding of constitutionalism and its creation. A set of practices managed from the center worked both to establish the objective, however elusive, of colonial oversight and to draw the margins of permissible legal variation. As MacMillan's examination of registers of the Privy Council shows, crown interventions into imperial affairs in this early period of English colonization were prompted largely by concerns related to the exercise of sovereign, prerogative, and imperial rights and responsibilities.⁶² The exercise of authority over English activities in the Atlantic also was predicated on a relationship of reciprocity between the king and his subjects, wherein the allegiance of English subjects to the crown ensured their continued protection of their liberties abroad.⁶³ Yet imperial policy in this period was neither linear nor consistent, as the king and his Privy Councilors sought to strike the delicate balance between establishing central oversight over issues important to the crown and the practical necessity of relinquishing peripheral discretion to those involved in the day-to-day business of colonization.⁶⁴ The evolving set of practices of the crown placed limits on colonial autonomy from the outset and was integral in shaping what MacMillan characterizes as a "definable, enduring, and bifurcated" Atlantic imperial constitution that balanced the rights of English subjects and the needs of the state.⁶⁵

Clearinghouses for metropolitan oversight also came in the form of the councils appointed to oversee the business of England's foreign plantations and operating under changing names and structures. The crown initially conceived the administration of colonial affairs by councils or committees as a temporary solution to the overflow of colonial business from the Privy Council, but the arrangement became a permanent fixture of colonial administration by the late seventeenth century.⁶⁶ Though perhaps best known for their regulation of imperial commerce and enforcement of

61. *See generally* KEN MACMILLAN, *THE ATLANTIC IMPERIAL CONSTITUTION: CENTER AND PERIPHERY IN THE ENGLISH ATLANTIC WORLD* (2011).

62. *Id.* at 4-8.

63. *Id.* at 82, 114.

64. *Id.* at 6-8.

65. *Id.* at 170.

66. *Id.* at 7-8, 145-146.

trade laws, such bodies did much more than regulate commerce. To ensure that colonial laws were not repugnant to the laws of England, they drafted patents and commissions, gathered information about the administration of government and justice in the colonies, wrote and amended governors' instructions, and reviewed colonial legislation.⁶⁷ Although no regular or systematic review of colonial legislation was made by the Privy Council or an administrative committee for the plantations before the Restoration in 1660, by the late seventeenth century the power exercised by metropolitan officials to review, and either to amend or to annul, colonial statutes formed the backbone of the crown's efforts to manage legal variation in the colonies.⁶⁸ Regulatory concerns of the crown regarding colonial statutes ranged from those involving the empire at large—such as suppressing piracy and regulating the Atlantic slave trade—to those affecting only a few colonists on one island in the Caribbean.⁶⁹

A central insight derived from such findings is that the constitution of the early English "empire" contemplated diversity while seeking to manage it. A key element of this constitutionalism was the elaboration of a doctrine of repugnance permitting all colonial legal orders latitude up to the point of adopting laws that were held to be repugnant within English law. Although the doctrine of repugnance was consistent throughout the centuries of English colonizing as well as commanding in some times and places, we cannot separate its influence from the institutional practices that in their operation refined the meaning of repugnance (and therefore the foundational content of English law) and that cast a wide net for laws and practices to place under review. As Mary Sarah Bilder notes in reporting the strategic misrep-

67. The first council commissioned by the crown with responsibilities specifically related to the consideration of colonial affairs was created in 1615, when the king commissioned several Privy Councilors to consider pleas for transportation to overseas settlement. *Id.* at 145; *see also*, Charles M. Andrews, *British Committees, Commissions and Councils of Trade and Plantations 1622-1675*, in 26 ADMINISTRATIVE AND POLITICAL HISTORY 9-10 (Johns Hopkins Univ. Studies ed., 1908).

68. ELMER BEECHER RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING-IN-COUNCIL* 16 (1915); Kathryn Walker, *Imperial Administrative Innovations and Adaptions: Poyning's Law in Jamaica* (Dec. 2013) (manuscript presented at the Atlantic History Workshop, New York University, Dec. 2013) (unpublished manuscript) (on file with author and Chicago-Kent Law Review).

69. When the Lords of Trade considered a set of laws transmitted from Jamaica in 1676, their concerns over various statutes included those posing a direct threat to the royal prerogative—such as language reserving penalties to the public use of the island rather than to the king directly—to concerns over the fees allotted for the marshall's fee for facilitating the executions of persons. A transcript of the minutes notes that "[i]n the Act for regulating the fees of the several offices, the Lords order that Sir Thomas Lynch be spoken to concerning the Marshall's fee . . . for executing persons which seems to be too great, but he informed their Lordships that the Marshall was at great charges in hiring an executioner and burying the person so 'the fee agreed.'" GREAT BRITAIN PUBLIC RECORD OFFICE, *CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES, 1675-1676*, at p. 393 (W. Noel Sainsbury ed., 1893), available at <http://books.google.com/books?id=7xIFAAAAYAAJ&lpg>.

resentations of Rhode Island colonists when writing to England about the legislation of the colony, officials on both sides of the Atlantic were making judgments about repugnance and the latitude for legal variation.⁷⁰ We must look to the legal politics of both the center and the colonies to understand how and why particular constellations of law were coming into existence.

IV. LEGAL CONVERGENCE IN COLONIAL AMERICA

We are now within sight of the complex context for Nelson's contributions. Before examining his work in more detail and extrapolating its method, we need to comment on one additional possibility for investigating legal diversity—one that Nelson observes with mild skepticism. Some historians have sought to explain legal diversity in English colonies by reference to the characteristics and legal heritage of migrant streams.⁷¹ Nelson recognizes these influences—for example, acknowledging the importance of Puritan reliance on scripture in the early development of Massachusetts law.⁷² Yet he does not give exclusive weight to migrants' origins in explaining legal diversity.⁷³ Instead, he folds this factor into a bundle of formative conditions and even portrays it as subordinate in importance to local politics and, especially, elite strategies. And although noting that colonists were responding actively to pressures from London, Nelson does not rest his account of legal convergence entirely on increasingly meddlesome imperial policy and colonists' strategies in response.⁷⁴

Instead, in Nelson's account, convergence begins early, even as varied legal systems take shape.⁷⁵ In addition to the argument that different local social and political conditions produced diversity, Nelson notes that in broad structural terms, "the common social and economic realities that colonists faced" drove law along parallel paths before 1660.⁷⁶ Those paths led to the construction of the rule of law, in a development that drew from, and in turn reinforced, elements of a shared English legal culture. As Nelson puts it, convergence was grounded in a "shared commitment to govern under the rule of law and to extract governing law from their English legal

70. MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 51-73 (2004).

71. DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 6, 783; *see also* TOMLINS, *supra* note 46, at 215-30.

72. NELSON, *CHESAPEAKE AND NEW ENGLAND*, *supra* note 2, at 53.

73. *Id.* at 125-131.

74. *Id.* at 7.

75. *Id.* at 125.

76. NELSON, *MIDDLE COLONIES*, *supra* note 2, at 7.

heritage.”⁷⁷ The common law entered at different moments and by different means but gradually became key to every colony’s legal system.

Parts of this argument are more explicit than others. Nelson credits John Phillip Reid with the insight that colonists sought stability through the rule of law as a solution to diverse problems of order.⁷⁸ In Massachusetts, the impulse to contain disorder derived from the perception of the arbitrary power of magistrates, a sentiment that again would play a central role in legal reform in the British Empire in the early nineteenth century.⁷⁹ In Virginia, property transactions established a craving for stability and a code of law.⁸⁰ Nelson gives credit to Pennsylvania’s Quaker elite for realizing the value of legitimate legal institutions to the colony’s prospects.⁸¹ Elsewhere, factional politics stymied rule-of-law colonial projects. But even in the most chaotic settings, Nelson glimpses the potential for stability and suggests the centrality of the courts in cultivating confidence in authority, or at the very least enhancing recognition of local government’s legitimate jurisdiction.⁸²

If disorder in Nelson’s story gives rise to visions of order, his narrative is less clear in explaining why specifically the common law featured so prominently in colonists’ solutions. Here Nelson implicitly credits the colonists’ common legal culture.⁸³ To be sure, Nelson’s legal culture is more repertoire than script; even in places where it was invoked inconsistently, “English common law was present in the background.”⁸⁴ Variations of such basic practices as the composition of juries and the use of writs prevailed, for example, in the smaller New England colonies even as their legal systems drew closer to that of Massachusetts.⁸⁵ The element of legal culture shared by these colonies was the pursuit “of some form of law to rein in judicial discretion.”⁸⁶ Similarly, in analyzing the diverse legal puzzles of the middle colonies and the Carolinas, Nelson proposes a patterned dynamic—the tension between top-down imposition of the common law and bottom-up attempts to preserve local norms—as both productive and reflective

77. *Id.* at 129.

78. *See id.* (referencing JOHN P. REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE 17TH AND 18TH CENTURIES* (2004)).

79. *Id.* at 9-10, 127-128.

80. NELSON, *MIDDLE COLONIES*, *supra* note 2, at 78.

81. *Id.* at 99-101.

82. *E.g.*, NELSON, *CHESAPEAKE AND NEW ENGLAND*, *supra* note 2, at 111-118.

83. *Id.* at 130.

84. *Id.* at 90.

85. NELSON, *CHESAPEAKE AND NEW ENGLAND*, *supra* note 2, at 91-95.

86. *Id.* at 98.

of a shared perspective on law.⁸⁷ Neither elites managing the judiciary nor colonists seeking protections in juries could be said to have a more or less authentic or inherently persuasive take on the possibilities of the common law.

In Nelson's analysis, legal culture informed legal strategy, but the endorsement of the common law derived from a bargain struck when colonists at different places in the colonial hierarchy perceived that "it provided a service for which people were prepared to pay."⁸⁸ Without explicitly emphasizing legal culture as an element of the emergence, by 1730, of a colonial legal order in which the common law was "in force everywhere," Nelson describes participation in the legal arena as conditioned by the combination of the exigencies of settlement and the search for order.⁸⁹ Without citing Reid in this context, Nelson might be building on the perspective elaborated in Reid's *Law for the Elephant*. In examining the many ways that emigrants on the overland trail in the nineteenth century drew on their knowledge of the law to guide their interactions, Reid describes his topic as "a behaviorism based on law," or patterned actions founded on "legal habit" and "the strength of custom."⁹⁰ Just as Reid's emigrants relied on practical knowledge of the law in guiding property transactions and resolving disputes, Nelson's colonists use the law they knew strategically—sometimes inconsistently, and often in doctrinally plural or even inconsistent ways, but always with reference to familiar legal idioms.⁹¹ Nelson does not point to shared culture as the bedrock of American law but instead points to the power of a plastic legal culture to provide the material for a family of common-law adaptations. Like colonists' growing confidence in the rule of law, their cultural perspectives and expectations emerged as they applied their knowledge about law to legal politics: slowly, one conflict at a time.

V. CONCLUSION

Our triptych shows three facets of the law of empire. In the first, networks carry legal processes across colonies while setting in motion locally distinctive adaptations. In the second, political forces from the center shape legal policies while also producing the ideological foundations and political

87. NELSON, MIDDLE COLONIES, *supra* note 2, at 8.

88. *Id.* at 44.

89. *Id.* at 146.

90. JOHN P. REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL 11, 19 (1980). *See generally* JOHN P. REID, POLICING THE ELEPHANT: CRIME, PUNISHMENT, AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1997).

91. REID, LAW FOR THE ELEPHANT, *supra* note 90, at 183-84, 335.

conditions for colonial legal diversity. In the third, colonial legal configurations reflect varied local conditions, with similar problems of order, property, and legitimacy urging parallel legal solutions.

In the first two volumes of *The Common Law in Colonial America*, Nelson has given us a clear image of the third panel of our triptych. Subsequent volumes promise to sharpen this picture by delineating colonial responses to policies from the center. The portrait of legal diversity and convergence belongs to a broader project of assessing an open-ended politics surrounding the emerging imperial constitution. While still looking forward to the late-eighteenth-century rupture and American constitutionalism, Nelson's project sketches a theory of legal convergence that roots rule-of-law consensus and other elements of American legal culture in colonial conflicts that took place well before the revolutionary period.

Contemplating this picture, historians work to refine understandings of cross-colonial movements and continue to uncover clumsy but significant mechanisms of imperial legal oversight. As increasingly intricate images of colonial and imperial law emerge from these efforts, scholars will do well to refer to Nelson's volumes on the common law in America and to compare, as he does, colonies to one another rather than to an idealized or imagined metropolitan law. The three-part method devised by Nelson and other gifted legal historians will integrate fully the history of colonial American law into a global and comparative history of empire and law.