It is a pleasure to be invited to respond to Christopher Tomlins’s review of my book, especially when the monograph has been so positively received by such a prominent legal scholar. Tomlins has written a thoughtful and thorough review of my book that both summarizes its content and argument extremely well and offers salient criticism that can serve to move important debates forward. One can scarcely expect more of a book review, and I must thank him for his time and effort.

At the beginning of his review, Tomlins highlights one of my significant points of contention. Specifically, this is that we must return to some of the metropolitan texts that sought to justify colonial activities to the English crown and especially to the wider European community. As Tomlins points out, this ‘return’ is necessary, in part, because many historians over the past two decades have come to question the role of the metropole and ideologies of empire during the colonial period. These works, especially the stimulating and challenging writings of David Armitage and Jack P. Greene, seek either implicitly or explicitly to show that there were few ideological notions of empire in the Tudor and Stuart period and that, even if there were, the attenuated relationship between the ‘metropolitan’ centre and the ‘colonial’ peripheries meant that the former had little overall impact on the latter (1). One of the implications of this body of scholarship is the belief that if we are to understand the legal and cultural development of colonial America before 1776, we must look to on-the-ground agents, rather than the speculations and expectations of distant and largely ineffective observers from across the ocean. It is important to point out that my desire to reintegrate these intellectual metropolitan texts has been preceded recently by the work of, for example, Armitage, Michael Braddick, Andrew Fitzmaurice, Elizabeth Mancke, and Anthony Pagden (2).

I should also emphasize that my argument is not that the ‘metropolitan centre’ had greater impact in America than has been recently recognized. In general, I agree that this relationship was attenuated for all of the reasons stated by other scholars, including a weak, generally laissez-faire centralized government and strong, independent colonial councils and legislative assemblies that eschewed central authority. Instead, I argue that, for reasons associated with its historical and legal supervisory role over the entire composite monarchy, which included its American peripheries, the ‘imperial centre’ (the crown rather than the metropolis, the monarch and privy council rather than the London merchant elite and Parliament), was involved in ways that have not been well recognized by modern historians. As Tomlins has very capably summarized, the use of Roman law was required both because it (as opposed to domestic English common law) provided the only legal framework by which the crown could supervise its entire empire and because these legal resources were, generally, recognized throughout Europe.

In this precise context, my stated purpose, ‘to bring the crown and empire back in’—although, as Tomlins points out, it is a cliché—is important and central to my thesis. As I have already implied, both ‘crown’ and ‘empire’ have recently fallen out of favour. The former has done so because of the remarkable body of literature that, looking forward to the ideological origins of the American Revolution, investigates the role of Parliament rather than the crown in especially post-Restoration colonial affairs (3). The exclusion of ‘empire’ of late is the result of its overzealous and anachronistic use by past generations of historians, and because—following Armitage and others—of the belief that overseas activities until at least 1680 were colonial and commercial but not imperial. My argument is that the reintroduction of these terms (and, in the case of empire, redefinition, following Pagden and James Muldoon) is essential to a proper understanding of the legal foundations of, and justifications for, English activities in America (4). Regardless of the crown’s often indifferent attitude toward colonial activities and toward controlling a vast, hegemonic empire, from a
legal viewpoint colonial affairs that were not officially and demonstrably authorized by, and taken into the perpetual protection of, a Christian, independent sovereign (that is, a person in whom was bestowed imperium), were extremely tenuous and not likely to gain recognition within the supranational community. Tomlins might also have pointed out an even more contestable cliché found in the same sentence, the now-common misappropriation of Richard White’s ‘middle ground’ (5). This was intended to indicate my central purpose of navigating between ‘imperial’ and ‘anti-imperial’ schools of historians through a process of redefinition and reconceptualization based on contemporary, rather than modern, epistemologies (p. 7). Thus, the purpose was ‘to bring the crown and empire back in’, but not to advocate an old-fashioned view of a Tudor-Stuart ‘British Empire’.

Despite an excellent overall summary of my main arguments, Tomlins has not mentioned what I consider to be one of the more important ideas. As expressed throughout the book and reiterated in detail in the final chapter, the English perception that claims to new lands could only be completed in Roman law through what I term the ‘twin tenets of animus and corpus’ (p. 181) is vital to our understanding. In order for sovereignty and possession to gain supranational acquiescence and recognition, which were essential to reduce subsequent disputes and gain a remedy at law, both mental and physical methods had to be communicated. This better explains the various methods employed by the English (letters patent, fortifications, maps), which provided legal rationale for effectively challenging, for example, the papal bull Inter caetera and the Treaty of Tordesillas. According to the English, these documents gave only a mental claim that remained incomplete until the granted territory was physically occupied. As articulated by John Dee and by the crown in its letters patent and subsequent correspondence, this was perhaps the most important and enduring aspect of English legal foundations for empire. In most diplomatic disputes between England and its European rivals (France, the Netherlands, Portugal, and Spain), the English envoys pointed out (although not always correctly or forthrightly, of course) the deficiency of one or the other of these two elements to show that claims to sovereignty and possession were incomplete.

As Tomlins rightly points out, and as is implied throughout the book, the issue of ‘knowledge’ was very important to the construction of early-modern empires and probably deserved a more sustained discussion. In the case of the English, in a manner consistent with the teachings of the studia humanitatis and made explicit in the colonial charters with the phrase ‘certain knowledge’ (pp. 106–7), knowledge was expected to precede action. The English consistently argued that one could not lay claim to what one did not know existed. Building upon the legal tenet of animus, having the mental intention to claim land also required both knowledge of its existence and deliberate rather than accidental acts. In 1604, the English directly challenged Spain’s rights to America on the grounds that Columbus had stumbled upon it by accident, ‘not guided by foresight or knowledge’ (p. 184). But, as I demonstrate in chapters 2 and 5, the communication of knowledge had to be carefully regulated by the crown in order to ensure that the indiscriminate or boastful dissemination of information did not empower other European colonizing powers. This is, perhaps, why central Elizabethan imperial texts—Dee’s Brytanici Imperii Limites and Famous and Rich Discoveries and Richard Hakluyt’s Discourse of Western Planting—and carefully-rendered maps remained in manuscript. The knowledge communicated in these documents was reserved to the crown so that it could make decisions about its empire without allowing valuable information to get into the hands of rivals. Thus, knowledge did not have to be widely communicated to be valuable and to confer a mental intention to claim sovereignty over newfound lands. To resort to another cliché, knowledge equalled power and, to quote Armitage, ‘empire was always a language of power’ (6).

Tomlins’s main criticism is over my use of the term terra nullius, a hitherto-accepted idea that, as the reviewer points out, is now heavily contested. I admit that, as it is written (and as Tomlins quotes it), the implication is that terra nullius was an explicit term in Justinian’s writings. As Tomlins points out, and as I emphasize in Chapter 6, however, Justinian’s work was never intended to provide legal justifications for taking newly discovered land. As I write,
nature, such as ‘an island arising in the sea’ by accretion, and wild animals that had either escaped man’s custody or had never been under man’s control. Even by the end of the sixteenth century, discovery was comparatively new legal terminology for Europeans, as it had a dubious place in Roman law and was still building consensus within the ius commune and the ius gentium (p. 181).

I later point out (p. 202), following Lauren Benton and Peter Stein, that the use of Roman law, because it was intended for the Roman city state and not as a supranational legal system, was subject to various ‘discursive possibilities’ that enabled it to be used in the context of American activities (7). Thus, these references to Justinian, despite their dubious contemporary relevance, were routinely resorted to. Partly, this use was in the form of a legal fiction to provide some precedent, however slight, to ‘new’ activities; more vitally, Justinian was used as the ratio scripta (written reason) of natural law, and thus his ‘principles’ were deemed—like the Bible—living, timeless, and subject to many forms of interpretation.

Though an increasingly blunt legal instrument in light of new scholarship, the term terra nullius conveys natural law ideas that remain important to my argument. As Tomlins and Fitzmaurice point out, it is the term, and not the general ideas it communicates, that requires scrutiny. I was very careful in this study to employ contemporary rather than modern definitions of various terms, particularly ‘empire’, because it is, in part, the anachronistic use of the term that has caused the revisionist reaction. I also deliberately chose to avoid the term ‘international law’, which was coined by Jeremy Bentham in the late-eighteenth century, because it was anachronistic to this study and suggested a degree of monolithic legal thinking that did not exist in the early-seventeenth century. Instead, I chose to use ‘supranational law’ or ‘law of nations’ (p. 10, note 28), terms with more contemporary resonance that reflected the pluralistic legal languages available to early modern ‘civilians’. By entering so easily into an anachronism respecting terra nullius while deliberately avoiding other modern terms, I concede its use was ‘casual’, especially when several contemporary terms spring to mind that would have served equally well.

In respect to Tomlins’s desire for a fuller conclusion, I should point out that Chapter 6, which draws together the central themes of the book by way of two case studies (or, as I state in the introduction, ‘by way of conclusion’ [p. 15]), coupled with that chapter’s sections entitled ‘Conclusion: Toward acquiescence and recognition’ and ‘Epilogue’, to me, offer a thorough conclusion of the book’s arguments in practical and relevant ways that do not merely summarize its contents or draw broad generalizations.

I would like to end by mentioning one of the main omissions from this book. Caused partly by a concern for continuity in the narrative, partly because Native Americans were not my subject, and partly by space and time constraints, the subject of ‘conquest’, an ancient Roman law concept with significant relevance to English Atlantic affairs, was only lightly touched upon. Understanding how this term was used legally, culturally, and rhetorically, in the context of England as a conquered and conquering state, is the project to which I am now turning my attention.

Notes


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