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The Transatlantic Constitution: Colonial Legal Culture and the Empire (Excerpt)

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In December 1772, Chief Justice Stephen Hopkins, who soon would be a revolutionary and would sign the Declaration of Independence, wrote to the English Privy Council that he and his fellow Rhode Islanders were "judges, under a peculiar constitution." Explaining what he meant, Hopkins said that the "local situation"—that is, circumstances in Rhode Island—created a "necessary and unavoidable difference in our modes of practice, laws & customs." He assured the Council, however, that these differences were "not in any essential point whatever repugnant to the laws of Great Britain."[1] The central principle—that a colony's laws could not be repugnant to the laws of England but could differ according to the people and place—bound all the American colonies. This repugnancy principle became the basis of what I call the *transatlantic constitution*. For a century and a half, this constitution developed as a continuous conversation among litigants, lawyers, legislators, and other legal participants over how and when the laws of England should apply in the colonies. While the empire that created the transatlantic constitution faded with the American Revolution, its legal culture survived to construct the skeleton of federalism and mold early national constitutionalism in the United States. This book is about the development of the transatlantic constitution in one particular colony, Rhode Island, and, of no less importance, the legal culture that grew up around it.

Contemporaries did not call it the "transatlantic constitution." As Thomas Paine wrote in *Common Sense* (1776), the American colonies had a "constitution without a name." In choosing the phrase, I use the term *constitution* in a sense unfamiliar to some readers. Through most of the seventeenth and eighteenth centuries, constitution did not refer to a specific document or even a specific, known set of laws. In certain situations, *constitution* carried the meaning of "that which is constituted," an idea of the constitution as representing an almost anthropomorphic, organic body politic, with its history, geography, social and cultural composition, and well-being. At other times, *constitution* related to more specific laws, principles, customs, and institutions, but here again, not to a discrete group of laws. The transatlantic constitution encompassed the political structure of the English empire in North America (the dual authorities of England and the colony); the central legal arguments legitimated by this structure (the principles of repugnancy and divergence); the determinative underlying policy (the effective functioning of the English empire); and the accompanying practices (such as the Privy Council's review of colonial acts and hearing of colonial appeals).[2]

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[1] Letter of Stephen Hopkins, et al. in *Freebody v. Brenton* (Dec. 1772), PC 1/60/10.

[2] For an excellent discussion of early understandings of *constitution*, see Daniel Hulsebosch, "The Constitution in the Glass Case and Constitutions in Action," 16 *Law and History Review* 397-401 (1998); Hulsebosch, "*Imperia in Imperio:* The Multiple Constitutions of Empire in New York, 1750-1777," 16 *Law and History Review* 319-326 (1998); Bernard Bailyn, *The Ideological Origins of the American Revolution*,

This transatlantic constitution existed as both an unwritten and written constitution. As an overarching arrangement of authority, it was unwritten, located in the history and purpose of the English empire in America. Nevertheless, specific boundaries were written into the colonial charters. The 1663 Rhode Island charter articulated the two central principles—repugnancy and divergence:

> [T]he laws, ordinances and constitutions [of Rhode Island], so made, be not contrary and repugnant unto, but as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there.

First, the colony was an extension of the realm of England. Colonial laws, therefore, could not be contrary or repugnant to the laws of England. As the Board of Trade wrote in the 1730s: "All these colonies . . . by their several constitutions, have the power of making laws for their better government and support, provided they be not repugnant to the laws of Great Britain, nor detrimental to the Mother-Country." *Repugnant* carried a broad set of cultural meanings including being contrary, contradictory, inconsistent, incompatible, and oppositional, as well as eventually also connoting strong dislike or aversion. Second, however, law and government should relate to the people and the place. Colonial laws thus only needed to be "agreeable" or, in the words of the Rhode Island charter, "as near" to English laws as "may be" "considering the nature and constitution of the place and people there." In short, colonial laws could diverge for colonial circumstance so long as they were not repugnant to the laws of England. The repugnancy and divergence principles linked the organic and legal notion of constitution.[3]

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The transatlantic constitution cast a shadow over this country's constitutional founding and early national period. Its existence helps to explain the rapid acceptance of federalism and judicial review of state legislation and the profound theoretical problems with judicial review of congressional action. The transatlantic constitution, with its principles of repugnancy and divergence, remains deeply embedded in American legal culture. We see it in our commitment to federalism as a conversation between dual authorities and our desire to have clear constitutional prohibitions and fuzzy areas of divergence. We hear it in our endless debate over whether the written constitution can be read as a living constitution that should change with a changing vision of the nation. We speak it when we maintain our commitment to dialogue in which the laws of the states

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rev. ed. (Cambridge, Mass.: Harvard University Press, 1992), pp. 184-192 (orig. pub. 1967); John Phillip Reid, *Constitutional History of the American Revolution*, abridged ed. (Madison: University of Wisconsin Press, 1995), pp. xviii-xx, 3. For Thomas Paine, see his *Common Sense* (Philadelphia: W. & T. Bradford, 1776), appendix.

[3] *R.I. Recs.*, vol. 2, p. 9; Board of Trade to the House of Lords (Jan. 23, 1733/34) in *CHS Coll.*, vol. 5, pp. 446-447. On the origins of the Rhode Island charter, see Sydney V. James, *John Clarke and His Legacies: Religion and Law in Colonial Rhode Island, 1638-1750*, ed. Theodore Dwight Bozeman (University Park: Pennsylvania State Press, 1999), pp. 59-83; James, *Colonial Rhode Island: A History* (New York: Scribner, 1975), pp. 67-70; and Patrick T. Conley, *Democracy in Decline: Rhode Island's Constitutional Development, 1776-1841* (Providence: Rhode Island Historical Society, 1977), pp. 22-23 n.3. For meanings of *repugnancy*, see *The Oxford English Dictionary*, 2nd ed., (New York: Oxford University Press, 1989), vol. 13, pp. 675-676.

are reviewed for conformity with the laws of the United States. The transatlantic constitution was our first constitution; it shaped the new country and in surprising respects continues to define the nation we share today.