

The Rule of Law in British America: Thinking with Indians While Comparing to Spaniards

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[This paper is a work-in-progress. Footnotes are largely reserved for direct citations (rather than for listing sources that generally support propositions in the text). I did not go through scholarly literatures doing what in figure skating used to be called “compulsory figures.”]

Settlers in British North America used stylized depictions of indigenous peoples to argue about what the rule of law meant in a New World polity. Colonial rule invited accusations of arbitrary government, extortion, and systematic lawlessness. By pointing to specific features of caricatured Native life and law, settlers could affirm, or deny, that their polity adhered to law rather than to arbitrary will and predation.

We will explore these debates from a particular vantage point. We will not look “within” legal materials, by reconstructing the arguments that controversialists fashioned from the multiple royal and provincial ordinances of colonial law, the law of nations (*ius gentium*), and divine and natural law. Rather, we will move outside the conventional framework of legal argument and ask how colonists used accounts of indigenous peoples as a contrast or counterpoint that helped settlers legitimate, shape, and critique their own rule of law. To be sure, scholars have long explored how Europeans created “images” of Indians, often resting on self-serving contrasts between “civility” and “barbarism,” to help settlers understand and evaluate aspects of their own society, from warfare to gender relations, from economics to religion, and much else.¹ This essay turns this longstanding approach to an important issue—the contested

¹ Distinguished examples of this scholarship include: Robert F. Berkhofer, *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage, 1979), esp. 27; Philip J. Deloria, *Playing Indian* (New Haven: Yale University Press, 1998), esp. 20.

meaning and fraught status of the rule of law in a colonial context—and treats that problem comparatively. Several of the sections that follow contrast British American and Spanish American uses of Natives to reflect on the rule of law. Other invoke Anglo-American caricatured images of the Spanish as well as indigenous peoples. Hence the subtitle of this article: “thinking with Indians while comparing to Spaniards.” The Spanish American material highlights distinctive features and implications of the British use of Natives that would not be as readily apparent if examined in isolation.

The meaning of the rule of law in a colonial society presents an immediate problem. The rule of law has been termed an “essentially contested concept” because it lacks a single, agreed upon definition and because some interpretations of what it requires are in tension with others.² Englishmen and Castilians at the opening of the early modern period were heirs to a Scriptural, classical, and medieval inheritance that supplied a variety of propositions later gathered uneasily under the rubric of the “rule of law.” The phrase itself seldom appeared in documents.³ To write about it is to study a concept *avant la lettre*. The early modern understanding of the rule of law seldom included concepts associated with it more strongly in later centuries, such as freedom of speech and conscience, human rights, democracy, and the separation of powers.⁴

² Richard H. Fallon, “‘The Rule of Law’ as a Concept in Constitutional Discourse,” *Columbia Law Review* 97 (1997): 1-56.

³ Early modern Anglo-Americans often used the phrase “rule of law” not to signify an ideal and accompanying set of practices but to refer to something more prosaic. For example, “rule of law” might indicate: (1) A particular legal interpretation—as in: we do not want this legislation to disturb the existing rule of law; or the judge must follow a given rule of law; or party X has the rule of law on their side. See, e.g., *Journal of the House of Representatives of Massachusetts* (Boston, 1743), 8, 11-13; *Journal of the House of Representatives of Massachusetts* (Boston, 1747), 109. (2) A judgment about hierarchies of law (what trumps what). For instance: “‘Tis I own, a rule of law, ‘that custom shall not prevail against a statute.’” “Layman and Platformist,” *A Letter to a Friend Occasioned by the Unhappy Controversy at Wallingford* (New Haven, 1760), 9. (3) The overall legal order or grundnorm of a society. Consider this usage from the Introductory Essay to William Wood’s *New England’s Prospect*, 3rd ed. (Boston, 1764 [1st ed., 1634]), xiv: “The first plan of the government established a kind of theocracy, by making the rule of God the rule of law.”

⁴ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 32-33.

Contemporaries focused on a core idea that will be at the heart of this essay: the supremacy of law.

Supremacy of law, but over what? From the Hebrew Bible came injunctions not to “wrest judgment”—neither to side unfairly with the “multitude” and the poor nor to “honor the person of the mighty”—and to maintain “one manner of law” for the stranger and one’s own countrymen.⁵ This Scriptural valorization of objective judgment uncorrupted by fear or hope of preferment and neutral among contending social groups came down to early modern Europeans alongside a different set of themes emphasized by Plato, Aristotle, and Cicero. They portrayed law as properly the master rather than the servant of government and as an expression of reason, which contains and silences passion. True laws aligned with justice and served the good of the community. Ideally, law itself ruled rather than the officials who happened to administer it at a given moment—a sleight of hand that at once encouraged political responsibility and juggling. The medieval scholastic and political traditions added to these inherited notions the insistence that a ruler subject himself to a Christianized understanding of divine and natural law, and emphasized his duty to uphold community custom and act through the processes and institutional forms established in his polity.⁶ Behind this cluster of ideas was fear—a fear of the potentially arbitrary, predatory, and corrupt ruler who did not act through known, standing laws. Supremacy of law ultimately meant supremacy over a ruler’s will, which ever threatened to elevate passion and self-interest above the common good and to break free of the restraints of natural and divine law, human institutions, and community custom.⁷

⁵ Exodus 23:1-3; Leviticus 19:15 and 24:22; Deuteronomy 16:18-19 (Jewish Publication Society translation).

⁶ Tamanaha, *Rule of Law*, 7-28; Judith N. Shklar, “Political Theory and the Rule of Law,” in *The Rule of Law: Ideal or Ideology*, ed. Allan C. Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), 1-16.

⁷ This late medieval and early modern understanding of the concept has been adopted by historians inclined to find a reasonable fidelity to the rule of law in the British and Spanish empires. See, for instance, Bernardino Bravo Lira, *Por La Razón O La Fuerza: El estado de derecho en la historia de Chile* (Santiago: Ediciones Universidad Católica

Many historians would consider invocation of the rule of law in a colonial setting tone-deaf, an insulting apologetic. In British and Spanish America alike settlers whipped slaves, exploited and dispossessed indigenous peoples, and enriched themselves and their allies through corrupt self-dealing. My objective is not to assess whether the rule of law actually existed in the New World. Such a project requires, first, selection of the “true” or “best” definition of that elusive term and, second, evaluation of whether Massachusetts and Virginia, New Spain and Peru, lived up to its requirements. Rather, this essay is agnostic on whether the rule of law existed and, simultaneously, fascinated by how historical actors used Indians to argue about its meanings and implications, the challenges of maintaining it in a colonial setting, and its future trajectory. Examples from Native neighbors provided a background against which colonists argued about violent self-help, the meaning of “despotism,” and the implications for their legal system of anglicization and commercialization. How British settlers thought with Indians about their own rule of law, and how comparison with Spanish America can draw out the meanings and implications of these debates, is the subject of this essay.⁸

I. Containing Violent Self-Help

From the beginning of colonization, Europeans discussed with fascination the difference between their own and Indian treatment of murder. Natives expected a killer and his relatives to “cover the grave,” to offer presents to the victim’s kin lest they take vengeance. Indian notables

de Chile, 1996), 24, 67-77; and John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb: Northern Illinois Press, 2004).

⁸ My use of the “thinking with” formulation has been influenced by two magnificent works on unrelated topics: Stuart Clark, *Thinking with Demons: The Idea of Witchcraft in Early Modern Europe* (Oxford: Oxford University Press, 1997), and David Nirenberg, *Anti-Judaism: The Western Tradition* (New York: W. W. Norton, 2013). Clark explains how in “many cases . . . the subject of witchcraft seems to have been used as a means for thinking through problems that originated elsewhere and that had little or nothing to do with the legal prosecution of witches” (p. viii). Nirenberg asks: “What work did thinking about Judaism do for them [Christians and Muslims] in their efforts to make sense of their world?” (p. 2).

guided the process behind the scenes to prevent a cycle of blood feuds. But no Indian “state” claimed a monopoly of legitimate violence.⁹ The English, by contrast, insisted on public trial and punishment of the murderer himself. Punishment could not be “bought out” by relatives offering compensation; nor could penalties be redirected against the killer’s kin offered up as a substitute, as Indian custom allowed.¹⁰ Settlers disdained covering the grave not only for practical but for religious and ideological reasons. Britain like other European states congratulated itself on its civility, having developed public tribunals and a rule of law that suppressed the “barbarous” cycle of blood feuds.¹¹ Covering the grave also undermined God’s insistence that a murderer, the killer himself and not a substitute, be punished to free the land from blood guilt.¹²

⁹ See, e.g., John Philip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (New York: New York University Press, 1970), esp. 73-92; Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: W.W. Norton, 1975), 148-49; Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, Conn.: Wesleyan University Press, 1986), 4-7. A small selection of primary sources includes: James Adair, *The History of the American Indians* (New York: Johnson Reprint Corporation, 1968 [1775]), 150-52; Jonathan Carver, *Travels through America, 1766-1768: An Eighteenth-Century Explorer's Account of Uncharted America*, ed. Norman Gelb (New York: John Wiley, 1993 [1778]), 132-33; Daniel Gookin, *Historical Collections of the Indians in New England* (New York: Arno Reprint, 1972 [1792; MS, 1670s]), 9; Roger Williams, *A Key into the Language of America* (1643), in *The Complete Writings* (New York: Russell and Russell, 1963), I, 162 [discussing robbery].

¹⁰ John Dunton, *John Dunton's Letters from New England*, ed. W. H. Whitmore, Prince Society Publications, vol. 4 (Boston: Prince Society, 1867), 162-63; Pennsylvania Lt. Governor William Keith boasted in a May 11, 1722 address to the Conestogoe Indians that English criminals could not “buy it [punishment] off, with any ransom.” Alden T. Vaughan, ed. *Early American Indian Documents: Treaties and Laws, 1607-1789* (Washington: University Publications of America, 1979-2004), I, 241. The Nanticokes offered Maryland two “innocent persons” in place of murderers they could not find. Nanticokes Confer with Maryland Governor and Council, 23 March 1677/8, in Vaughan, *Indian Documents*, VI, 92-94.

¹¹ The opposition between savagery (composition in the shadow of vengeance) and civility (public judgment according to law) recurred throughout the colonial period. A classic, extended historical account of the transition is in Lord Kames, *Historical Law Tracts*, 2nd ed. (Edinburgh, 1761), 1-57.

¹² John Brickell, *The Natural History of North Carolina* (New York: Johnson Reprint Corp., 1969 [1737]), 378. A 1669 Connecticut granted the colony the power to execute Indians who killed other Indians within English plantations in order to “take the guilt of blood from the land.” *The Public Records of the Colony of Connecticut, 1636-1776*, ed. J.H. Trumbull and Charles J. Hoadley (Hartford, 1850-1890), II, 117. Virginia Lt. Governor Robert Dinwiddie demanded that the sachems of the Six Nations turn over a killer to honor God’s command that “whoso sheds man’s blood, by man shall his blood be shed.” Instructions from Dinwiddie to Joshua Fry, Lunsford Lomax, and James Patton for Logstown Treaty, April 1752, in Vaughan, *Indian Documents*, V, 132, 139

Negotiations between Natives and settlers worked out whose system for handling murder would prevail in what territories, for which peoples, and under what circumstances. The English tried to exempt themselves and their territory from Native violent self-help. Settlers demanded that intercommunal crimes—whether colonists or Indians were offenders or victims—be tried and punished under English law, with Native representatives present. Colonists sought immunity from indigenous justice and private vengeance. They demanded that Native suspects not escape trial in colonial courts by offering presents or handing over kin in place of an absent, powerful, or popular offender. Crimes between Indians were generally left to indigenous justice, unless the offense took place within core areas of colonial settlement.¹³ The English never reliably secured these objectives. They allowed covering of graves instead of public trial on account of military weakness, disorganization, and the need to preserve Native goodwill and alliances. Historians have ingeniously and at length reconstructed how diplomacy, ever aware of the balance of power, mediated between Indians and settlers who each wanted their respective systems of justice to extend as fully as possible.¹⁴

Alongside and related to this now familiar account is a second story, one connected to colonial governments' struggles to assert the rule of law over their own settlers. Particularly where governments exercised only tenuous control—over dispersed plantations and trading posts

¹³ See, for instance, the 1722 Pennsylvania and 1678 Maryland conferences and the 1669 Connecticut statute cited in the previous several footnotes; Pemaquid Agreement between Massachusetts and Wabanakis, 11 August 1693, in Vaughan, *Indian Documents*, XX, 64; Conference of South Carolina Governor Glen and the Council with the Creeks about the Creek-Cherokee Peace, 30 May 1753, *ibid.*, XIII, 262; Preliminary Articles of Peace between the Seneca Indians and Sir William Johnson, 3 April 1764, *ibid.*, X, 435; Conference between Seneca Chief Ogista and Col. John Reid (June 16-17, 1765), in William Johnson, *The Papers of Sir William Johnson* (Albany: University of the State of New York, 1921-65), XI, 791-93.

¹⁴ See, e.g., Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (New York: Cambridge University Press, 1991); Nancy O. Gallman and Alan Taylor, "Covering Blood and Graves: Murder and Law on Imperial Margins," in Brian P. Owensby and Richard J. Ross, eds., *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York: New York University Press, 2018), 213-37.

and over the backcountry—settlers claimed the right to privately judge supposed offenders and inflict violence upon them. Public authorities contended that self-help, erratic and arbitrary, driven by passion and self-interest, and lacking neutrality and due process protections, violated core values of the rule of law. In 1649, Virginia restricted the power of private settlers, granted in a 1646 Act, to kill Indians trespassing within specified territories. The “colony being subject to many prejudices by reason of the latitude and generality of such allowance, and that the breach of the peace may probably be the consequence thereof through the rashness and unadvisedness of divers person who by such act rather vindicate some private malice than provide for their own or the public indemnity.”¹⁵ Since settlers no less than Natives undertook private vengeance and violent self-help against the other, governments tried to restrain both sides. The interplay of settler and Native seizures and violence outside the regulation of a state provided a challenge to the colonial authorities, but a challenge that invited them to assert governmental control in the service of the rule of law.

Connecticut legislated against colonists who, without public approval, took property or used force against Natives, forms of self-help not tolerated against fellow Europeans. A 1638 statute provided that no settler “shall bind, imprison, . . . or whip any . . . Indians,” except to bring them before a magistrate. In 1680, the colony forbid “any . . . to take away by force or otherwise, without the owner’s consent, under pretense of debt, the corn or other estate from any Indian, unless it be by virtue of order from lawful authority.”¹⁶

Virginia at first permitted violent self-help against Natives before legislating against it. A 1632 statute directed at “the neighboring Indians our irreconcilable enemies” allowed a plantation commander who lost cattle, hogs, or other property to Natives to “raise a sufficient

¹⁵ Law to Curtail Killing of Indians, 10 October 1649, in Vaughan, *Indian Documents*, XV, 39.

¹⁶ *Connecticut Records*, I, 14; and I, 355.

party and fall out upon them, and persecute them as he shall find occasion.” A 1649 Act (mentioned earlier) restrained but did not eliminate the power of settlers to kill Indians found in specified areas. No “man shall hereafter kill an Indian within the limits aforesaid unless such Indian shall be taken in the act of doing trespass or other harm, in which the oath of that party by whom the Indian shall be discovered or killed shall be full and sufficient evidence.” This restriction left intact the right of private persons to judge and execute Indians outside of the colony’s legal system and compelled the government to accept—not to evaluate, but to accept—the settler’s oath that the punishment was warranted. Seven years later, in 1656, Virginia repealed the 1649 Act, in part because it feared that private persons’ mistaken and “unnecessary shedding of blood” might provoke an Indian war. But the colony also acknowledged that its former enactment violated two core concerns of the rule of law—proportionality in punishment and neutrality in judgment. Trespass by an Indian was “of too mean a nature to deserve” death, the “greatest” sanction. “And the evidence [was] too weak,” coming from only one witness, who should not “be allowed being a party.”¹⁷ Virginia’s growing interest in restricting settlers’ resort to violent self-help can also be found in treaties. Lt. Governor Alexander Spotswood concluded agreements in 1713 with the Tuscoruro and Nottoway nations that provided that any Indian who commits a capital crime shall be “tried and punished according to the laws of Virginia,” and “proper judges” shall hear “lesser offenses” and “disputes and controversies between” Indians and settlers. For “that purpose neither shall *either party* be permitted to *seek redress by any other means*” [italics added]. This latter clause recurred in treaties signed the next year with the Saponi, Stukanoe, Occaneechi, and Totero Indians.¹⁸ As the treaties and statutes from Virginia and Connecticut suggest, governments not only tried to restrain vengeance and self-help for both

¹⁷ Virginia statutes in Vaughan, *Indian Documents*, XV, 25 [1632]; XV, 39 [1649]; XV, 50-51 [1656].

¹⁸ Vaughan, *Indian Documents*, IV, 213-17, and IV, 221.

settlers and Natives; but the process occurred in parallel and the efforts reinforced each other. Criticism of Indians' ungodly and "barbarous" vengeance provided the backdrop against which colonies in the name of the rule of law moved against private settlers' pretensions to judge in their own case and unleash violence on their own authority. A very old issue that traced back through European history and into classical antiquity and the Bible—the public control of private violence and the legitimacy of compensation in cases of murder—became in a colonial context bound up with Indians.

II. Natives as Counterpoints to Despotism

An elusive term, the "rule of law" was commonly defined against its opposite—arbitrary power and tyranny. Anglo-Americans often held up Indian nations as exemplars of non-despotic societies, thereby using them to shape the meaning of the rule of law among colonists. This was not, of course, the only way to enlist Natives in the service of defining or legitimating European claims to rule New World territories through law rather than will. A brief look at two Spanish modes of argument will help identify the distinctive properties and implications of the English approach.

Beginning in the sixteenth century, Spanish writers with varying agendas worked to reconstruct the law and government of the Aztecs and Incas. Historians have grouped these efforts into two dominant traditions that persisted with amendments and variations for over two hundred years. If read the right way, if read in one of many possible interpretations, each could support Spanish claims to have established a tolerably robust rule of law in the core areas of New Spain and Peru.

What David Brading calls an "imperial" school indebted to Spanish theologian and humanist Juan Ginés de Sepúlveda stressed Native incivility, brutality, and vice in support of the

conquest and crown domination of settlers and Indians alike.¹⁹ Historians have studied in depth how Sepúlveda and his successors accused Native societies of disregarding natural and divine law through human sacrifice, cannibalism, idolatry, sodomy, and polygamy—sins so severe that they justified Spanish replacement of indigenous rulers.²⁰ For our purposes, though, let us focus on accusations that the Incas and Aztecs violated not only God’s and nature’s ordinances but the human, temporal rule of law.

Why was this? The Indian empires did not offend against the rule of law simply through the conquest and domination of subject peoples forced to labor and pay tribute, a condemnation that would have likewise indicted the Spanish.²¹ The charges were more particular. Critics who denounced the Native empires for violating the rule of law often began with praise for the impressive organization and administrative institutions of governance before damning its underlying purposes.²² The imperial school portrayed Aztec and Inca rulers as abusing their people in the ways that defined a “tyrant” in European law and politics. Native governance, it

¹⁹ D. A. Brading, *The First America: The Spanish Monarchy, Creole Patriots, and the Liberal State, 1492-1867* (Cambridge: Cambridge University Press, 1991), 3, 256.

²⁰ See, e.g., Juan Ginés de Sepúlveda, *Tratado sobre las justas causas de la guerra contra los indios*, ed. Manuel García-Pelayo (Mexico City: Fondo de Cultura Económica, 1941), 99-127; Sepúlveda, “Del Nuevo Mundo,” in *Obras Completas, XI*, ed. Luis Rivero García (Pozoblanco: Ayuntamiento de Pozoblanco, 2005), 47-48; *Gómez de Cervantes, Gonzolo, La vida económica y social de Nueva España, al finalizar el siglo XVI*, ed. Alberto María Carreño (Mexico City, 1944 [MS, 1599]), 81-82; Juan de Matienzo, *Gobierno del Perú* (Buenos Aires: Compañía sud-americana de billetes de banco, 1910 [1567]), 13; Sarmiento, *History*, 42-43.

²¹ Nor did the Aztecs and Incas violate the rule of law because they lacked government. They boasted extensive, well-articulated states, even if they were “barbarians” in the eyes of the imperial school. In the evolutionary scale that the Spanish devised to rank barbarians from the most primitive to the most advanced, the sophistication of Aztec and Inca “political organization,” their “republics which are controlled by powerful kings who have as their subjects other caciques and lords with vassals,” raised them to the highest level, well above the disorganized natives scattered in the Americas who had little government to speak of and were ruled by the caprice and “violence” of the “most powerful man.” Cobo, *History*, 43-44; José de Acosta, *Natural and Moral History of the Indies* [*Historia natural y moral de las Indias*], ed. Jane E. Mangan, trans. Frances M. López-Morillas (Durham: Duke University Press, 2002 [1590]), 345-47.

²² See, e.g., Cobo, *History*, 189-238; Antonio de Herrera y Tordesillas, *Historia general de los hechos de los castellanos en las islas i tierra firme del mar oceano*, 8 vols. (Madrid: Nicolas Rodriguez [sic] Franco, 1726-30 [1601-1615]), Volume III, Book 2, chapter 19, and Book 4, Chapter 16; “*Relación del Origen e Gobierno que los Incas Tuvieron y del que habia antes que ellos señoreasen a los Indios deste reino*,” in Urteaga, *Informaciones*, 60-63, 70-86.

was said, pursued as its ultimate purpose not justice so much as the subjugation of common Indians and, even more, the domination of tributary peoples. The indigenous empires placed their “vassals in greater subjection and servitude every day” through top-down governance reinforced by surveillance and by forced population exchanges (the *mitimaes* system of the Incas).²³ Diego Durán portrayed the Aztecs simultaneously as gifted in “matters of government and good order” and as “the cruelest and most devilish people that can be imaged because of the way they treated their vassals. . . . One did not dare to question them at any time.”²⁴ There were effective institutional mechanisms for imposing the directives of Inca and Aztec rules, but not for restraining their appetite and will. Native “kings” and their nobles made laws, the critique continued, not only in pursuit of the common good but also to advance their own self-interest. Spanish writers professed shock at how the Aztec and Incas made common Indians labor continuously. This was partly for public purposes—fortresses and roads. But forced labor also generated tribute to enrich the rulers and, more insidiously, was meant to break the spirit, so that Natives, “oppressed and humiliated,” would “lack the vigor and spirit to aspire to rebel.” Common Indians were portrayed as the “slaves” of the Inca rulers—slaves not because they worked each day under compulsion but because they lacked rights over property and family. Only by the Inca’s will did they enjoy the fruits of their labor; he could at any time withdraw his grace, by which they held property. And, contrary to natural law, the Inca denied male heads of households the power to protect and control their wife and children. Wives could be given to

²³ See, e.g., Bernabé Cobo, *History of the Inca Empire [Historia del Nuevo mundo]*, trans. Roland Hamilton (Austin: University of Texas Press, 1979 [MS, 1653]), 33, 189-90, 239-43 [quotation from p. 240]; Pedro Sarmiento de Gamboa, *The History of the Incas*, trans. Brian S. Bauer and Vania Smith (Austin: University of Texas Press, 2007 [MS, early 1570s]), 41-42, 135-37, 203-4; “Informaciones del Virrey Toledo,” in Horacio H. Urteaga, *Informaciones sobre el antiguo Perú...(crónicas de 1533 a 1575)* (Lima: Sanmartí y Ca., 1920), 107, 116, 137-9.

²⁴ Diego Durán, *The History of the Indies of New Spain [Historia de las Indias de Nueva-España y Islas de Tierra Firme]*, trans. Doris Heyden (Norman: University of Oklahoma Press, 1994 [MS, c.1581]), 21, 166.

other men and children seized for sacrifices. Daughters could be taken at ten years old for service and, upon reaching the age of marriage, could be distributed to the Inca's favorites and military veterans. Subjects of the Aztecs could not complain if their daughters were "used" at "pleasure."²⁵ Many of these misdeeds brought to mind familiar abuses, the ones characteristic of a "tyrant" in Aristotle's *Politics*. Spanish imperial writers carefully selected indigenous practices that, when darkened and translated into a European political idiom, made the empires reminiscent of the classical picture of a tyranny.

Having done so, the Spanish could then praise themselves as the bringers of the rule of law, again as Europeans understood the term. Imperial writers congratulated the Castilian crown for freeing Indian commoners in New Spain and Peru from subjugation to an Aztec or Inca despot, raising Natives from slavery up to the status of vassals to a justice-giving king, alongside settlers. The king's officials, it was said, ruled not by will and appetite but in the interests of the common good upheld by *derecho* and an extensive imperial bureaucracy. A composite of natural and divine precepts, theological learning, royal ordinances, customs, and the combination of canon and revised Roman law in the *ius commune*, *derecho* provided a measure of justice that existed outside and above the state, one whose foundations came into the world by God's command and natural law. *Derecho* was not the product of the king's will; it was an objective standard of justice that, ideally, restrained settlers and crown officials alike. To act outside of *derecho* was to act illegitimately. The empire's extensive bureaucracy prided itself on providing an elaborate array of overlapping, competing institutions, personnel, and legal devices that could

²⁵ Vasco de Quiroga, *Información en Derecho*, ed. Paulino Castañeda Delgado (Madrid: Ediciones J. Porrúa Turanzas, 1974 [MS, 1535]), pp. 145-46; Matienzo, *Gobierno*, 11-13; Cobo, *History*, 239-41 [quotation on pp. 240-41]; "Relación," 63-4; Herrera, *Historia*, V, 84-5 [Book 4, Chapter 2]; Francisco López de Gómara, *Pleasant History of the Conquest of the West India, now called New Spain . . . Translated out of the Spanish Tongue*, trans. T. N. Anno (London, 1578), 190.

(imperfectly) uphold *derecho*: from viceroys and provincial judicial-administrative tribunals (*audiencias*), to multiple mechanisms for appellate review of improper governmental acts, to the General Indian court and the *protector de indios*, to the thousands of crown ordinances minutely regulating matters as varied as inheritance, work contracts, tribute and labor obligations, and to *residencia* and *visita* inspections of administrators and judges.²⁶ This fusion of a bureaucracy sustaining *derecho* with a political ideology that restrained power through an objective, external theory of justice was thought to provide checks and balances and restraints on the ruler's will, which were supposedly ill-developed in the Native empires. Overreaching and self-dealing officials were now to be restrained. Indian men's natural rights to control their property and oversee their wives and children were now to be respected. Or such was the aspiration. It was easier to see the rule of law in Spanish governance if it could be presented as the cure for a particular kind of tyranny afflicting the Native empires.

Against Sepúlveda and the imperial school stood a group of writers indebted to Dominican friar and bishop Bartolomé de las Casas, who worked to rebut accusations of indigenous tyranny and vice by emphasizing indigenous cultural achievement, civility, and conformity to natural law. Las Casas and his followers praised Aztec and Inca governance as the equal to or superior of the pre-Christian classical polities of Greece and Rome and even as better in some respects than the Christian conquistadores. The relationship of all this to Spanish debates on the rule of law was complicated, generating a variety of contrary political implications. Las Casas famously criticized the brutal, bloody exploitations of conquered

²⁶ Brian P. Owensby and Richard J. Ross, "Making Law Intelligible in Comparative Context," in *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America*, ed. Owensby and Ross (New York: NYU Press, 2018): 8-10, 37-38; Bernardino Bravo Lira, *Por La Razón O La Fuerza: El estado de derecho en la historia de Chile* (Santiago: Ediciones Universidad Católica de Chile, 1996); José Manuel Pérez-Prendes y Muñoz de Arracó, *La Monarquía Indiana y el Estado de Derecho* (El Puig, Valencia: Asociación Francisco López de Gomara, 1989).

indigenous peoples. More subtly, he and his followers reconstructed history to portray Inca and Aztec legal administration in ways that tacitly condemned well-known shortcomings of Spanish American justice. Ignacio de Castro, headmaster of the Colegio de San Bernardo, praised Inca laws as so stable and clear that judges did not feel compelled to alter and mitigate them. The *mestizo* historian Garcilaso de la Vega warned that the “use of discretion” by Inca magistrates “would make them venal and open the door to the purchase of justice by bribery or importunity, leading to utter confusion in the state, each judge would do as he thought fit and it was not right that anyone should constitute himself a legislator, when his duty was to execute what the law prescribed, however rigorous.”²⁷ This celebration of bounded, self-disciplined Inca justice tacitly rebuked the *derecho indiano*, infamous for its tangled complexity, for the casuistical reasoning it relied upon, and for its acquiescence when officials chose not to comply with particular ordinances so long as they professed obedience to imperial authority. Native rulers, it was said, kept magistrates honest and under control through close supervision and occasional severe punishment, a rebuke to Castilian kings whose distance from their greedy officials allowed corruption and self-dealing to fester. Jesuit Francesco Saverio Clavigero insisted that the “capital punishments prescribed” by the Aztecs “against prevaricators of justice, the punctuality of their execution, and the vigilance of the sovereigns, kept the magistrates in check; and that care which was taken to supply them with every necessary at the expense of the king, rendered any misconduct in them inexcusable.”²⁸ Vega described the royal progress that Incas

²⁷ Ignacio de Castro, *Relación del Cuzco*, ed. Carlos Daniel Valcárcel, 2nd ed. (Lima: Universidad Nacional Mayor de San Marcos, 1978 [1795]), 22; Garcilaso de la Vega, *Royal Commentaries of the Incas, and General History of Peru [Comentarios Reales de los Incas]*, trans. Harold V. Livermore, 2 vols. (Austin: University of Texas Press, 1966), I, 95.

²⁸ Francesco Saverio Clavigero, *The History of Mexico* (New York: Garland Press, 1979 [1787]), II, 405. For more on the oversight and punishment of judges, see Jerónimo Román y Zamora, *Repúblicas de Indias: idolatrias y gobierno en México y Perú antes de la conquista* (Madrid: V. Suárez, 1897 [1575]), 260; Toribio Motolinía, *Memoriales*, ed. Nancy Joe Dyer (Mexico City: El Colegio de México, 1996 [MS, middle 16C]), 491; Mariano Veytia, *Historia Antigua de México*, 2 vols. (Mexico City: Editorial Leyenda, 1944 [MS, c.1769]), II, 201.

made through their land to ensure that magistrates did not “become careless and tyrannical because of the long absence and neglect of their prince. Another reason was to allow their subjects to present complaints about injustices to the Inca himself, face to face—they did not permit themselves to be addressed through third parties, lest the latter should understate the guilt of the accused or the wrongs of the complainant out of friendship for those concerned or through bribery.”²⁹ Vega, Augustinian friar Jerónimo Román y Zamora, and historian Mariano Veytia each emphasized the supposedly speedy resolution of lawsuits and prosecutions in Aztec and Inca tribunals, and the simplicity of their procedure, which encouraged ready access for the poor. This condemned by implication the delays, expense, and confusion of the overelaborate Spanish American bureaucracy, where cases dragged from tribunal to tribunal.³⁰

And yet within these admiring accounts of Aztec and Inca law that hinted at the abuses of European justice—what one would expect from writers indebted to Las Casas—something else could be found: a tacit defense of the rule of law in Spanish America. The starting point was the continuity between indigenous and Spanish legality. The imperial school narrative relied on a disjuncture, the supplanting of Native tyranny by the Castilian elevation of law over will. By contrast, writers indebted to Las Casas suggested that Incas and Aztecs foreshadowed some of the features of Spanish American governance. Though these writers were typically critical of Castilian power, their findings could, if read from another perspective, suggest that New Spain and Peru constrained arbitrary appetite in ways similar to the Native empires.

The Spanish empire accommodated—indeed, expected—significant variation in customs and jurisdictional privileges (*fueros*) among localities and corporate groups and between settlers and natives—subject, however, to the constraint that no usage could violate Christianity or stand

²⁹ Vega, *Commentaries*, 334.

³⁰ Vega, *Commentaries*, 95, 98; Román y Zamora, *Repúblicas*, 261; Veytia, *Historia*, 186.

against an explicit contrary imperial ordinance. Vega discovered in the Inca empire a similar ambition, though in a pagan rather than Christian framework. The “Inca kings were always content to allow every tribe to follow its traditional usages so long as they did not conflict with their idolatrous religion and the general laws of the kingdom.”³¹ Authors described indigenous judicial systems in ways that heightened their structural similarity to the Spanish one. Native imperial and regional tribunals carefully arranged in an appellate hierarchy sat in review of local judges, as in Castile’s empire. At the apex, judges worked in panels that consulted before reaching collective decisions, akin to a Spanish American provincial tribunal (*audiencia*).³² Counselors close to the Inca and Aztec rulers travelled through the provinces inspecting the administration of justice and correcting magistrates in a prefiguring of the functionally similar *visitas* and *residencias*.³³ Parallels between indigenous and settler justice were heightened by using Spanish terms to describe the roughly analogous Native institutions—not only the *audiencia* and *visita*, but the viceroy, the *alcaldes* and the *corregidores* [local judicial and administrative officials].³⁴ Beyond these structural similarities, Spanish authors discerned in the Aztecs and Incas the basic ethical and political foundational principles of the rule of law: that everyone is subject to the law; and that they “were not allowed to have one law for themselves and another for the rest.”³⁵ In one of many ideological ironies, then, the opponents of the imperial school offered an often sympathetic account of Aztec and Inca civilization that allowed

³¹ Vega, *Commentaries*, 339.

³² Román y Zamora, *Repúblicas*, *passim*; Juan de Torquemada, *Monarquía Indiana*, 3 vols. (Mexico City: Biblioteca Porrúa, 1969 [1615]), *passim*; Martín de Murúa, *Historia general del Perú, origen y descendencia de los Incas*, ed. Manuel Ballesteros-Gaibrois, 2 vols. (Madrid: Joyas Bibliográficas, 1962-64 [MS, c. 1600]), II, 36-39, 62-3.

³³ Pedro de Cieza de León, *The Second Part of the Chronicle of Peru*, ed. Clements R. Markham, trans. Clements R. Markham (London: Hakluyt Society, 1883 [MS, mid 16C]), 81; Murúa, *Historia*, 37.

³⁴ Vega, *Commentaries*, 103; Zorita, *Life*, 124; Murúa, *Historia*, 38; Torquemada, *Monarquía Indiana*, 168.

³⁵ Román y Zamora, *Repúblicas*, 255; Vega, *Commentaries*, 53, treats this latter precept as a teaching of Manco Capac.

readers to find, if they looked, a defense of Spanish American claims to the rule of law. The more that Aztec and Inca governance foreshadowed in key respects the Spanish empire, the more that New Spain and Peru appeared to maintain continuities with pre-contact indigenous legality, drawing on seemingly similar practices and ideas to try to elevate law above passion and self-interest.

Anglo-American enlisted Indians in colonists' rule of law debates in a different fashion. Seventeenth-century English observers, particularly after contact with the Powhatan confederacy, saw in Native nations elements of tyranny.³⁶ But as familiarity grew, the English came to be more impressed with the absence among Indians of what was understood as despotism within European political thought.³⁷ Certain persistent continuities marked the figure of the tyrant since the Renaissance, when Europeans intensified engagement with classical political thought. To begin with, the despot refused to solicit and heed counsel. A marker of civility and good government, well-delivered counsel steered a ruler from passion to reason and from self-serving willfulness to pursuit of the common good. A despot ignored counsel or,

³⁶ Indians lacked written law, a damning point for Europeans who assumed that written ordinances surpassed oral traditions in providing the stability and public notice essential to the rule of law. Natives were thought, inaccurately, to live either without law or under the will of their sachems. Thomas Cecil, *A Relation of Maryland* (London, 1635), 26-27; Samuel Clarke, *A True and faithful account of the four chiefest plantations of the English in America : to wit, of Virginia, New England, Bermudus, Barbados ... : as also of the natives of Virginia and New-England* (London, 1670), 11-13, 47; John Eliot, *A Late and Further Manifestation of the Progress of the Gospel amongst the Indians in New England* (London: 1655), in *The Eliot Tracts*, ed. Michael P. Clark (Westport: Praeger, 2003), 302; Robert Gray, *A Good Speed to Virginia* (London, 1609), C3v-C4r; Robert Johnson, *Nova Britannia: Offering Most Excellent Fruits by Planting in Virginia* (London, 1609), B4r-B4v; Cotton Mather, *The life and death of the Reverend Mr. John Eliot* (London, 1691), 94; Samuel Purchas, *Purchas his Pilgrimage, or Relations of the World and the Religions Observed in all Ages and Places Discovered*, 2nd ed. (London, 1614), 769; John Smith, *A Map of Virginia, with a Description of the Country* (1612), in *The Complete Works of Captain John Smith (1580-1631)*, ed. Philip L. Barbour, (Chapel Hill: University of North Carolina Press, 1986), I, 174-75; William Strachey, *The History of Travel into Virginia* (London, 1849 [MS, c.1616]), 70.

³⁷ On the general problem of settlers and Indians struggling to understand each other's legal culture, see Brian P. Owensby and Richard J. Ross, eds. *Justice in a New World: Negotiating Legal Intelligibility in British, Iberian, and Indigenous America* (New York: New York University Press, 2018).

through cruelty and unpredictable rages, frightened advisors into dissembling and flattery.³⁸ Tyrants feared that confident men and women speaking their minds would erode his mastery.³⁹ On this point, Indian nations stood out as the negation of tyranny, for they placed counsel, private and public, at the center of their polities. Europeans came to realize that most Indian rulers served as “first among equals” within complex kinship networks and political alliances, where “public opinion” shaped the possibilities and limits of action. Soliciting views and offering guidance were among the most important skills of an Indian sachem. An anonymous traveler in the Carolinas observed that Indian “kings can do no more than persuade. All the power they have is no more than to call their old men and captains together, and to propound to them the measures they think proper. And they have done speaking, all the others have liberty to give their opinions also; and they reason together with great temper and modesty, till they have brought each other into some unanimous resolution.”⁴⁰ Europeans were particularly struck by the “extraordinary regularity and decorum” at public councils, where Indian notables debated policy and revived alliances through oratory.⁴¹

³⁸ John Guy, “The Rhetoric of Counsel in Early Modern England,” in *Tudor Political Culture*, ed. Dale Hoak (Cambridge: Cambridge University Press, 1995), 292-310; Jacqueline Rose, “Kingship and Counsel in Early Modern England,” *Historical Journal* 54 (2011): 47-71.

³⁹ Aristotle, *The Politics of Aristotle*, trans. Ernest Barker (Oxford: Oxford University Press, 1958), 227 [Book V, ch. 11] Here, and for much else in the creation of the image of the tyrant, early modern Europeans drew on Aristotle’s *Politics*.

⁴⁰ Anonymous, *A new voyage to Georgia: By a young gentleman. Giving an account of his travels to South Carolina, and part of North Carolina* (London, 1737), 58-59.

⁴¹ The quotation is from William Johnson to Arthur Lee, 28 Feb. 1771, in *The Documentary History of the State of New York*, ed. E. B. O’Callaghan (Albany: 1849-51), IV, 271. Benjamin Franklin agreed: “Having frequent occasions to hold public councils, they have acquired great order and decency in conducting them. . . . He that would speak rises. The rest observe a profound silence. When he has finished and sits down; they leave him 5 or 6 minutes to recollect, that if he has omitted any thing he intended to say, . . . To interrupt another . . . is reckoned highly indecent. How different this is, from the conduct of a polite British House of Commons where” the Speaker grows “hoarse in calling to order.” Benjamin Franklin, *Two Tracts: Information to those who would remove to America, and, Remarks concerning the savages of North America* (London, 1784), 29-30; see also 25-26. On the central place of oratory, persuasion, and counsel in Native government, see, e.g., John Brickell, *The Natural History of North Carolina* (New York: Johnson Reprint Corp., 1969 [1737]), 350; Cadwallader Colden, *The History of the Five Indian Nations of Canada*, 3rd ed. (London, 1755), 15; Dunton, *Letters*, 218; Daniel Gookin, *Historical Collections of the Indians in New England* (New York: Arno Reprint, 1972 [1792; MS, 1670s]), 14; John Lawson, *A New*

The stereotypical tyrant was no less selfish than heedless of advice. Christianized Aristotelian political thought persistently asked: did a ruler act to further the common good or his own gain and private ends? The answer to that question—whether a decree or program advanced the community’s or the ruler’s interests—helped distinguish just from unjust ordinances, the rule of law from arbitrary command, and the three healthy Aristotelian regimes of monarchy, aristocracy, and polity (or constitutional government) from their degenerate deviations of tyranny, oligarchy, and democracy.⁴² Locke, in this reflecting the English mainstream, defined tyranny as power exercised by a ruler “not for the good of those who are under it but for his own private separate advantage.”⁴³ This tradition underscores the importance of settlers praising Indian leaders for avoiding greedy, self-seeking rule, the tyrant’s vice. If Native sachems and captains “should once be suspected of selfishness,” remarked New York councilor Cadwallader Colden, “they would grow mean in the opinion of their country-men, and would consequently lose their authority.”⁴⁴ James Adair, who for forty years traded among the Natives of the Carolina and Georgie frontiers, wrote approvingly of the Indian principle that “leading men are chosen only to do good to the people; and whenever they make a breach of their trust, injuring the public good, their places of course become vacant, and justly devolve to the people, who conferred them.”⁴⁵ The ability of Natives to largely disempower leaders by withdrawal and noncooperation restrained rulers tempted to elevate their own interests over those

Voyage to Carolina, ed. Hugh Talmage Lefler (Chapel Hill: University of North Carolina Press, 1967 [1709]), 204; Roger Williams, *A Key into the Language of America* (1643), in *The Complete Writings* (New York: Russell and Russell, 1963), I, 224; David Zeisberger, *David Zeisberger's History of Northern American Indians*, ed. Archer Butler Hulbert and William Nathaniel Schwarze (Columbus: Ohio State Archaeological and Historical Society, 1910 [MS, 1779-80]), 123.

⁴² See, for instance: Aristotle, *Politics*, 115-16 [Book III, ch. 7], 218 [Book V, ch. 10]; Aquinas, *Summa Theologiae*, Q96, art. 4.

⁴³ Locke, *Two Treatises*, 398-99 [§199]

⁴⁴ Cadwallader Colden, *The History of the Five Indian Nations: Depending on the Province of New York in America* (Ithaca: Cornell University Press, 1964 [1747]), xx.

⁴⁵ James Adair, *The History of the American Indians* (New York: Johnson Reprint Corporation, 1968 [1775]), 435.

of the community. Carolina Indian agent Thomas Nairne wrote of Chickasaw chief Fattalamee, who failed in his duty of promoting peace through oratory and serving as a “counterpoise” to the fury of the warriors. He instead pursued profit, joining the warriors in catching and selling foreign Indians as slaves, but at the cost of losing the people’s regard for him as king. For “it seems they’re of the whiggish opinion that the duties of kings and people are reciprocal [so] that if he fails in his they’ve sufficient cause to neglect theirs.”⁴⁶

Europeans saw in indigenous people traits reminiscent of “Roman” or “republican” political virtue. “None of the greatest Roman heroes have discovered a greater love to their Country” than the Iroquois, wrote Colden respectfully.⁴⁷ Natives, it was said, proudly bore arms and admired martial feats. They were independent, able to obtain their livelihoods from hunting, fishing, and modest agriculture; no great men or employers supplied and controlled their subsistence, or their weapons. Scant disparities in wealth and living standards, and a political culture requiring few gestures of submission, encouraged social equality. “Plato nor no other writer of politics,” Nairne wrote, “could never contrive a government where the equality of mankind is more justly observed than here” in the Chickasaw commonwealth of “complete leveling.”⁴⁸ This line of interpretation concluded with an admiring account of Indian political character, seeing in them sincere “patriotism,” love for their “constitution,” and self-sacrifice, a willingness to subordinate their personal interests to the good of the community.⁴⁹ These virtues persisted not because of fear of coercion by the sachem but from intensive education and

⁴⁶ Thomas Nairne, *Nairne’s Muskhogean Journals: The 1708 Expedition to the Mississippi River*, ed. Alexander Moore (Jackson: University Press of Mississippi, 1988), 38-39.

⁴⁷ Colden, *History*, vi. The Iroquois are “much given to speech-making, ever the natural consequence of a perfect republican government.” Colden, *History*, 3rd ed. (London, 1755), 15.

⁴⁸ Nairne, *Journals*, 64. On equality, see also Adair, *History*, 379; William Robertson, *The History of America* (Philadelphia, 1812 [1777]), I, 315.

⁴⁹ In addition to Colden, see, e.g., Brickell, *Natural*, 350-51; Adair, *History*, 378-79, 427

socialization, reinforced by neighbors' compliments and guidance. "Governed as they are by manners, not by laws," observed Edmund and William Burke, "example, education, and the constant practice of their ceremonies give them the most tender affection for their country, and inspire them with a most religious regard for their constitution and the customs of their ancestors." Every "man has his eye upon his neighbor" and "the whole bent of everything they do is to strengthen those natural ties by which society is principally cemented."⁵⁰

Where others have asked how Natives sketched as noble Romans entered into debates over the contested place of republicanism in Anglo-American politics, my purpose is to think about their relationship to the rule of law. The image of the Indian-as-noble-Roman continued the work of positioning Native nations as the antithesis of stereotypical European despotism. The tyrant—in addition to pursuing his selfish interests and ruling heedless of counsel—exercised cruel domination, upheld by fear, over unwilling subjects. He undermined his people's independence. He weakened their economic independence by intrusively regulating their land and labor or, more far reaching, by formally denying their property rights, insisting that all was held through his grace. He struck at his subjects' psychological independence by demanding the performance of servile obligations, which corroded self-confidence and filled the day with busywork that made political engagement difficult. Mistrust, dishonesty, self-seeking, fear, and top-down command with few limits were the keywords of tyranny. Against this stood the depiction of the Roman-Indians: economically and psychologically independent, martial, largely

⁵⁰ Edmund and William Burke, *An Account of the European Settlements in America* (5th ed., London, 1770), 181-82; see also 176. Passages from Burke and Burke appear in W. A. Young, *The History of North and South America* (London, 1776), I, 58-60. Thomas Jefferson concurred: The Indians' "only controls are their manners, and that moral sense of right and wrong, which, like the sense of tasting and feeling in every man, makes a part of his nature. An offence against these is punished by contempt, by exclusion from society." Jefferson, *Notes on the State of Virginia* (New York: Harper, 1964 [1785]), 95.

egalitarian, patriotic and self-sacrificing, and living in polities oriented around consent, counsel, and the regulation of behavior through social cues rather than repression.

In this portrayal, Indian nations resisted tyranny persistently and predictably; they did not fall victim to it and arise out of it, now and again. This mattered given the distinction emerging among eighteenth-century Europeans between tyranny and despotism, terms that had served and often continued to serve as functional substitutes. Aristotle portrayed tyranny, like all of his ideal-typical regimes, as unstable.⁵¹ Some eighteenth-century French writers, influential among Anglo-Americans, began to distinguish Aristotle's short-lived eruptions of tyranny from longstanding "despotisms." Building on French critics of the late years of Louis XIV's reign, Montesquieu's *The Spirit of the Laws* emphasized that some regimes—the Persians for ancient Greeks, the Ottomans for early modern Christians—did not fluctuate between periods of tyranny and periods of public-regarding, law-respecting government, as a Greek polis might. Rather, to their unsympathetic opponents, Persian and Ottoman rulers managed for centuries to dominate slave-states through fear and with minimal legal restraint.⁵² If despotism was tyranny turned from a temporary to an enduring oppression, from the vice of a particular ruler to a system, then Indian negation of tyranny was no less structural. Europeans admiring the Roman-Indians assumed that their economic and psychological independence and their reliance on consent and counsel rather than coercion in their weak "states" precluded tyranny, generation after generation.

⁵¹ Aristotle, *Politics*, Book V, esp. ch. 10-12 [pp. 217-32].

⁵² Richard Koebner, "Despot and Despotism: Vicissitudes of a Political Term," *Journal of the Warburg and Courtauld Institutes* 14 (1951): 275-77, 301-2; Melvin Richter, "Despotism," in *Dictionary of the History of Ideas*, ed. Philip P. Wiener (New York: Scribner, 1973), II, 7-8; Franco Venturi, "Oriental Despotism," *Journal of the History of Ideas* 24 (1963): 133-34. Aristotle foreshadowed this treatment of despotism, which became common in eighteenth-century European thought, by identifying instances of permanent political oppression: governments in servile, "barbarian" countries where hereditary legitimate—not usurped—royal power resembled the arbitrary command of a master over his slaves. Aristotle, *Politics*, 136 [Book III, ch. 14].

Colonists associated Indian nations, the antithesis of despotism, more with popular than prerogative politics. Nairne explained Chickasaw society and politics by invoking Whigs and Levelers. W. A. Young and much revolutionary iconography linked Natives to the patriot cause; so did the “Mohawks” of the Boston Tea Party.⁵³ But Indians should not be reduced to adjuncts of particular parties and causes. Controversialists constructed the ever-contested definition of the rule of law in opposition to images of arbitrary power salient in a society’s frame of reference. The Bible and histories of classical antiquity and contemporary Europe provided no shortage of tyrants and of those who opposed or rebuked them. King Ahab had his Prophet Elijah, as Caesar had his Cicero and Cato the Younger. Natives likewise loomed in the colonists’ frame of reference. Not far away or distant in time, they dwelled nearby. Treated as negations of despotism, they tacitly shaped for settlers the meaning of the rule of law.

Spanish American uses of Natives to buttress their shaky claims to the rule of law suggest some of the reasons for and implications of the Anglo-American approach. As a practical matter, the Spanish American moves were not available to the English settlers. They built their colonies not atop the wreckage of grand indigenous empires but next to a diverse array of modestly-sized Native polities. The English did not live among millions of Indians while reshaping their indigenous legal orders in ways that allowed the colonists to flatter themselves as liberators replacing “tyranny” with law. Apart from occasional discussions about the origins of the Iroquois confederacy, settlers seldom tried to reconstruct centuries of native history—and

⁵³ Nairne, *Journals*, 38-39, 64; Young, *History*, I, 58 [“our colonies . . . seemed to have imbibed” the Native love of liberty, “if we may judge from the resistance they now make to the acts of the British legislature”]. Philip J. Deloria, *Playing Indian* (New Haven: Yale University Press, 1998), 1-2; Donald A. Grinde, Jr. and Bruce E. Johansen, eds. *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: American Indian Studies Center, University of California, Los Angeles, 1991), 111-40.

even less glimpsed in its prefigurations of their own rule of law. The English did not argue about how to orient themselves to a contested Native past.

Instead, Indians were a living counterpoint and a resource—a resource that could be drawn upon to reinforce key elements of the English version of the rule of law more than to legitimate settler polities. Had the English followed the Spanish imperial school in portraying Natives polities as tyrannies—ones whose features were carefully selected so as to represent the exploitive colonial regime as the ascension of law over arbitrary will—then the settlers’ governance could essentially congratulate itself as an improvement, even a liberation. The settlers sometimes took this route. Cotton Mather, looking back on the New England Indian “praying towns,” claimed that the sachems themselves understood that Christianized government under English auspices would “abridge them of the tyranny” through which they “held their [Native] people in a most absolute servitude and ruled by no law but by their will.”⁵⁴ But the primary English response from the latter seventeenth century forward was not to use caricatured Indian “despotism” to legitimate their rule. Instead, alongside sneers about the Native “barbarism,” settlers perceived in Indians a challenge and a form of inspiration, seeing in them values and practices essential for the colonists’ rule of law.

That settlers did this in a particularly Anglo-American idiom is revealed by a comparison with Las Casas and his followers. They too used Natives, their civil and prudent Aztecs and Incas, to suggest how Spanish governance could better control arbitrary power. But this advice took the form of praise for indigenous practices that would help the Spanish legal-bureaucratic empire elevate *derecho* and *justicia* over the will and greed of officials and powerful private subjects. In the Aztecs and Incas were found stable, clear laws that left little room for casuistry

⁵⁴ Cotton Mather, *The Life and Death of the Reverend Mr. John Eliot* (London, 1691), 93-94.

and discretion, the parents of venality, bribery, and confusion. The Native empires also seemed to offer close supervision and periodic inspections of potentially wayward magistrates; speedy resolution of lawsuits through simple procedures; and the meaningful opportunity to seek redress from a justice-giving monarch present in person. In all of this Indian practices offered remedies to well-known weaknesses in the Spanish empire's strategies for elevating law over will.

British American settlers did not draw on Natives to suggest improvements to a legal-bureaucratic empire straining to uphold an objective theory of justice. Rather, settlers cast Natives as living negations of tyranny who tacitly reinforced ways of controlling arbitrary power prominent in the English country and Whig traditions: a non-repressive politics of consent featuring rulers open to counsel, overseeing and constrained by patriotic, constitution-loving, active citizens who, like their rulers, ideally valued the public good over self-interest. Colonists writing accounts of Native life sometimes paused to show how Indian values and practices could improve the British American form of the rule of law. Colden contrasted colonial governors manipulating "expedients" to grasp money with Iroquois sachems who gave away property to the point to poverty lest they be suspected of selfishness. Adair noted how the love of country shared by Indians and settlers alike could help the latter maintain the old, good English constitution against the ever-present threat of tyranny. And he hoped that colonial legislators and lawyers could imitate Indians' honest oratory and detestation of "despotic power."⁵⁵ Looking at the Spanish case helps us see how British Americans, several decades after initial contact, came to portray Natives in ways that did not legitimate or prefigure colonial governance or suggest reforms to it so much as to valorize the political personality of the ideal rulers and ideal citizens presupposed in the English style of controlling arbitrary power.

⁵⁵ Colden, *History*, xx, 82-83; Adair, *History*, 427-29.

III. The Anglicization Debate

From the latter seventeenth century through the Revolution, colonial society was powerfully reshaped by increasing imperial oversight and commercialization (the involvement of a larger share of the economy and the population in specialized production for market and in intercolonial and transatlantic trade). In this new context, settlers refashioned their use of Natives in debates about the rule of law. Historians have detected a reorientation of the colonial legal systems from the last quarter of the seventeenth century forward in a set of interlinked changes often grouped under John Murrin's rubric of "anglicization."⁵⁶ The colonial court systems of the seventeenth century were overwhelmingly staffed not by trained lawyers or imperial appointees but by laymen who administered nontechnical, arbitral, and discretionary justice and brushed aside inconvenient ordinances. Magistrates selected more for their social prominence than their legal competence praised fairness and common sense and looked down on legal "niceties." When arbitration was not possible, settlers concentrated on the substance of disputes, disparaging the intricacies of English legal procedure, with its complicated rules of pleading and obscure terms of art. By the turn of the eighteenth century, important elements of this inherited system were under stress. Where neighbors might arbitrate disagreements in order to restore peace in a face-to-face community, population growth and dispersion and the expansion of long-distance trade and credit networks meant that more disputes arose among strangers "at arm's length," who were determined to prevail at trial even at the cost of fracturing relationships. Commercialization, especially trans-Atlantic trade, created pressures for a more

⁵⁶ John M. Murrin, "Anglicizing an American Colony: The Transformation of Provincial Massachusetts" (PhD dissertation, Yale University, 1966); and Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts," in *Colonial America: Essays in Political and Social Development*, ed. Stanley N. Katz and John M. Murrin (New York, 1983), 540-72.

predictable, more lawyerly and formal legal system, one more attentive to English technicality. Settlers dealing across colonial boundaries or with international merchant networks, and colonists trying to engage or resist imperial administrators, Navigation Acts, and Privy Council reviews, were pushed towards English precedents and procedures as a legal lingua franca. As tribunals and administrators increasingly respected rather than recoiled from legal technicality, litigants found it in their interest to hire lawyers who could master that lingua franca. This further undermined the simplicity and accessibility of colonial justice. The settlers' legal systems became more like England's, more "anglicized," as they moved from a lay-dominated "communal, informal mode of resolving disputes to a rationalized, lawyerly" mode.⁵⁷

Colonists who resented this relative shift nostalgically compared an earlier era of approachable, readily-understood justice to a law growing increasingly formal and alienating. Virginia planter and historian Robert Beverley looked back fondly on the middle seventeenth-century General Court that determined lawsuits "by the standard of equity and good conscience," never "admitting such impertinences of form and nicety as were not absolutely necessary." The "tricking and foppery of the law [was] happily avoided." But in the last quarter of the seventeenth century, he bitterly observed, "English forms" and statutes and the "nicety of pleading, with all the juggle of Westminster-Hall was creeping into" Virginia courts.⁵⁸

⁵⁷ On these points, see, e.g., Stephen Botein, *Early American Law and Society* (New York: Alfred A. Knopf, 1983); Cornelia Hughes Dayton, "Turning Points and the Relevance of Colonial Legal History," *William and Mary Quarterly* 50 (1993): 10 [quotation]; Cornelia Hughes Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill: University of North Carolina Press, 1995); Peter Charles Hoffer, *Law and People in Colonial America*, revised ed. (Baltimore: Johns Hopkins University Press, 1998), 76-85, 93-97; Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987); Deborah A. Rosen, "Courts and Commerce in New York," *American Journal of Legal History* 36 (1992): 139-63.

⁵⁸ Robert Beverley, *The History and Present State of Virginia*, ed. Louis B. Wright (Chapel Hill: University of North Carolina Press, 1947 [London, 1705]), 255, 95-101. A variant of this story can be found in Guillaume Thomas [Abbé] Raynal, *A Philosophical and Political History of the Settlements and Trade of the Europeans in the East and West Indies*, trans. J.O. Justamond (London, 1788 [originally published, Amsterdam, 1770], VII, 333.

Settlers spoke against anglicizing colonial justice not only in their own voice but through Indians, publishing critiques of European law attributed to Natives that mixed indigenous opinion and the author's own agenda. In the eighteenth century, both English satirists who had scarcely met Indians and settlers who had travelled among them could join in attributing to Natives some of the conventional criticisms of English law. It was so bulky and overextended, ran the stereotypical complaint, that the English "natives don't know a thousandth part of" the disorganized mess. Average people scurried to hire lawyers who, for a fee, explained the law in ways that stirred up quarrels. Indian justice, "summary," decisive, and free, looked attractive by comparison. And so on.⁵⁹ The best of the colonial authors—Adair, for instance, who lived and traded among the southeastern tribes—wrote Native critiques that in part echoed these stock complaints but, intriguingly, also went beyond them to engage the settlers' anglicization debate. Indians, according to Adair, commented tartly on the military and social degeneration of the colonists. For the "colonies in their infant state . . . the law of reason was their only guide. . . . They copied after honest nature . . . both in domestic and social life." With an uncertain mixture of self-assertion and assistance from Adair, the Natives recommended that settlers' "voluminous" laws scattered through "confused old books" be reduced into an "honest small one, that the poor people might be able to buy, and read it." Pruned, accessible, published law would help laypeople "avoid snares" and free them from the fees and manipulations of attorneys. Obscure law reliably produced "tedious," delay-ridden court proceedings vulnerable to manipulation. The "quotation of dark quibbles" from "old books" threatened to confuse just and

⁵⁹ Henry Baker, "The Remaining Part of the Observations of Sa Ga Tern Qua Rash Tow," in *Universal Spectator and Weekly Journal* (London, 1756 [1742]), IV, 243-44; Adair, *History*, 424, 434-35. Baker's satirical essay purports to be a newly discovered manuscript from one of the four Mohawk "kings" who visited England in 1710. On the literary reaction to the Indians, see Richmond P. Bond, *Queen Anne's American Kings* (Oxford: Clarendon Press, 1952); Eric Hinderaker, "The 'Four Indian Kings' and the Imaginative Construction of the First British Empire," *William and Mary Quarterly* 53 (1996): 487-526.

unjust causes. The poor in particular suffered from the “perplexed science of granting equity” by charging for it. In response to this harsh assessment Adair offered a brief “excuse”: the “multiplicity of contracts in our great trading empire, with the immense difference” between the “abilities of the contending parties” required lawyer-driven proceedings attuned to technicalities and precedents buried in “registers.”⁶⁰

The purposes and limits of Adair’s “Native” appraisal emerge more clearly when compared to the assessment of European law produced by, or attributed to, Indians in the Spanish and French empires. French writers advanced a more thoroughgoing political and legal critique of European law through the vehicle of the “noble savage”—for instance, through Baron de Lahontan’s dialogue between a Huron and French soldier, translated into English at the turn of the eighteenth century.⁶¹ Lahontan’s Huron began with criticisms of European justice common to Indian observers in French and British America: distaste for the corrupt manipulations of officials and for the brutalities of imprisonment and judicially-imposed servitude.⁶² But he went much further. The dialogue portrayed the Huron as “strangers to the measures of *meum* and *tuum*” and to “distinctions of property.” Even as they adhered to tribal custom, they rejected European-style law, which they held to be a deviation from “reason and justice,” a form of artifice that allowed the French to do wrong by obscuring natural, readily-apprehended rightful and “innocent conduct.”⁶³

⁶⁰ Adair, *History*, 432, 434, 436-37.

⁶¹ Louis Armand de Lom d’Arce Lahontan, baron de, *New Voyages to North America: Reprinted from the English Edition of 1703*, ed. Reuben Gold Thwaites, 2 vols. (Chicago: A. C. McClurg, 1905).

⁶² Lahontan, *Voyages*, II, 557-61.

⁶³ Lahontan, *Voyages*, II, 552-59. On the distinction in Lahontan’s dialogue between the natural and artificial, see Anthony Pagden, *European Encounters with the New World: From Renaissance to Romanticism* (New Haven: Yale University Press, 1992), 122-23.

Spanish America provides another vantage point for looking at the British case since indigenous people evaluated colonial law (*derecho indiano*) as much from “within” as “outside” the European legal system. Indians in British America were foreigners, unless naturalized. Indigenous nations on the frontier and in the backcountry negotiated agreements with settlers over trade, war and peace, and justice—specifying when Natives would accept colonial jurisdiction and ways of handling disputes. By contrast, Indians within New Spain, Peru, and other core areas of Castilian settlement stood as vassals of the crown. They constantly confronted a bureaucracy that calibrated the labor and tribute to be exacted from them, reordered their governments and leadership, moved them into new villages, and decided when and how far to “Hispanicize” their customs. Indians assessed this legal-bureaucratic empire from the standpoint of subjects who lived under it rather than next to it, subjects who felt its impact not occasionally on matters limited by treaty but continually on the most important issues of daily life. Felipe Guaman Poma de Ayala, for instance, an Andean Indian descended from a noble Inca family, harshly criticized *corregidores*, estate stewards, and mine owners for exploiting indigenous people: robbing Natives of property and labor, taking their wives and daughters, and banishing literate Indians capable of protesting. One of Guaman Poma’s solutions was to make the extensive South American state more open to Indian complaints and to turn it against their tormentors. Judges, he insisted, should accept petitions in Native languages and render decisions in writing so they might be preserved and delivered to the crown. State officials should periodically inspect the stewards who collected tribute and ran the mines and ranches.⁶⁴ Guaman Poma was in no position to follow Adair’s southeastern tribes in deriding legal technicality and speaking fondly of lay justice by the light of the settlers’ “reason.” Nor could he, like

⁶⁴ Felipe Guaman Poma de Ayala, *The First New Chronicle and Good Government* [*El primer nueva crónica y buen gobierno*], trans. David Frye (Indianapolis: Hackett Publishing, 2006 [MS, 1600-1615]), 167-69, 176, 184, 270.

Lahontan's "Hurons," reject law itself as an artifice corrupting natural rectitude. For indigenous people in Spanish America, the legal-bureaucratic empire, with its layered hierarchy of institutions, detailed ordinances, and *visita* and *residencia* inspections, at least offered a partial defense against ever-present abuse and extortion.

Viewing Adair's Indians simultaneously from the perspectives of the French and Spanish indigenous critiques of European law helps situate the southeastern nations' expectations of justice and underscores how they served as a particular kind of protest ideal to English settlers. Adair's Natives did not, in the style of the Andean Indians, call for improvements on their own behalf in an imperially-dominated bureaucratic justice enveloping them. Neither did they reject European law and property in the fashion of the noble-savage "Hurons." Rather, Adair's Indians' criticism and suggestions for improvement echo a law reform agenda voiced in England and its American colonies from the late sixteenth century through the eighteenth century: scorn for the multiplicity of hard-to-find laws and for the "snares" of non-intuitive precedents and procedures, coupled with calls for simplifying and pruning law, ideally printing it in a slim primer that made it accessible to laymen.⁶⁵ English colonists, listening to a mixture of the southeastern tribes' indigenous perspective and Adair's ventriloquism, could hold fast to the value of the European rule of law while disparaging its unwelcome drift toward an estranging anglicization.

IV. Commerce and the Troubling Future of the Rule of Law

The growing importance of commercialization did more than encourage anglicization. It also shaped how British Americans used stylized depictions of Natives to think about possible

⁶⁵ See, e.g., Barbara Shapiro, "Law Reform in Seventeenth-Century England," *American Journal of Legal History* 19 (1975): 280-312.

future trajectories of the rule of law. Scottish Enlightenment thinkers articulating sweeping four-stage theories of evolutionary development played the leading role in developing or synthesizing these ideas. Speculating about the impact of commerce upon law particularly engaged four-stage theorists because of the emphasis that the British tradition put on the “spirit” or “character” of the people in sustaining the rule of law. The right legal principles and institutions (such as juries, representative assemblies, and *habeas corpus*) were important but not in themselves sufficient. A judge with any wit enjoyed extraordinary discretionary power when interpreting written law, observed Adam Ferguson. As a result, if

forms of proceeding, written statutes, or other constituents of law, cease to be enforced by the very spirit from which they arose; they serve only to cover, not to restrain, the iniquities of power: they are possibly respected even by the corrupt magistrate, when they favor his purpose; but they are contemned or evaded, when they stand in his way: And the influence of laws, where they have any real effect in the preservation of liberty, is not any magic power descending from shelves that are loaded with books, but is, in reality, the influence of men resolved to be free; of men, who, having adjusted in writing the terms on which they are to live with the state, and with their fellow-subjects, are determined, by their vigilance and spirit, to make these terms be observed.⁶⁶

Ferguson’s fellow Scottish evolutionary theorist, Lord Kames, contended that lawsuits,

like war between different states, accustom people to opposition, and prevent too great softness and facility of manners. In a free government, a degree of stubbornness in the people is requisite for resisting encroachments on their liberties. The fondness of the French for their sovereign, and the easiness and politeness of their manners, have corrupted a good constitution. The British constitution has been preserved entire, by a people jealous of their prince, and resolute against every encroachment of regal power.”⁶⁷

The people must maintain a “strict civil discipline” to keep their polity both free and ordered.⁶⁸

⁶⁶ Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 2007 [1767]), 249.

⁶⁷ Lord Kames, *Sketches of the History of Man*, ed. James A. Harris, 3 vols. (Indianapolis: Liberty Fund, 2007 [reprint based on 1788 ed.; 1774 first ed.]), II, 412. The notion that the (limited) liberties of England rested on the willingness of the people to oppose government overreaching obstinately and incessantly travelled into Spanish American sources. See, e.g., José Servando Teresa de Mier Noriega y Guerra, *Memoria politico-instructiva, enviada desde Filadelfia en agosto de 1821, a los gefes independientes del Anáhuac, llamado por los Españoles Nueva España* (Monterrey: R. Ayuntamiento de Monterrey, 1974 [1821]), 66-67, 70-71, 77-8.

⁶⁸ A representative example of this often-repeated observation can be found in Cadwallader Colden’s “Account of the Government of the New England Colonies” (MS, 1742?). Colden wondered at the “strictness” with which New

It was not obvious in the Atlantic world that a vigilant and stubborn popular spirit was essential to maintaining the rule of law. Spanish Americans who believed that their polities tolerably upheld the supremacy of law over willful passion and self-dealing justified their position by pointing to the empire's extensive bureaucracy and the restraining force of *derecho*. From within this conception of the rule of law, the failure of popular character, the corruption, that loomed largest was the temptation of subjects to "try to imitate" the "bad example" of officials who ignored or twisted ordinances and *derecho* to further their self-interest.⁶⁹

Anglo-Americans likewise worried about this contagion of corruption. But particularly in the Whig and republican strands of British constitutionalism, expectations for the people's character was higher since it played a larger role in sustaining the rule of law. Refraining from manipulation and lawbreaking was not enough. More was needed: Kames' "stubbornness," a resolution to confront executive overreaching resting on discipline, skepticism, and manners hardened by pursuing conflict through law; and Ferguson's active "vigilance," which ensured that laws restraining the state and preserving liberty not wither but be enforced "by the very spirit from which they arose." The centrality of participatory, lay justice in British North America

England magistrates "put their laws in execution." After all, their elected "authority expires annually" and "they hold their offices at the good liking of the people they govern." Why did New England not descend into confusion and anarchy? Colden found the answer in the extraordinary self-discipline to which the people of New England had "voluntarily" subjected themselves on account of their Puritan faith, a discipline that persisted even as religious fervor faded. Colden, "Account," in *The Letters and Papers of Cadwallader Colden* (New York: New York Historical Society, 1918-37), IX, 247-48.

⁶⁹ Jorge Juan's and Antonio Ulloa's *Noticias Secretas de América* (MS, 1749) provides a classic example. Why, they asked, were settlers in Peru so remarkably disobedient to law? The common people looked about and saw judges, officials, and even clergy giving vent to passions and seeking their own self-interest instead of following law. Viceroy's, far from stopping this deceit and financial predation, taught a master class in twisting the law to reward themselves and their relatives and entourage. "Disrespect for the law stems in large part from the misguided behavior of those who govern." Subjects "come to view justice under the law as a ridiculous concept, purely an ideal which is never put into practice in the republic." They see viceroys disobey the commands of the king, *audiencias* frustrate the viceroys, town councils disregard the *audiencias*, and other "vassals follow [this] example to the letter, so that going down the line from one person to another, no one remains, not even the smallest child, who does not do the same with the laws pertaining to him. Juan and Ulloa, *Discourse and Political Reflections on the Kingdoms of Peru [Noticias Secretas de América]*, trans. John J. TePaske and Besse A. Clement (Norman: University of Oklahoma Press, 1978), 242-45.

made even more salient this pronounced concern with political psychology, with popular character. What might growing commercialization do here? To be clear: this inquiry does not reduce to the question, often asked within and in reaction to the civic republican tradition, of whether commerce undermined the political virtue necessary for free government. Rather, my objective is to explore a thesis foreshadowed in selected eighteenth-century British thinkers and more fully developed in Scottish Enlightenment four-stage theorists. It holds that trade at first strengthens the institutions and practices favorable to the rule of law. But, later, as commercial development yields opulence, it damages the popular commitment to values animating the rule of law, wearing them away even as tribunals and ordinances expand and become more precise.

The leading Scottish stadial theorists, Lord Kames, Adam Smith, Adam Ferguson, William Robertson, and John Millar, contended that much of humanity became more mature and civilized as it progressed through four developmental epochs—hunting, pastoral, agricultural, and commercial.⁷⁰ The impulse among these writers was to look at a society’s “mode of subsistence. Accordingly, as that varies, their laws and policy must be different.”⁷¹ Peoples in Europe, Asia, Africa, and the Americas had passed through the four eras at different times and rates, yet displayed striking parallels in their socio-economic and legal arrangements in each stage. Hunters and shepherds had “occasion for very few regulations” as they lived with “imperfect conceptions of property.”⁷² Because their economy depended on physical control of

⁷⁰ See, e.g., Henry Home, Lord Kames, *Sketches of the History of Man*, ed. James A. Harris (Indianapolis: Liberty Fund, 2007 [1774]), esp. I, 11; II, 373-74, 565-66; Henry Homes, Lord Kames, *Historical Law Tracts*, 2nd ed. (Edinburgh, 1761), esp. v; Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Indianapolis: Liberty Fund, 1982 [1762-66]), esp. 14; Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 2007 [1767]); William Robertson, *The History of America* (Philadelphia: Johnson and Warner, 1812 [1777, 1796]); John Millar, *The Origin of the Distinctions of Ranks: or, An Inquiry into the Circumstances Which Give Rise to Influence and Authority in the Different Members of Society*, ed. Aaron Garrett (Indianapolis: Liberty Fund, 2006 [1806]). The following paragraphs will emphasize these theorists’ similarities rather than their differences.

⁷¹ Robertson, *History*, I, 301.

⁷² Robertson, *History*, I, 315; Smith, *Lectures*, 202; Smith, *Wealth*, 709-10.

animals and grounds for hunting and pasturage, they seldom envisioned property as distinct from possession. Their property law “would be but very short and have few distinctions in it, so that every man would understand it without any written or regular” ordinances.⁷³ The pursuit of agriculture encouraged greater abstraction in legal ideas about property: powers of testation; mechanisms for dividing ownership among groups and into future time; and more elaborate distinctions between real and moveable property—all ways in which rights became “disjointed from possession.”⁷⁴ Strictly speaking, the legal abstractions born of agriculture did not require the circulation of money, as William Robertson suggested in his reconstruction of late Aztec society. But, the Aztec case aside, the importance of money could scarcely be overestimated, and Robertson accounted its introduction and routine use “of the greatest consequence in the progress of nations.”⁷⁵ Money spurred the growth of manufactures and commerce.

In tandem, money, manufactures, and commerce amplified the causes of dispute, their complexity and scale, and the distance across which people interacted, thereby encouraging development of the institutions and practices foundational to the modern rule of law. Trade created pressure not only to turn custom into written and formal laws, but to multiply the number and extend the range of these laws and transform popular attitudes towards them. “In the age of commerce, as the subjects of property are greatly increased, the laws must be proportionately increased,” Adam Smith observed, building on Montesquieu, as most Scottish stadial theorists did. “The more improved any society is . . . the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of property.”⁷⁶

⁷³ Smith, *Lectures*, 212-13.

⁷⁴ Kames, *Historical*, 90-96.

⁷⁵ Robertson, *History*, II, 200.

⁷⁶ Adam Smith, *Lectures*, 16. Montesquieu famously commented: “The laws are very closely related to the way that various peoples procure their subsistence. There must be a more extensive code of laws for a people attached to commerce and the sea than for a people satisfied to cultivate their lands.” Montesquieu, *The Spirit of the Laws*,

Commerce introduced legal devices—for instance, stocks, insurance, speculative contracts, negotiable instruments—far more complicated than those that sufficed in the age of agriculture. Parties dealt with trading partners whom they might never see, perhaps foreigners. Confidence in the “regular administration of justice” became essential to trade that deployed abstract legal ideas yet could not rely on face-to-face interactions and local social norms to manage relationships and defuse disputes. Only confidence in the fairness and predictability of the state’s justice reassured merchants and customers risking their property through commercial contracts and credit.⁷⁷

The importance of confidence meant that, as Adam Ferguson observed, the “commercial and political arts have advanced together.” Nations in which trade became important tended to build confidence in justice by limiting the prerogatives of the sovereign over judicature, in part by appointing trained judges and separating the judicial from the executive power.⁷⁸ All of this reduced uncertainty introduced by rulers’ commercial inexperience, favoritism, and short-term self-interest. Trade also reshaped popular attitudes. The “spirit of commerce,” Montesquieu claimed, “produces in men a certain feeling for exact justice, opposed on the one hand to banditry and on the other to those moral virtues” that encourage people to subordinate self-interest to the interests of others.⁷⁹ Kames surmised that patriotism, or love of the homeland [*amor patriae*], arose with agriculture and government, but grew strong with commerce. “Patriotism at the same time is the great bulwark of civil liberty; equally abhorrent of despotism on the one hand, and of licentiousness on the other.”⁸⁰ By cultivating the balancing force of

trans. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 289; see also 349.

⁷⁷ Smith, *Wealth*, 910.

⁷⁸ Ferguson, *Essay*, 247; Kames, *Historical*, 285-86; Smith, *Wealth*, 722-23.

⁷⁹ Montesquieu, *Spirit of the Laws*, 339.

⁸⁰ Kames, *Sketches*, II, 416-18.

patriotism along with a commitment to “exact justice,” by creating pressure for the “regular administration” of a corpus of written, formal laws expanding in number and range of objects regulated, and by favoring the shielding of judicature from rulers’ volatility and bias, commercial expansion, in the eyes of the Scottish stadial theorists, promoted the rule of law. At least initially.

As trade grew ever more successful, it produced not just profit but opulence. Scholars have long discussed how English republicans and the country party warned that if commerce brought not just gain for the nation but gaudy wealth for the few, it would sink the many into dependency, and increase the risk of tyranny by corroding virtuous citizenship and providing the means for political corruption. Rather than enter into this ongoing discussion, we ask a more precise question: how did Scottish stadial theorists imagine the risks that exorbitant riches posed to the practices and values necessary to the rule of law? Kames and Ferguson, who engaged most carefully with this question, cautioned that the beneficiaries of abundance would be tempted to demand more, in a propulsive, accelerating process. “Opulence begets luxury, and invigorates the appetite for sensual pleasure. The appetite, when inflamed, is never confined within moderate bounds, but clings to every object of gratification, without regard to propriety or decency.” As this progresses, trade breeds selfishness and “voluptuousness,” which smother the “industry” and “fair dealing” that initially sustained mercantile success.⁸¹ Wealth, which once supported a “vigorous spirit” and the “confidence of the subject,” later becomes, as it multiplies and concentrates, the “idol” of a “timorous mind.” “Overflowing riches unequally distributed . . . eradicate patriotism.” The vices of “selfishness, sensuality, and avarice” become “antagonists” specifically to the rule of law. These vices give rise to an “effeminacy” that wears down the

⁸¹ Kames, *Sketches*, I, 204, II, 418-24.

popular “stubbornness” once ready to resist overreaching power. A “luxurious and licentious” people loses its “attachment . . . to our excellent [British] constitution” and become “impatient of rule, . . . despising of all authority.” They grow inured to deceit at the customhouse, “bribery and corruption in elections,” and the ready abandonment of the promise, the moral commitment, upholding contracts. The laws against these ills lose effect when “patriotism is banished by corruption” in a “degenerate people. Nothing is studied, but how to evade the penalties; and supposing statutes to be made without end for preventing known evasions, new evasions will spring up in their stead. The misery is, that such laws, if they prove abortive, are never innocent with regard to consequences; for nothing is more subversive of morality as well as of patriotism, than a habit of disregarding the laws of our country.”⁸² There was no reason to think that the debasement of public character that ate away at the rule of law would be confined to commercial Britain. Because of the explicitly trans-national nature of stadial theory, the trajectory of Britain stood as a warning, as a projection of a distressing future for colonies ever more shaped by trade.

Where were the Indians in all of this? Stadial theorists, as is well known, drew liberally on caricatured accounts of indigenous peoples in the Americas to illustrate the society and politics of the “rude” hunter stage.⁸³ But more relevant for our purposes is how Anglo-American commentators treated Natives as exemplifying many of the virtues that commerce threatened to corrode. Where opulence invited idleness and lassitude and tended to “enervate” the “manly powers,” Natives were seen as vigorous; not overfussy but hardy and devoted to the stern

⁸² Ferguson, *Essay*, 248; Kames, *Sketches*, III, 780; II, 426-27; III, 782. John Brown’s discussion of “the effects of exorbitant trade and wealth on manners,” with its warnings about “effeminacy,” foreshadowed the themes of the stadial theorists. Brown, *An Estimate of the Manners and Principles of the Times* (London, 1757), 151-61, 173-74, esp. 158-61.

⁸³ Relying on deeply misleading accounts of Indian society, evolutionary theorists saw Natives, inaccurately, as stuck in an early stage as hunters and fishermen with rudimentary agriculture, living with little sense of property rights and scarcely any government. Kames, *Sketches*, II, 362, 561, 565; Ferguson, *Essay*, 75, 81-84; Robertson, *History*, I, 305; Smith, *Lectures*, 15, 459.

propriety that dandies abandoned to chase sensual gratification. Fear of losing riches made wealthy Europeans “timorous” and deferential to authority, unlike the self-confident, independent Indians who esteemed liberty. As love of the homeland [*amor patriae*] and reverence for its “excellent constitution” dissipated among the “luxurious and licentious” British degraded by commercial overabundance, Natives were thought to display remarkable “patriotism” and dedication to their “constitution.”⁸⁴ Finally, unlike the “degenerate” British who were falling into a habit of “disregarding the laws” and studying “how to evade” its “penalties,” the Indians, as Colden noted, respected their customs, “which it is scandalous for any one not to observe, and draw after them public or private resentment when they are broke.” Colden contended that the Five Nations of the Iroquois confederacy had long maintained a stable “form of government, . . . free from those complicated contrivances which have become necessary to those nations where deceit and cunning have increased as much as their knowledge and wisdom.”⁸⁵ These idealized Native societies, as yet uncorrupted by opulence, seemed to produce the self-confident, independent, resolute patriots who resisted willful, selfish overreaching by leaders, maintained inherited constitutional forms, and insisted on adherence in the name of the public good to the duties and restraints imposed by custom. Understood this way, Indians provided a counterpoint. They underscored the dangers of commercial excess to the popular “character” and “spirit” necessary to the rule of law.

By the 1750s, though, colonial observers began to detect hints that commerce was beginning to reshape some Native nations in the ways expected by stadial theory. Though indigenous people were hardly mercantile, their exchanges of furs and, in the south, slaves for cloth and manufactured goods was making itself felt. Thomas Pownall, writing of the Iroquois

⁸⁴ Adair, *History*, 378-79, 432-33, 427; Burke and Burke, *Account*, 181-82; Colden, *History*, vi.

⁸⁵ Colden, *History*, xx, xvii.

three decades after Colden, argued that trade along with diplomacy and war was having its usual effect: strengthening government. Where the Five Nations had historically lacked magistrates to impose “civil coercion,” they began to “find by experience rather than reason the necessity of a civil union of power and action,” and were inching closer to a “state.” Meanwhile, the southeastern tribes, in Adair’s opinion, once lived with limited wants and in “ignorance of the gay part of life. . . . In their former state of simplicity, the plain law of nature was enough; but, as they are degenerating very fast from their ancient simplicity, they, without doubt, must have new laws to terrify them from committing new crimes, according to the usage of other nations, who multiply their laws, in proportion to the exigencies of time.”⁸⁶ Indians, then, helped colonists look not only backwards to the supposedly common past of humanity, but also forwards to a possibly distressing future for the colonial rule of law. Why should the colonists hope for an exemption from the prediction offered by stadial theory, in which commerce at first encouraged legal institutions and practices favorable to the rule of law only to later eat away at the popular spirit that sustained it? From the perspective of Massachusetts and Virginia, the English were ahead of them on this trajectory and the Iroquois and southeastern tribes well behind, but all were moving, at different rates, along similar pathways.

The British use of Natives to reflect about the colonial rule of law becomes clearer and more distinctive when compared to anomalous work in Spanish America. First, Castilians often praised the Aztecs’ and Incas’ *policia*, their well-designed legal institutions, pointedly comparing

⁸⁶ Pownall, *Considerations*, 17-18; Adair, *History*, 430-31. Anglo-American officer Henry Timberlake, writing about ten years before Adair, maintained a more traditional view of the Cherokees, one of the nations that Adair lived among: “Their government, if I may call it a government, which has neither laws or power to support it, is a mixed aristocracy and democracy, the chiefs being chose according to their merit in war or policy at home; these lead the warriors that choose to go, for there is no laws or compulsion on those that refuse to follow, or punishment to those that forsake their chief.” Henry Timberlake, *The Memoirs of Lt. Henry Timberlake: The Story of a Soldier, Adventurer, and Emissary to the Cherokees, 1756-1765*, ed. Duane H. King (Cherokee, NC: Museum of the Cherokee Indian Press, 2007 [1765]), 36.

them to what came before: the disorganized justice and reliance on the will of great men evident among the tribes later incorporated into the indigenous empires. The Aztecs and Incas, this story continued, over time imposed through imperial expansion their rudimentary rule of law over a growing number of tributary nations. Second, writers in the Spanish imperial school figured the Aztecs and Incas as tyrannies so as to set up a second and distinct grand narrative: the creation of a rule of law by the Castilian crown, which overcame the self-interested brutality and willfulness of the Indian empires and, later, of the conquistadors. From the perspective of the mature Spanish empire, both of these accounts put Indians at the center of a story about the rule of law; both were dynamic and featured dramatic changes over time; and yet both looked backwards. The Spanish did not typically see the Natives, in the British fashion, as an exemplary counterpoint, as the repository of a popular character essential to the European rule of law but vulnerable to loss by the settlers. Nor did the reaction of Native societies to trade within Spanish America reinforce a stadial theory that offered predictions about the future of the settlers' rule of law. To be sure, following the influence of Acosta, Spanish writers ranked the various Indians they encountered in the Americas as more "primitive" or "advanced," placing them into an evolutionary model that differentiated among the stages of barbarism. This stadial project, like the histories of the spread of the rule of law through the Aztecs and Incas and through the Castilian crown, looked backwards to the early days of the Spanish empire or to pre-contact indigenous civilizations. Natives did not help the Spanish reflect upon how socio-economic change might threaten settlers' rule of law in the coming decades.

Yet Spanish America did help the British in this forward-looking work, if in an ironic and unflattering way. Scottish stadial theorists suggested that as commerce accelerated towards its late degenerate phase of concentrated opulence, it would encourage the multiplication of legal

rules and devices while slowly corroding the popular character that animated the rule of law. This portrait—a hypertrophy of structures and procedures that could not successfully restrain the greed and the arbitrary will of the powerful—resembled the representation of the Spanish empire current among its critics. The Castilian crown, William Robertson acidly noted, issued “numerous and often repeated” edits to protect the Indians. “In no code of laws” are “precautions multiplied with more prudent concern for the preservation, the security, and the happiness of the subject.” Yet these “too often proved ineffectual remedies against . . . the avarice of individuals” and “the exactions of the magistrates.”⁸⁷ John Campbell likewise pointed to the greed of Spanish American officials, who tried to extract as much money as possible within their limited terms of office. Every “officer, from the highest to the lowest, has the avidity which a new and lucrative post inspires; ravenous because his time is short, he oppresses the people, and defrauds the crown; another succeeds him with the same dispositions, and no man is careful to establish anything useful in his office, knowing that his successor will be sure to trample upon every regulation that is not subservient to his own interests. Thus these enslaved people are obliged to submit to be drained by a constant succession of hungry and impatient harpies, who . . . extirpate all public spirit.”⁸⁸ And so the British settlers faced a potentially dark irony. The commercial growth that was enriching them and drawing more of them into transatlantic networks, the commerce that in their self-congratulation distinguished their empire of trade and liberty from Castilian absolutism, threatened to nudge their rule of law toward the Spanish model: elaborate, verbose, and technical, yet hollow. In this way images of the Spanish

⁸⁷ Robertson, *History*, II, 248-49, 270. Raynal likewise lamented that the extortionate demands of Spanish American officials were “pursued with impunity.” The laws established to protect the Natives “offered small relief” against the “savage, proud, and rapacious Spaniards.” Raynal, *Philosophical and Political History*, IV, 308, 311.

⁸⁸ John Campbell, *An Account of the Spanish Settlements in America* (Edinburgh, 1762), 155-56.

joined caricatures of Indians in Anglo-American anxieties about a potentially distressing trajectory for their rule of law.

V. Conclusion: Thinking with Indians

What does it mean, in the end, to think with Indians about the rule of law? When settlers used Natives to reflect upon challenges and uncertainties about law, those challenges and uncertainties might, but need not, directly involve and influence actual Indians. Sometimes settler conflicts with indigenous peoples (say, over covering graves) acted as a catalyst to generate arguments that spilled over into broader colonial preoccupations (over the control of private violence). Sometimes settlers used representations of Natives to participate in rule of law debates that scarcely implicated Indians and had no analogue in indigenous societies. Dead Aztec and Inca rulers had not mused about the implications of their legal order for Castilian disputes about supremacy of law. The Seneca and Cherokee did not debate among themselves about the stereotypical European image of the “tyrant” or the implications of commercial opulence for the future of colonial law. Adair’s southeastern tribes tacitly commented on anglicization of the settler legal system. But British imperial government and transformations in colonial political economy, not Natives, drove anglicization forward.

“Thinking with Indians” was not a single mode of thought, but an array. Natives appeared in many guises: as a baseline or counterpoint against which to define aspirations and to measure colonial achievements and shortcomings; as ethnographic “raw material”; as evidence for trans-cultural stadial models; as a front for ventriloquism; and as an exemplar of practices and values, negative or positive, repellant or admirable. In these various ways, Indians helped

colonists argue over the meanings, dilemmas, and trajectory of the rule of law in a colonial context.