INTRODUCTION [to Volume 3]

Constitutional scholars and historians have typically characterized Britain's policy toward its North American colonies during the decades between 1690 and 1760 as one of salutary neglect. Edmund Burke first gave the term its currency in a 1775 speech in Parliament in which he urged his colleagues to abandon efforts at coercion of the colonies and return to the "wise and salutary neglect" that had resulted in America's economic growth and commitment to liberty. In Burke's view, "the colonies in general owe[d] little or nothing to any care of ours" and had not been "squeezed" into their "happy form by the constraints of watchful and suspicious government."

Historians have carried on the Burkean tradition. In a book entitled "Salutary Neglect", James Henretta, for example, wrote of "the great watershed of 1688-89 when a relatively strong and coherent colonial policy collapsed in the aftermath of the glorious revolution." The decades that followed, according to Henretta, witnessed "the neglect of colonial problems by those in London" and the absence of any "concerted attempt . . . to administer the political life of the colonies in a purposeful way."

The legal and constitutional history of Britain's North American colonies during decades from 1690 into the mid-eighteenth century suggests that, although there is much truth to the Burkean perspective, "salutary neglect" is not the whole truth. Indeed, it is a somewhat oversimplified mischaracterization.

As volume two showed, Charles II and James II both strove to strengthen the power of monarchy and wipe out the vestiges of republicanism remaining in England and its colonies in the

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3 Ibid, 346-347.
aftermath of the English Civil War. These strivings led to the conquest of New York, the establishment of the Carolina outpost under the administration of royal favorites, the imposition of the common law throughout the empire, and governance by lawyers in the newly established colonies. As this volume will show, the crown in the years before 1689 directed the imposition of the same royal policies everywhere, especially in New England. Charles and James demanded the replacement of Puritan law by common law in New England, sent over a royal official to enforce the Navigation Acts, and even sent regular troops as an occupation army in New York and to help suppress Bacon's Rebellion in Virginia.

Professor Henretta is correct that the Glorious Revolution was a great watershed: it produced enormous change. Parliament's invitation to William of Orange to take the throne led over time to the end of a century of conflict between the king and Parliament. William and his successors solidified the monarchy, but in a constitutional, almost republican form. Within decades real power in England lay not with the king but in Parliament.

Even greater change in policy emerges when William's acceptance of the English throne is examined from a Dutch perspective. The Dutch republic had named William its stadholder in 1672, when it was under attack on all sides by Catholics, especially by Louis XIV, who threatened the republic's very existence and its Protestant religion. But when William III died in 1702, his accession to the English throne and the Dutch-English alliance to which it led -- an alliance that would remain in place after William's death -- had put an end to French expansionism and laid the foundations for British world hegemony that would begin to emerge in the War of Spanish Succession and fully emerge in the Seven Years' War. By enhancing and harnessing British power, William III thus accomplished the goal on which he set out in 1672 -- the defeat of Louis XIV's bid for what William called "universal monarchy," the preservation of Dutch and more generally European independence, and the safety of Protestantism.4

Volume 3 will show that in America as on the North Sea littoral the primary goal of British colonial policy after 1689 was no longer the enhancement of royal power and the elimination of republicanism, but the defeat of France and the establishment of Protestant hegemony, ideally that of the Church of England but alternatively of other reformed sects as well. In New England the crown abandoned what had appeared, especially in New Hampshire, as an effort by Charles II and James II to wipe out Puritanism and impose conformity with the Church of England. Royal policy after 1689, most notably in Massachusetts, supported Puritanism as the established religion. Maryland after 1689 lost its unique Catholic status and became a royal colony with Anglicanism as its official religion. Even in Virginia, where the Church of England had long been dominant, greater efforts occurred to wipe out Catholic than sectarian Protestant dissent.

In short, Britain after 1689 did not neglect its colonies. On the contrary, officials in London used them at all times to promote their principal policy: before 1689 to enhance the power of the monarchy and to destroy the remnants of republicanism, and after 1689 to promote Protestantism and to rein in French imperial pretensions. When, after 1689, the promotion of Protestantism also resulted in the acceptance of quasi-republican, communitarian institutions associated with it in America, there was little objection from England. The growth of such institutions was not inconsistent with William III's anti-French, pro-Protestant policy goals.

Nor was the generation of wealth, colonial as well as home-county wealth. As Christine Desan has written, Parliament's most important legislation in the 1690's was the creation of the Bank of England, which gave the nation a modern, flexible money supply. A subsequent act in 1704, the Promissory Note Act,⁵ which made promissory notes negotiable throughout the empire, similarly created a money supply for the colonies. As subsequent chapters will show, the existence of negotiable paper commercialized colonial economies, revolutionized colonial law, and stimulated

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¹ For discussion of William's youth and its relationship to his passionate nationalism and Protestantism, see ibid., 36-37, 63.

⁵ 3 and 4 Anne c. 9 (1704), in Statutes of the Realm 106.
the development of the legal profession as a leading force in colonial society.

Thus, English policy was never one of neglect. William III did not neglect England's colonies. Rather he sought to transform them from entities that enhanced monarchical power into vehicles for preserving Protestantism from the dangers of French expansion. Coincidentally he was prepared to build the companion commercial and quasi-republican institutions that would bring about Protestantism's nineteenth-century global ascendancy. William's policy succeeded remarkably well.

As Professor Henretta has pointed out, a veneration for traditional ways of doing things pervaded English consciousness during the first half of the eighteenth century. Associated perhaps with a common law mentality that favored reliance on precedent, this tendency to adhere to what previously had been done meant that practices once adopted tended to remain in place, often without thought being given to why they had been adopted. This was certainly true of the imposition of the common law on the North American colonies. As will be seen in subsequent chapters, the centrality of the common law in colonial institutional structures grew stronger over the course of the early eighteenth century, albeit not necessarily in the interests of the crown's hegemony. Likewise, at least until the defeat of France in 1759-60, the anti-French and pro-Protestant policies of William III remained firmly entrenched in Britain's North American colonies, again not necessarily in the interests of the crown's hegemony.

Promoting the crown's hegemony was not, however, the goal of Britain or of its ministry's policies between 1689 and 1760. Rather the goal was to nurture Britain's own empire and destroy the empire of France. The time was not one of neglect, but of solid construction of America's economy and society. The decades between 1689 and 1760 laid the foundations for nearly two centuries of British imperial hegemony and a yet undetermined era of anglophile world dominance. As late as 1763, British policymakers could congratulate themselves on how successful their policies

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not of neglecting, but of building an empire had been.

Massachusetts offers a paradigmatic example of the workings of English policy and of a colonial legal system's response to that policy during the century following 1660. In the first quarter of the century, as Chapter One will show, the governments of Charles II and James II sought to destroy Puritanism and to force the Bay Colony to accept the common law. New Hampshire was split off from Massachusetts Bay, and its royal governor prosecuted Puritan clergymen who refused to conduct services in the Anglican fashion. Common-law procedure was imposed on both colonies, and efforts were made to enforce the Navigation Act. Finally, in 1684, the crown secured the revocation of the Bay Colony's 1629 charter, and royally appointed officials attempted thereafter to govern without legislative sanction. But, as the chapter will also show, powerful forces in both colonies resisted the crown's efforts, especially by situating lawfinding power in local juries. As a result, even in the late 1680s, officials of the Dominion of New England found themselves subject to significant legal restraints on what they could do. Even so, the people of Massachusetts had good reason to fear that the government of James II would wipe out the Puritan legal system they had established. Before that could occur, however, James was overthrown and a new regime put into place.

Puritanism did not trouble the new regime of William III and his successors, who needed the support of the Bay Colony in their wars against the French. Chapter Two will reveal how, under a new charter in 1692, the crown authorized the restoration with some modifications of the old Puritan legal system. English authorities accepted legislation perpetuating the main substantive and procedural elements of Puritan law, although they still strove to blend it with the common law. Gradually, over a course of several decades, the common law did gain a foothold and, with that foothold, a legal profession slowly emerged. By the 1750s, the profession had come to rival the Puritan ministry in its power and influence over the colony's society and law.

Chapter Three will turn to the other, smaller New England colonies. As had been true
before 1660, their patterns of legal development continued to mimic those of Massachusetts, although there were differences in detail between them and Massachusetts and among them. Even in Rhode Island, however, which had been established by settlers who rejected the Massachusetts way, the general patterns of legal development resembled those of the Bay Colony more than those of the Middle Colonies and of colonies further to the south.

Colonial Virginia's pattern of legal development, in contrast, was totally different from patterns in New England. The decisive moment in Virginia's legal history was neither the English Civil War nor the Glorious Revolution of 1688-1689, but Bacon's Rebellion of 1675-1676. Virginia had turned sharply to the common law in the 1620s, especially after it had become a royal colony, and reception of the common law continued uninterrupted into the 1670s. Chapter 4 will trace that reception. Meanwhile, a class of wealthy, elite planters began to emerge. Bacon's Rebellion challenged the preeminence of that class, along with the authority of the puny royal administration situated in Jamestown.

With the support of a few hundred English soldiers, the Jamestown authorities and their allies among local elites managed to defeat the rebels. But the English regulars soon went home, and the royal administration in Jamestown and later Williamsburg remained small. Real power came to rest increasingly with the wealthy elites scattered throughout Virginia's many local counties. Chapter 5 will show how the late seventeenth- and eighteenth-century legal system developed to preserve the power of local governments presided over by elite magistrates largely drawn from the wealthy planter class.

Bacon's Rebellion also produced a transformation in Virginia's laboring class -- a transformation that is the subject of Chapter 6. Although African slavery had gained a toehold in Virginia before the 1670s, most physical labor at the time was performed by white, indentured servants. For reasons that Chapter 6 will discuss, the flow of indentured servants slowed in the 1680s and after, to be replaced by slaves imported from Africa and by the children later born to
those slaves. As is well known, Virginia slavery constituted an especially harsh form of labor exploitation; Chapter 6 will explore what made it so.

Chapter 7 will turn to Maryland, whose legal development largely followed that of Virginia. But there were two important differences. Bacon's Rebellion did not extend to Maryland, the power of central officials accordingly was never challenged, and the legal system of Maryland therefore remained more centralized that the systems of most other colonies. The second difference was that Maryland, prior to 1689, was governed by a Roman Catholic proprietor. With the Glorious Revolution, the proprietor lost his province, and Maryland became a royal colony, in which Anglicanism rather than Catholicism became the established religion. The Baltimore family did not regain its proprietorship until 1715, after the then Lord Baltimore had converted to Anglicanism. The colony thereafter retained its Anglican establishment, with Catholics losing even the right to vote in 1718.

A final Chapter 8 will summarize the state of the law as of the mid-eighteenth century in Britain's mainland American colonies, as revealed in volumes 2 and 3. It will conclude that the efforts of the crown under Charles II to govern the colonies cheaply through the common law and the legal profession and under William III to ensconce Protestant legal hegemony had, in large part, succeeded. The North American colonies had become common law, nonhierarchical Protestant societies that provided a bulwark insuring that Roman Catholic absolutism of the sort championed by France and Spain would never dominate the continent's Atlantic coast. But the success of the policies of Charles II and William III did not insure that Britain would be able to govern its colonies effectively. Indeed, as volume 4 will show, the common law and the nonepiscopal Protestantism that accompanied it contained the very seeds that would soon mature into independence and revolution for those colonies.