American Federalisms: The Structure of 18C North American Law
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The purpose of our discussion this morning, as has already been made clear, is to consider the alternatives to a form of interpretive dispute in which historians of law in late colonial and early national America have been recurrently engaged throughout the twentieth century. The elements of this dispute have already been suggested, and perhaps no further characterization is necessary from me; I would say, if it were not tediously redundant, that we were seeking an escape from hypotheses of transformation—that is, interpretations based upon the asserted existence of sharp and discontinuous change in the legal system of British North America occurring sometime between 1770 and 1850.

Although I have come to suggest that it is once again time to discard "transformation" as an idea, I don't want to associate myself with the proposition that transformationism was a form of historiographic pathology. The "formative era" and the "transformation of American law" were not historical frauds like the rise of the middle class—a process discovered by historians to have begun (and ended) in every century from the eleventh to the nineteenth. These were rather historiographic approaches intended to account for everybody's deeply felt and commonsensical intuition that the American legal world of 1850 was a very different place from the world of 1750. I was more foolish when I was younger, and no doubt I thought that writers such as Morty Horwitz and Bill Nelson could be dismissed out of hand. I published words having that implication, and I was wrong. The problem, like the problem for geologists in the nineteenth century, was not to deny the fact of change, but to decide whether to account for it on broadly uniformitarian or catastrophist premises. In our little corner of the world, the time has come for a resurgence of uniformitarianism, and my purpose this morning is to suggest one of what I trust will be a species of gradualist explanations for the replacement of one legal regime by another.

I regret to say that I have not brought to bear upon the project any innovative new ideas. Indeed, it is my misfortune to declare that the process in which I have been engaged fitfully and inefficiently over the past six years, as I tried to understand legal development in New York during the eighteenth century, is one of increasing conceptual poverty. One by one I tried to match the sophisticated conceptions of my more imaginative contemporaries against the inadequate record, and one by one they failed. I have nothing left to offer, after the better part of a decade, but a single truism of little apparent value—in the last quarter of the eighteenth century the British Empire in North America dissolved, and was replaced by a new federal legal régime whose intellectual and administrative center was on this side of the Atlantic.

My truism, you will note, does not employ the word revolution. This is not a resurgence of Bill Nelson's Americanization hypothesis, though I hope to convince you that it is I, and not Bill, who legitimately can lay claim to being interested in the Americanization of the common law. For from the perspective of New York, at least, I conclude that it makes a great deal of sense to think of the contours of eighteenth-century development as set largely by the processes of empire and its dissolution. The political, economic, and strategic imperatives of empire exercised enormous influence on the formation of the legal system in New York from 1664 on, and the benefits and disadvantages of having a local system embedded within the larger imperial legal structures were primary items of attention for colonial legal thinkers. John Reid has in recent years urged us to take seriously the British Empire as a legal régime, and to speed us on our way he has given us no shortage of words on the subject. I have elsewhere expressed my conviction that his work is of the utmost importance, and I shan't bore you by repeating myself here. I shall only say that in both public and private law domains the Empire was a legal as well as a political entity, with both advantages and disadvantages for colonial lawyers and clients, and the history of early national law in America cannot be rendered comprehensible without a fuller description than we are accustomed to provide of the legal institutions of the Empire.

I recognize that this will strike some of you as a bizarre proposition. Have we not an entire volume on Privy Council Appeals alone, dozens of volumes on navigation acts and customs policy, to say nothing of more Osgood and Gipson than any reasonable historian can stand? Surely we do, and yet the vast bulk of this material concerns the empire as a bilateral structure; in its legal dimension it is comprised of the rules governing the relations of the colonies and the metropolis. But to the contemporary legal observer, client or lawyer, that was not all, or even most, of what the empire meant.

Let me give here an anecdotal illustration. From 1770 through the beginning of the occupation of New York City there met (roughly monthly) a Moot Society in the city, which in the typical fashion debated propositions of law considered to be of interest to the intensely practical elite of the City Bar. It occurred to me a while ago that it might be rewarding to know what these lawyers thought was important enough to talk about. Perhaps you will be less surprised than I was to discover that a large proportion of the problems posed, and an even larger proportion of the discussion time, was devoted to problems of intercolonial commercial transactions, and what we might be inclined to call the civil procedure of interstate litigation. To the application of Parliamentary statutes, or the complexities of trans-Atlantic transactions or litigation—in short, to the staples of our retrospective understanding of the legal meaning of empire, not a single hour of discussion was devoted.

This is an illustration, not a conclusion, but for me it serves as a potent reminder that we must think of empire not solely as a structure determining the legal relations between the metropolis and colonists, but also as a working legal system regulating the relations of North Americans with one another. The colonial legal systems of 1760 were as fully embodied within a federal system as the state legal systems of 1860. We should understand their development, I think, as occurring within the context of the replacement of one overarching federation by another.

Recognition of the importance of imperium effects substantially the way one views doctrinal problems of all sorts, ranging from the land law to the problems of inter-colonial commercial transactions, insolvency, and the like. There *is* a transformation of law in the late eighteenth century; I call it "devolution," by which I mean the replacement of the legal structure of empire with British North America's second federal system. In the public law domain, the process of devolution had of course two major elements: the adjustment of principles governing the relation between the federal political power and the individual, and the redefinition of the relation between the constituent states and the federal entity. As John Reid has taught us, the Americans viewed these as primarily *legal* problems before the process of devolution began, and they remain the great problems of public law thereafter, as the Americans under their newly-devolved authority seek to make good on the principles they declared during the climactic disputes of the 1760s and '70s.

On the private law side, the most visible characteristics of the new system are a concern with rationalizing the structures of what had been inter-colonial commerce (the legal equivalent of "thinking Continentally" rather than trans-Atlantically), and a decline in the importance of custom as a source of law.

The former of these points, the legal replacement of imperial structures for regulating inter-colonial trade by a concern with interstate commerce, is insufficiently appreciated because the problems of inter-colonial legal relations are understressed in the extant literature. Our tendency is to work in one colony at a time, or else to perform "comparative" studies that take two or more independently. I was guilty of this too, and my own book has come in important ways to seem to me one of the defective works that I hope will not be emulated in future. I did my research substantially undervaluing the importance of inter-colonial trade in affecting institutions of arbitration, insolvency, and admiralty, to name only a few. Similarly with the land law, which ought to be understood in New York as primarily responsive to inter-colonial tensions over boundaries and the availability of tenants (as Sung Bok Kim long ago suggested). My book explores the development of law in New York through the immediate post-Revolutionary period with these issues in mind; its primary difficulty, as I have already suggested, is that it was undertaken, and the research performed, by a callow fellow who thought that disproving the claims of Nelson and Horwitz was the *summum bonum* of colonial legal scholarship.

This leaves open the second major conceptual issue to be addressed by those writing about private law in the period from 1750 to 1850—the decline of custom as a source of law in the new American régime. Needless to say, having identified this as a primary issue, I propose to write another book about it. Too little time remains to me this morning to reveal the full extent of my ignorance about it, but I can make at least a few suggestions. What fifteen years ago was called the new instrumentalism of early national judges seems to me now like the behavior of lawyers who, lacking the gloss of reliance on custom, perforce revealed other elements of the legal reasoning process which were less visible, though no less present, in the legal technique of the Empire (and which, it is unnecessary to say, remained less visible in the work of common law judges who remained within the Empire, in England and elsewhere). Custom, after all, was a principle of federalism within the British Empire—one whose roots lay in the federalism of 1087, not 1787. To the Americans, custom as a source of law created more problems than it solved, as the writings of Grimké, Rantoul, and others suggest. And thus, in a fashion I can now only indicate by hand-waving, the basic preconceptions of one federal system slowly gave way to another, and the intellectual environment of American law took on a distinctiveness that gave the impression of an overnight transformation.

I have gone on long enough. Let me summarize by affirming my belief that the forging of strong narrative links between our accounts of the late colonial and early national legal systems will be achieved, at least in part, through a renewed consciousness of the federal nature of *both* the colonial and national legal systems. Renewed attention to the empire as a legal system will cause us to view the legal world of early national America not as identical with colonial America, but as a system newly born of old themes, pursuing with technology new in detail aims old in conception, and responding in 1830 to problems that can be glimpsed, not in embryo but in altered adult form, in the world of 1760.