In the past several decades, few fields of historical study have seen as much growth as the history of American law. Reflecting a wealth of new material in this field, A Companion to American Legal History presents a comprehensive analysis of the most recent scholarship on legal history from the colonial era through the late twentieth century.

Featuring contributions from the finest established and emerging legal scholars, essays treat major time periods and themes from the perspective of race, gender, family, and labor, through to economics, jurisprudence, and crime. The essays represent an authoritative overview of leading historical interpretations as they address essential legal questions and point to future interpretive research directions to understand the complexities of American law and its legal institutions.

A Companion to American Legal History offers illuminating insights into the evolution of the laws that have shaped—and been shaped by—American society from its origins until the present day.
A Companion to American Legal History
WILEY-BLACKWELL COMPANIONS TO AMERICAN HISTORY

This series provides essential and authoritative overviews of the scholarship that has shaped our present understanding of the American past. Edited by eminent historians, each volume tackles one of the major periods or themes of American history, with individual topics authored by key scholars who have spent considerable time in research on the questions and controversies that have sparked debate in their field of interest. The volumes are accessible for the non-specialist, while also engaging scholars seeking a reference to the historiography or future concerns.

Published:
A Companion to the American Revolution
Edited by Jack P. Greene and J. R. Pole
A Companion to 19th-Century America
Edited by William L. Barney
A Companion to the American South
Edited by John B. Boles
A Companion to American Women’s History
Edited by Nancy Hewitt
A Companion to American Indian History
Edited by Philip J. Deloria and Neal Salisbury
A Companion to Post-1945 America
Edited by Jean-Christophe Agnew and Roy Rosenzweig
A Companion to the Vietnam War
Edited by Marilyn Young and Robert Buzzanco
A Companion to Colonial America
Edited by Daniel Vickers
A Companion to American Foreign Relations
Edited by Robert Schulzinger
A Companion to 20th-Century America
Edited by Stephen J. Whitfield
A Companion to the American West
Edited by William Deverell
A Companion to American Technology
Edited by Carroll Pursell
A Companion to African-American History
Edited by Alton Hornsby
A Companion to American Immigration
Edited by Reed Ueda
A Companion to American Cultural History
Edited by Karen Halttunen
A Companion to American History
Edited by William Deverell and David Igler
A Companion to American Military History
Edited by James Bradford
A Companion to Los Angeles
Edited by William Deverell and Greg Hise
A Companion to American Environmental History
Edited by Douglas Cazaux Sackman
A Companion to Benjamin Franklin
Edited by David Waldstreicher
A Companion to American Legal History
Edited by Sally E. Hadden and Alfred L. Brophy

In preparation:
A Companion to American Urban History
Edited by David Quigley
A Companion to the History of American Science
Edited by Mark Largent
A Companion to Supreme Court History (2 volumes)
Edited by John Vile
A Companion to American Sports History
Edited by Steven Riess

PRESIDENTIAL COMPANIONS

Published:
A Companion to Franklin D. Roosevelt
Edited by William Pederson
A Companion to Richard M. Nixon
Edited by Melvin Small
A Companion to Theodore Roosevelt
Edited by Serge Ricard
A Companion to Thomas Jefferson
Edited by Francis D. Cogliano

In preparation:
A Companion to the Antebellum Presidents, 1837–61
Edited by Joel Silbey
A Companion to the Reconstruction Presidents, 1865–81
Edited by Edward Frantz
A Companion to Gerald R. Ford & Jimmy Carter
Edited by V. Scott Kaufman
A Companion to Warren G. Harding, Calvin Coolidge, and Herbert Hoover
Edited by Katherine A. S. Sibley
A Companion to John F. Kennedy
Edited by Marc Silverstone

A Companion to Lyndon B. Johnson
Edited by Mitchell Lerner
A Companion to George Washington
Edited by Edward G. Lengel
A Companion to Andrew Jackson
Edited by Sean Patrick Adams
A Companion to Woodrow Wilson
Edited by Ross A. Kennedy
A Companion to John Adams and John Quincy Adams
Edited by David Waldstreicher

A Companion to James Madison and James Monroe
Edited by Stuart Leibiger
A Companion to Harry S. Truman
Edited by Daniel S. Margolies
A Companion to Abraham Lincoln
Edited by Michael Green
A Companion to Dwight D. Eisenhower
Edited by Chester J. Pach
A Companion to Ronald Reagan
Edited by Andrew L. Johns

A Companion to Lyndon B. Johnson
Edited by Mitchell Lerner
A Companion to George Washington
Edited by Edward G. Lengel
A Companion to Andrew Jackson
Edited by Sean Patrick Adams
A Companion to Woodrow Wilson
Edited by Ross A. Kennedy
A Companion to John Adams and John Quincy Adams
Edited by David Waldstreicher

A Companion to James Madison and James Monroe
Edited by Stuart Leibiger
A Companion to Harry S. Truman
Edited by Daniel S. Margolies
A Companion to Abraham Lincoln
Edited by Michael Green
A Companion to Dwight D. Eisenhower
Edited by Chester J. Pach
A Companion to Ronald Reagan
Edited by Andrew L. Johns
For our mentors

Bernard Bailyn, Charles Donahue,
William Gienapp, and Morton Horwitz
Contents

Notes on Contributors x

Introduction 1
  Sally E. Hadden and Alfred L. Brophy

Part I  Chronological Overviews 5
  1  Reconsidering the Seventeenth Century: Legal History in the Americas 7
     Elizabeth Dale
  2  What’s Done and Undone: Colonial American Legal History, 1700–1775 26
     Sally E. Hadden
  3  1775–1815 46
     Ellen Holmes Pearson
  4  The Antebellum Era Through Civil War 67
     Alfred L. Brophy
  5  Beyond Classical Legal Thought: Law and Governance in Postbellum America, 1865–1920 86
     Roman J. Hoyos
  6  American Legal History, 1920–1970 105
     Christopher W. Schmidt

Part II  Individuals and Groups 125
  7  Native Americans 127
     Christian McMillen
## Part III  Subject Areas

14 Law and the Economy of Early America: Markets, Institutions of Exchange, and Labor

*Christine Desan*

15 Law and the Economy in the United States, 1820–2000

*Harwell Wells*

16 Law and Labor in the Nineteenth and Twentieth Centuries

*Deborah Dinner*

17 Siting the Legal History of Poverty: Below, Above, and Amidst

*Felicia Kornbluh and Karen Tani*

18 Taxes

*Robin L. Einhorn*

19 Law and the Administrative State

*Joanna L. Grisinger*

20 Law and Religion

*Steven K. Green*

21 Legal History and the Military

*Elizabeth L. Hillman*

22 Criminal Law and Justice in America

*Elizabeth Dale*

23 Intellectual Property

*Steven Wilf*

## Part IV  Legal Thought

24 Law and Literature

*Jeannine Marie DeLombard*
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Author(s)</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
<td>Legal Thought from Blackstone to Kent and Story</td>
<td>Steven J. Macias</td>
<td>484</td>
</tr>
<tr>
<td>26</td>
<td>American Jurisprudence in the Nineteenth and Early Twentieth Centuries</td>
<td>James D. Schmidt</td>
<td>506</td>
</tr>
<tr>
<td>27</td>
<td>Critical Legal Studies</td>
<td>John Henry Schlegel</td>
<td>524</td>
</tr>
<tr>
<td>28</td>
<td>The International Context: An Imperial Perspective on American Legal History</td>
<td>Clara Altman</td>
<td>543</td>
</tr>
<tr>
<td></td>
<td>Index</td>
<td></td>
<td>562</td>
</tr>
</tbody>
</table>
Notes on Contributors

Clara Altman is a doctoral candidate in American history at Brandeis University and a National Fellow at the Miller Center of Public Affairs at the University of Virginia. Her research focuses on law, imperialism, and international affairs in the twentieth century.

Felice Batlan is Associate Professor of Law at IIT/Chicago-Kent College of Law. She is a leading scholar on legal history and gender and is the author of the forthcoming book Engendering Legal Aid: Lawyers, Social Workers, and the Poor, 1863–1960.

Alfred L. Brophy is the Judge John J. Parker Distinguished Professor of Law at the University of North Carolina at Chapel Hill. He is the author of Reconstructing the Dreamland: The Tulsa Riot of 1921 (Oxford University Press, 2002) and Reparations Pro and Con (Oxford University Press, 2006), the lead co-author of Integrating Spaces: Property Law and Race (Aspen, 2011), and co-editor with Daniel Hamilton of Transformations in American Legal History: Essays in Honor of Morton J. Horwitz (Harvard, 2009 and 2010).

James Campbell is Lecturer in American History at the University of Leicester. He is the author of Slavery on Trial: Race, Class, and Criminal Justice in Antebellum Richmond, Virginia (University Press of Florida, 2007) and Crime and Punishment in African American History (Palgrave, 2012).

Elizabeth Dale is Professor of History at the University of Florida, where she is also an affiliate at Levin College of Law. She is the author of several works of legal history, including A History of Criminal Justice In America, 1789–1939 (Cambridge, 2011) and Debating—and Creating—Authority: The Failure of a Constitutional Ideal, Massachusetts Bay 1629–1649 (Ashgate, 2001).

Thomas J. Davis is Professor of History at Arizona State University,

**Jeannine Marie DeLombard** is Associate Professor of English at the University of Toronto. She is the author of *In the Shadow of the Gallows: Race, Crime, and American Civic Identity* (University of Pennsylvania Press, 2012) and *Slavery on Trial: Law, Print, and Abolitionism* (University of North Carolina Press, 2007) and a contributor to *Early African American Print Culture* (University of Pennsylvania Press, 2012), as well as the forthcoming Oxford History of the Novel in English (Vol. 6: American Novels, 1870–1940), the *New Cambridge Companion to Herman Melville*, and the *Oxford Handbook of the African American Slave Narrative*.

**Christine Desan** is a Professor of Law at Harvard Law School. She is the co-director of Harvard University’s Program on Capitalism, and the author of a forthcoming book on money as a legal institution called *Making Money: Coin, Credit, and the Coming of Capitalism*.

**Deborah Dinner** is Associate Professor of Law at Washington University in St. Louis. She is the author of articles examining the legal history of second-wave feminism and its opponents and is working on a book manuscript based on her dissertation, *Pregnancy at Work: Sex Equality, Reproductive Liberty, and the Workplace, 1964–1993*.

**Robin L. Einhorn** is Professor of History at the University of California Berkeley. She is the author of *Property Rules: Political Economy in Chicago, 1833–1872* (Chicago, 1991), and *American Taxation, American Slavery* (Chicago, 2006), and also a contributor to *The New Fiscal Sociology: Taxation in Comparative and Historical Perspective* (Cambridge, 2009).

**Steven K. Green** is the Fred H. Paulus Professor of Law and Adjunct Professor of History at Willamette University, where he serves as the director of the interdisciplinary Center for Religion, Law and Democracy. He is the author of *The Second Disestablishment: Church and State in Nineteenth-Century America* (Oxford University Press, 2010) and *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine* (Oxford University Press, 2012).

**Joanna L. Grisinger** is Senior Continuing Lecturer at the Center for Legal Studies at Northwestern University. She is the author of *The Unwieldy American State: Administrative Politics since the New Deal* (Cambridge University Press, 2012).
Sally E. Hadden is Associate Professor of History at Western Michigan University. She is the author of Slave Patrols: Law and Violence in Virginia and the Carolinas (Harvard University Press, 2001), a contributor to the Cambridge History of Law in America (Cambridge University Press, 2008), as well as co-editor with Patricia Minter of Signposts: New Directions in Southern Legal History (University of Georgia Press, 2013).


Roman J. Hoyos is Associate Professor of Law at Southwestern Law School in Los Angeles, California. He is currently completing a book on popular sovereignty entitled The Rise and Fall of Popular Sovereignty: Constitutional Conventions, Law, and Democracy in Nineteenth Century America.

Felicia Kornbluh is an Associate Professor of History and Director of the Women’s and Gender Studies Program at the University of Vermont. She is the author of The Battle for Welfare Rights (University of Pennsylvania Press, 2007) and of articles on law, poverty, disability, gender, and sexuality, and is writing on the blind constitutional theorist Jacobus tenBroek and on the place of claims for economic justice in twentieth-century U.S. social movements.

Steven J. Macias is Assistant Professor of Law at Southern Illinois University, Carbondale. His history dissertation, “The Creation of Legal Science in the Early Republic” (UC Berkeley, 2012), examined the intellectual motivations behind the movement to formalize legal studies in the early American republic.

Christian McMillen is Associate Professor of History at the University of Virginia. He is the author of Making Indian Law: The Hualapai Land Case and the Birth of Ethnology (Yale, 2007). He is the author of several articles on the history of medicine.

Ellen Holmes Pearson is Associate Professor of History at the University of North Carolina at Asheville. She is the author of Remaking Custom: Law and Identity in the Early American Republic (University of Virginia Press, 2011).

John Henry Schlegel has been a Professor of Law at the SUNY/Buffalo Law School for going on forty years. A participant in the Critical Legal Studies movement, of late he has been researching and writing about law and economy in the twentieth century.
Christopher W. Schmidt is an Assistant Professor at Chicago-Kent College of Law and a Faculty Fellow at the American Bar Foundation. He has published articles on various topics relating to the intersection of social mobilization and legal change in recent American history, and he is currently writing a book on the use of *Brown v. Board of Education* in debates over the Constitution and the courts.


Mark E. Steiner is Professor of Law at South Texas College of Law. He is the author of *An Honest Calling: The Law Practice of Abraham Lincoln* (Northern Illinois University Press, 2006).

David S. Tanenhaus is Professor of History and Chair of the UNLV History Department and the James E. Rogers Professor of History and Law at the William S. Boyd School of Law. He is the author of *Juvenile Justice in the Making* (Oxford University Press, 2004) and *The Constitutional Rights of Children: In re Gault and Juvenile Justice* (University Press of Kansas, 2011).

Karen Tani is Assistant Professor of Law at the University of California, Berkeley. She has published articles in the *Law and History Review* and the *Yale Law Journal* (forthcoming), and is currently working on a socio-legal history of public welfare administration between the New Deal and the Welfare Rights Movement.

Allison Brownell Tirres is an Assistant Professor at DePaul University College of Law. Her work has appeared in the *American Journal of Legal History*, the *Georgetown Immigration Law Journal*, and various edited collections.

Harwell Wells is Associate Professor of Law at the Temple University Beasley School of Law. A scholar of business associations and legal history, he holds a JD from the Vanderbilt University School of Law and a PhD in American history from the University of Virginia.

Steven Wilf is the Joel Barlow Professor of Law and Associate Dean for Research & Faculty Development at the University of Connecticut. He is the author of *The Law Before the Law* (Rowman & Littlefield, 2008) and *Law’s Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (Cambridge University Press, 2010), as well as numerous articles in legal history and intellectual property.
Introduction

Sally E. Hadden and Alfred L. Brophy

As early as the eighteenth century writers from Montesquieu to Joseph Priestley linked law to its intellectual, cultural, and economic context. This was followed in the nineteenth century by Oliver Wendell Holmes’ *The Common Law*, which famously averred that “The life of the law has not been logic; it has been experience.” Yet, those insights were too rarely utilized by historians for much of the twentieth century. The centrality of law to historical analysis – and vice versa – was submerged, with law only playing a supporting role in the development of more traditional historical fields; legal history languished while political, diplomatic, and intellectual history flourished. In the past several decades, however, few if any fields of historical study have seen as much growth as the history of law. Dominated in the 1950s and 1960s by works of hagiography that privileged biography or celebrated the Supreme Court, the history of law now spans an extraordinary range of topics from the early seventeenth century to the recent past.

Changes in the field have been great and reflect the broadening sense of people involved in the legal system, the subject matter studied, and the methods employed. The subjects of study have increased greatly. Where legal history was once mostly discussions about the opinions of great white judges, especially Supreme Court justices, the field now spans the complete spectrum of people involved in law – from traditional actors like judges, legislators, and lawyers, to humble litigants, defendants, even those protesting and seeking to reform law. Similarly, the subject matter has expanded far beyond judicial biography and doctrine as announced in appellate court opinions. For a time, historians of the law wrote only from an “internalist”
perspective; they studied how legal doctrine evolved without much regard for exogenous factors. Now legal history is dominated by studies of how legal institutions respond to, are influenced by, and influence surrounding society. The subjects are not just appellate judicial opinions and statutes, as they once were. Now legal historians study everything from the decisions of police and trial courts to administrative agencies’ adjudications, local ordinances, and social norms that have the effect of law. Economics and demography, as well as politics and ideology, are key variables that are correlated with law.

The methods have expanded, too. In the realm of cultural and intellectual history, legal historians are concerned with the ideas of people in the streets, with reformers, workers, the enslaved, and people in poverty as well as the more familiar judges, legislators, and lawyers. Social history also looms large. Such studies look to the effects of law on people, as well as how the common person’s ideas and motivations provided the impetus to change law.

Following broader trends in history and scholarship generally, legal history has recently expanded further, looking beyond the United States’ borders, to see how transnational politics, culture, and economics relate to domestic law and legal practices. This new perspective reduces the privilege often accorded to the United States as nation-state, while encouraging broader, more comparative scholarship (hence our title is a *Companion to American Legal History* rather than a *Companion to United States Legal History*). So now American legal history crosses borders; it encompasses intellectual, cultural, and social history; it studies institutions, like courts, prisons, and states, as well as flamboyant judges, legislators, lawyers, litigants. Sometimes the subjects are famous; at other times they are humble and almost completely forgotten. In all cases, the field of legal history appears to be expanding as rapidly as scholars can publish their findings.

Given how widely legal historians now cast their nets, one may begin to wonder whether there is still a distinct field of legal history. For when “law” is construed broadly, when the subjects used to explain “law” include such expansive categories as economics, politics, religious thought, and literature, when questions span social, cultural, and international history, and when virtually everyone is a subject of study, it is reasonable to think that legal history is becoming synonymous with American history. In fact, some recent literature, such as G. Edward White’s *Law in American History* (2012) treats law as embedded in larger American history and, thus, uses law to tell the story of American development from the settlement of transplanted European cultures in the seventeenth century through the epic struggles of the Civil War.

Within law schools, especially, history is increasingly seen as a method of legal analysis, much as economics is a method of legal analysis. The historical method looks to understand how legal structures are dependent on
their context and how statutes and cases need to be interpreted based on their context, as well as frame legal institutions to solve problems that have deep roots in our culture. Legal history is not merely studied as an artifact of the past, but to reveal choices made (or yet to be made) in public policy that have implications well beyond the court house or capitol. This “applied” aspect of historical studies in law gives it added relevance for jurists, legislators, or agency administrators contemplating decisions that can affect virtually every realm of human endeavor. Historical analysis demonstrates the complexity of legal institutions. How far that will go remains to be seen, but legal history is certainly going in many different directions simultaneously.

In large part, the prospect of an ever increasing empire of legal history is positive, because it is expanding in geography and demography at the same time it is expanding in subject matter and method. Quantitative historians, those who truck in thick description, and close readers of texts all find ample room for work in this field. But there are downsides to a field growing so rapidly and in so many different directions, for that fragments the efforts of scholars into many different subfields. Likewise, the separation of legal historians into history departments and law schools (and other locales) is reflected in choices made about where to publish findings: history professors tend to publish monographs, while law professors gravitate toward law journals. It can be difficult to keep up with the assorted places where legal history appears. Many people are speaking, but often in different venues, on different themes and with different purposes. Where once there were common themes and a small array of publications to know in the field, now there are many. New areas of research seem to sprout into existence every year: legal history now collides with the history of the book, while the Internet seemingly rewrites legal concepts such as property and privacy almost daily. These developments create a problem for editors who cannot include essays on every topic in a rapidly expanding discipline. The field of legal history, grand and growing, is in search of unifying themes and questions for analysis. The *Companion to American Legal History* offers guidance on where to start, what not to miss, and in many instances, indicates fruitful avenues for future research.

This volume surveys the extraordinarily rich work that has appeared since the 1950s, when J. Willard Hurst first envisioned a field apart from constitutional history that he called legal history. It emphasizes the diverse literature of the last several decades and infuses its analysis with up-to-the-minute information – new studies like David Rabban’s *Law’s History: American Legal Thought and the Transatlantic Turn to History* (2013) that offer fresh insights about legal historians working in earlier generations. Whether a reader is looking for a subject specific guide, or one arranged by time period or school of thought, this *Companion* should be able to provide a point of entry. Our first six chapters are organized chronologically. Our
contributors cover developments from the seventeenth century up through the 1960s. We then have seven chapters that look to groups in American legal history – from Native Americans, to African Americans in slavery and then in freedom, to women, families, and lawyers. Our third section has ten chapters on topics, including the economy, poverty, religion, taxes, the administrative state, and the military. Our fourth and final section looks to jurisprudential explorations, ranging across law and literature, legal thought from the eighteenth through early twentieth century, critical legal studies, and the international context of American law. Like a scout looking down from a mountain top, the Companion to American Legal History provides expert guidance to the terrain of our vast scholarly enterprise. We hope it inspires, as well as guides, the next generation of American legal historians.

References


Part I

Chronological Overviews
Commenting in a forum on law in British India, the legal anthropologist Sally Engle Merry noted that colonialism, and colonial law, was always uncertain (2010). Her point applies as well to histories of the seventeenth-century Americas where the uncertainties that Merry identified as arising from law’s contradictory roles as source of order and space of contention are complicated by the fact that seventeenth-century America has always been a disputed space. In the seventeenth century, the boundaries of the Americas were subject to disputes between sovereigns, settlers and native peoples, and settlers from different colonies. Today, those boundaries continue to confound: for many legal histories seventeenth-century America is North America, or the closer confines of British North America. But the Americas extended beyond those boundaries, and studies of law and justice in the seventeenth century need to consider New Spain, New France, the New Netherlands, and Native Americans, as well.

To try to capture the complexity of that territory, this chapter tacks between the general and the particular. It begins at the most general level, considering the seventeenth-century Americas as part of a global story of imperialism and sovereignty. The next section tightens the focus to look at regional studies of law and justice in the Americas, while in the third section the perspective shifts out once again, to consider how the various regional studies might be brought into conversation with one another. The final section brings the particular and the general together, suggesting how studies of specific trials might help connect the global to the local.
The Realms of Legal History

Law and Justice

In a recent review, Stuart Banner observed that one “message of this book is that law is almost everywhere, and thus that just about any aspect of the past can be viewed as a facet of legal history” (Banner, 2009: 685). That expansive view has long been a characteristic of the legal histories of British North America (Tomlins and Mann, 2001), and recently has influenced the legal histories of New Spain and New France as well (Owensby, 2008: 5–11; Moogk, 2000). The realm of law in the seventeenth century was blurred for several reasons. Law changed in the Americas, as native people were forced to adapt their systems of law and justice to European settlement (Hermes, 2008), but it also evolved in the early modern European world of which the Americas were a part (Williams, 2010).

Despite the ambiguities at the heart of the law, disputes in the Americas often were cast as legal claims. But even when they were set out in the language of law, disagreements were not exclusively settled through formal litigation. In addition to the courts, disputants could and did appeal to other institutions—imperial governments (Middleton, 2010), a native process (Kawashima, 2001), church congregations (Oberholzer, 1956), or the household (Herzog, 2004)—to resolve their differences. Seventeenth-century actors might frame their claims in the precise terms of law (Offutt, 1995) or the vague language of justice (Herzog, 2004); they could rest their legal claims on custom and practice (Tomlins, 2010), deeds (Baker, 1989), local rules or imperial statutes (Owensby, 2008), scripture or natural law (Dale, 2001), or treaties and charters (Tomlins, 2001).

Studies of law in the seventeenth-century Americas typically share a desire to uncover general principles about law, its place in society and its role in history, precisely because the very nature of law in this period was unsettled. Many concern themselves with law’s function, asking whether the aims of a legal system are to achieve order (Konig, 1979), ensure the rule of law (Offutt, 1995), or enforce shared understandings of justice (Herzog, 2004). Still others tease out the relationship between formal systems of law and illegal or extralegal practices (Godbeer, 2004), or consider whether law is best understood as a site of power and dominance (Pagan, 2002), a place of contestation (McKinney, 2010), a space for negotiation and resolution (Baker, 1989), or an uneasy mix of all of the above (Kawashima, 2001). Another group of studies look at how legal and constitutional systems changed over time, exploring whether legal concepts were borrowed and adapted from earlier traditions (Reinsch, 1899) or how the legal developments of the seventeenth century laid the groundwork for subsequent legal practices and assumptions (Morgan, 1975).
Imperial Agents, Colonial Subjects, or Founding Fathers?

Because the seventeenth century was marked by extensive European efforts to colonize and assert legal control (MacMillan, 2011; Pagden, 1995), seventeenth-century legal actors were rarely people playing out their lives on a local stage, but were characters in larger, transatlantic (Amussen, 2007) and imperial dramas (Herzog, 2004). Broadly speaking, studies of law in the seventeenth-century Americas approach that dynamic from one of three perspectives, though there is sometimes considerable overlap. The first considers whether seventeenth-century legal actors were creators of distinctive American legal regimes. This is the oldest tradition, stretching back to Paul Reinsch’s work at the end of the nineteenth century (Reinsch, 1899), but it has its share of recent practitioners whose studies look to the seventeenth century to find the roots of modern legal orders (Moogk, 2000).

A second approach considers the legal actors as colonial subjects. This perspective is often taken by studies that consider the impact of European settlement on Native Americans (Pulsipher, 2005), but it also is found in scholarship that looks at the legal impact of negotiations between settlers from different countries (Middleton, 2010), explores the influence of colonial slave regimes on European law and society (McKinney, 2010), or traces out imperial efforts to create distinctive, colonial legal systems (Herzog, 2004). A third approach looks at seventeenth-century legal actors as imperial agents, tracing how their decisions implemented (Moogk, 2000), undermined (Koots, 2011), or adapted (Bernhard, 2010) the imperial projects of their sovereigns. In one study of law in New Spain, Brian Owensby offered a variation on this approach, examining how imperial laws were developed to try to control colonial agents and how Native Americans used the imperial laws to check the local officials (2008: 11).

Read as a whole, these studies confirm John Comaroff’s observation that “far from being a crushingly overdetermined monolithic historical force, colonialism was often an underdetermined, chaotic business, less a matter of the sure hand of oppression … than of the disarticulated, semicoherent, inefficient strivings for modes of rule that might work in unfamiliar, intermittently hostile places a long way from home” (Comaroff, 2001: 311). In such a world, the lines between colonizer and colonized are often blurred and that was particularly true in the seventeenth century, notwithstanding the fact that colonial laws often were enacted in order to mark the divisions between colonized and colonizer, or ruler and ruled (Moogk, 2002). Ultimately, those distinctions did take hold, particularly where racial slavery entered into the mix. But as that process unfolded colonial agents undermined imperial authority and command (McKinney, 2010), colonial subjects thwarted efforts to contain them (Daughters, 2009) and settlers constructed their own legal orders (Pagan, 2002).
As that suggests, international and constitutional law was in flux across the seventeenth century. Although this was the century of the Treaty of Westphalia, with its effort to define national sovereignty and give sovereign nations legal status (Middleton, 2010: 33–34), the scope and shape of international law was unsettled (MacMillan, 2011) and key concepts, from the meaning of imperial authority (Armitage, 2000) to the nature of sovereignty (Benton, 2010) remained unclear. In the colonies, theoretical disputes over sovereign power were complicated by the everyday as claims of sovereignty were ignored by colonial officials (Herzog, 2004) and local disputes escalated into international problems (Middleton, 2010).

These problems were as much issues of constitutional order as they were questions of international law or sovereignty and they were exacerbated because the seventeenth century was a period of considerable constitutional change. In England the Civil War and related internal constitutional debates significantly altered the old order (Nemmer, 1977) while France was “not yet a nation and scarcely a unified kingdom” (Moogk, 2000: 55) in the seventeenth century and experienced its own constitutional tensions as a result. Constitutional weakness at the center was reinforced by conflict in the colonies. There were constitutional disputes within the colonies over who governed (Breen, 1970), an issue that could be complicated by theological differences (Chu, 1987) or social pressures (Morgan, 1975). There were also questions about who was governed and how: Were Native Americans entitled to the rights and protections of subjects of an imperial power, or the privileges typically accorded the subjects of another sovereign, or neither (MacMillan, 2011)? Were women or children part of the political order, and if so, to what extent (Brewer, 2005)? What was the status of Dutch settlers after the New Netherlands became New York (Merwick, 1999), or German settlers in the English colonies of the Chesapeake (Roeber, 1993)? What about settlers who were not Quakers in Pennsylvania (Offutt, 1995) or not Puritans in Massachusetts (Pestana, 2004)? Constitutional ferment in the periphery helped prompt changes in constitutional ideas and practices in Europe (Norton, 1996) just as much as constitutional changes in the center played a role in shaping the rules of colonial governance (Kettner, 1978).

The wealth of recent work on sovereignty and imperialism (Pagden, 2008) invites further work in these areas of law in the seventeenth-century Americas, but more could be done to explore the connections between local problems and imperial designs or to dig down into the sources to tease out support for Benton’s suggestion that “even in the most paradigmatic cases, an empire’s spaces were politically targeted; legally differentiated; and
encased in irregular, porous and sometimes undefined borders” (Benton, 2010: 2). So too, we could go beyond our recognition that colonial charters were important (Bilder, 2004) to discover how they were understood and what constitutional roles they played in both the center and the periphery.

Regional Interpretations of Law

In contrast to recent studies of colonialism and imperialism, which look at more than one country (Benton, 2002), legal histories of the seventeenth-century Americas usually follow the flag, focusing on the legal orders established by particular imperial powers. Many of these studies examine law in the British colonies (Hoffer, 1992), and while recent studies by Christopher Tomlins (2010), Richard Godbeer (2004), and Bradley Chapin (1983) survey specific areas of law across British North America, most look at only a specific part of Britain’s American holdings. The largest share explores the legal history of New England (Ross, 2008), but there are studies of northern colonies that look at law in New York (Goebel, 1944) and Pennsylvania (Offutt, 1995). In similar fashion, histories that study seventeenth-century law in the southern colonies are mostly about Virginia or the Chesapeake (Brown, 1996; Konig, 1982; Roeber, 1981), though some studies of the law or legal institutions of the South discuss law in other parts of the region in the seventeenth century (Hadden, 2001; Wyatt-Brown, 1982). A few recent works have pushed the boundaries of the English Atlantic world to include the law and legal cultures of the Caribbean (Bernhard, 2010; Amussen, 2007) and British Canada (Johnston, 2003). While there are not as many legal histories of the other colonies, there are several important works on law in New Spain. Some cover northern New Spain (Brooks, 2001); others consider Spanish legal regimes in the south (Herzog, 2004). In addition, Peter Moogk has written extensively about law and legal culture in his work on New France (2000), and a handful of studies touch on law and legal regimes in the New Netherlands (Middleton, 2010; Merwick, 1999).

The legal histories that consider law and Native Americans are simultaneously sparse and complex. The best overview of this area of legal history is an article by Katherine Hermes (2008). In it, she described two approaches to Native Americans and law in the Americas. One tries to uncover what she calls the “jurisprudence” of Native Americans, the “mixture of thought and action taken by ordinary people to construct the law without elaborate legal theories but with definite understanding about the law and its purposes” (Hermes, 2001: 127 n.9). Thus, in his study of land deeds in seventeenth-century Maine, Emerson Baker reconstructed Native American understandings of land and boundaries (1989); Yasuhide Kawashima offered a view of legal practices and culture among the Native Americans in New England in his study of the Sassamun murder trial (2001). Often
those studies look at native treatment of property or crime and punishment, but some touch on native constitutional principles. Owensby, for example, sketched Aztec institutions and distributions of power in his recent study (2008) and Kawashima offered a similar glimpse at constitutional order in his study of the Sassamon murder. Because of the debates over the extent to which ideas from the Iroquois constitution influenced the U.S. Constitution, there is a more extensive literature on Iroquois constitutional practices (Levy et al., 1996).

Most of the studies of Native Americans and the law consider the treatment of Native Americans within the legal systems of the various European colonies (Hermes, 2008). Some specifically look at the impact of colonial laws on native populations (Kawashima, 1986), others consider laws and legal practices as part of a larger history (McManus, 1993). Many of these studies focus on the English colonies (Kawashima, 2004), but Native Americans play a significant role in legal histories of New Spain (Kellog, 1995; Borah, 1983) and New France (Moogk, 2000). Read together, those works demonstrate that legal relations between the native peoples and European settlers could range from the lofty realm of international law, with its claims of sovereignty and negotiated treaties (Brooks, 2001), to local disputes about injury and harm (Herzog, 2004), rights to property (Baker, 1989), or marriage and inheritance (O’Brien, 2003). Often these studies described how law was deployed to subdue native peoples and societies (Hermes, 2008), though some treat law as a space of interaction between settlers and native people (Plane, 2002), or explore the how Native Americans understood, worked within, and sometimes resisted or manipulated colonial laws (Owensby, 2008; Kawashima, 2004).

Connections or Comparisons?

Taken as a whole, these different works make it possible to begin to actually speak of the legal histories of the Americas in the seventeenth century, but most do little to tell us whether those worlds were as separate and their legal trajectories as discrete as their histories suggest. A few studies have tried to push past the limits imposed by political boundaries; some by looking at various American borderlands and considering how law was used to try to control those fluid spaces on land (Demers, 2009) and sea (Benton, 2010), others by considering the colonies themselves as hybrid spaces where people with different legal practices and expectations met (Hermes, 2008). One example of this approach is Gregory Roeber’s study of the impact German immigrants had on the laws and legal cultures of the Chesapeake region (1993), another is William Offutt’s consideration of cultural clashes and legal differences among English settlers.
in Pennsylvania (1995). Sometimes, as in Offutt’s study or in my own work on Massachusetts Bay (Dale, 2001), legal disagreements arose from different belief systems. But other studies (Allen, 1981) have demonstrated that geography, as much as belief, gave rise to distinctive legal cultures when immigrants from one part of England brought with them legal traditions that were foreign to those from other parts of the country. Given that, more could be done to consider these interactions of legal cultures and the effect they had on the institutions and practices of law in the seventeenth century.

There are other ways that historians might try to connect the separate legal histories of the Americas. One approach, suggested by studies of slave law (Watson, 1989), is a comparative analysis. Scholars have taken that approach within the British colonial world: P.G. McHugh looked at how aboriginal societies in a number of British colonies fared under the common law (2004), Philip Stern compared British colonies in Asia and the Atlantic World (2006), while David Konig compared the legal regimes established in British North America to those set up at roughly the same time in Ireland (1991). But while Richard Ross compared methods of legal communication in the Spanish and English empires (Ross, 2008), little has been done to try to make comparisons across imperial legal regimes. Such an approach is possible and a quick review of some of the themes of seventeenth-century legal history suggests there are a number of points of comparison.

Law and Justice

One recurring theme in the literature that invites comparison is the issue of the relation between justice and law in colonial legal systems. Although the legal system established in the Delaware Valley was marked by a strong commitment to the rule of law from the first (Offutt, 1995), for much of the seventeenth century legal appeals and outcomes were cast in terms of justice, not legal rules (Henretta, 2008). While discretionary justice with its emphasis on community notions of fairness is an established part of the literature, there is little consensus about why that was the case. In his study of law in Virginia, Gregory Roeber argued that for much of the seventeenth century the absence of a significant body of people trained in law encouraged magistrates and other legal actors to appeal to community norms (1981). He found that dynamic ended with the rise of a generation of trained lawyers at the end of the seventeenth century. Recently James Henretta offered another institutional explanation, arguing that because most court systems in British North America lacked separate courts of equity equitable principles often influenced legal outcomes, helping drive the preference for justice (2008). In contrast, Tamar Herzog
concluded that the reason appeals to justice and community were more powerful than law in seventeenth-century Quito was ideological, not institutional (2004); Catholic teachings, with their emphasis on the importance of community and fairness, prompted the focus on justice in that outpost of New Spain.

Even studies that look at the shift from justice to law within a particular colony offer a variety of explanations for the phenomenon. In his study of law in Connecticut, Bruce Mann suggested that the shift to a more formal and legal system occurred as the colony’s population became larger, more diverse, and more mobile. When strangers replaced neighbors, people looked to law to provide the sorts of protections and sanctions that the community had been able to guarantee before (Mann, 1987). In contrast, Cornelia Dayton concluded that Connecticut’s early, informal legal system reflected religious precepts, which were weakened as part of a larger effort to use law to strengthen the power of the patriarchy (1995). A similar disagreement underlies discussions of the shift to a more formal legal system in Virginia. Kathleen Brown and Edmund Morgan both agree that social shifts, particularly the rise of African slavery, prompted the embrace of legal control in colonial Virginia (Brown, 1996; Morgan, 1975), but differ in their understanding of the causes of that shift. Brown argued that racial issues that arose because of the presence of Native Americans and then the arrival of African slaves intersected with gender norms in a way that forced the colony to enact laws that distinguished between wives and female servants; servants and slaves; and whites and blacks. For Morgan the colony’s shift from the older, less formal approach to a more legalistic order was shaped by several factors: the environmental elements that led so many English settlers to die in the first decades; the pressures on land that arose when white settler health improved, and the social tensions that arose because the colony had a skewed sex ratio with far more men than women.

In those studies historians rely on several different causal forces, some ideological, some institutional, to explain the shift from justice to law. Comparative study across colonies and imperial regimes might help scholars piece together whether these influences were truly distinctive, or whether there were factors in play that connected some or all of those forces together and might also provide support for another explanation: Most studies that consider the shift from justice to law emphasize local circumstances, but in their studies of law in New Spain Herzog and Owensby argue that the shift was a reflection of a larger, transatlantic transformation (Herzog, 2004; Owensby, 2008). Comparative study might make it possible to determine whether the shift from justice to law in the Americas was part of a larger, transatlantic process, and, if so, whether that process occurred as a result of the pressures of colonization itself or because of changes in the idea of law.