

9-25-2008

Colonial Constitutionalism and Constitutional Law

Mary Sarah Bilder

Boston College Law School, bilder@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>



Part of the [Constitutional Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

Mary Sarah Bilder. "Colonial Constitutionalism and Constitutional Law." In *Transformations in American Legal History: Essays in Honor of Morton J. Horwitz*. Alfred L. Brophy and Daniel W. Hamilton, eds., Cambridge: Harvard University Press, 2009.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.



TRANSFORMATIONS
in AMERICAN
LEGAL HISTORY

*Essays in Honor
of Professor Morton J. Horwitz*

EDITORS:

Daniel W. Hamilton

Alfred L. Brophy

HARVARD LAW SCHOOL

Distributed by

HARVARD UNIVERSITY PRESS

Cambridge, Massachusetts and London, England 2009

2

Colonial Constitutionalism and Constitutional Law

MARY SARAH BILDER

THE TRANSFORMATION OF CONSTITUTIONAL LAW—THE SHIFT FROM A colonial constitutional culture to an explicit written constitution—is apparent yet elusive. Thirty years ago, Morton Horwitz's pathbreaking *The Transformation of American Law, 1780–1860* insisted on a transformation in “private law (tort, contract, property, commercial law)” from the colonial period.¹ Horwitz's focus on private law diminished interest in the development of early American constitutionalism. As Stanley Katz wrote in 1984, “Constitutional history is certainly not dead, but it is not flourishing and its significance for colonial history is not altogether obvious.”² Twenty years later, constitutional history and, in particular, colonial constitutional history have once again begun to flourish. Interest in colonial constitutionalism appears in recent work by Lauren Benton, Alexander Haskell, Daniel Hulsebosch, Alison LaCroix, David Konig, Bernadette Meyler, Bill Offut, Ellen Pearson, Carla Pestana, Claire Priest, Richard Ross, George Van Cleve, Craig Yirush, and myself, among others.³ Yet there remain significant questions about the transformation of colonial constitutionalism to American Constitutional law. This essay argues that this larger transformation was less the result of the admittedly important invention of a written constitution than of three less apparent transformations.

Constitutionalism is rampant with transformations: the well-discussed shift from the “little c” to “big C” constitution,⁴ the creation of Constitutional law as “a new substantive legal genre,”⁵ and the invention of judicial review.⁶ Since Sir

My thanks to Alfred Brophy, Paul Halliday, Bernie Meyler, Catherine Patterson, Sharon O'Connor, and participants at the American Society for Legal History (2006) and at the Cornell Law School's Law and Humanities Colloquium (2007) for comments; to David Warrington and Whitney Bagnall for manuscript assistance; to Natasha Hsieh and Andrew Golden for assistance in checking footnotes; and to Morton Horwitz and Dan Hulsebosch, with whom I first read Joseph Smith.

Henry Maine penned his famous transformation of law—from status to contract—legal historians have been enamored of transformations.⁷ For Maine, as for the legally trained who followed him, transformations that can be summed up in a phrase—a holding—have been particularly appealing. Daniel Hulsebosch offers a fine example of such a succinct transformation in his argument of a shift from a preconstitutional focus on jurisdiction to a constitutional focus on jurisprudence.⁸

American constitutionalism has been enamored of one particular transformation: the shift from the organic, unwritten British constitution to the defined and enumerated written American Constitution. This appealing orthographical shift, however, is our own creation. The word “constitution”—in the small *c* sense—often appeared in the pre-1776 period with a capital *C*. Bolingbroke’s oft-quoted description appeared as: “By *Constitution* We mean . . . that Assemblage of Laws, Institutions, and Customs, derived from certain fix’d Principles of Reason . . . that compose the general System, according to which the Community hath agreed to be governed.”⁹ Conversely, writers continued to refer to the written federal Constitution with a small *c* into the early nineteenth century.¹⁰ Indeed, *The Federalist Papers* originally appeared with “constitution” consistently spelled with a small *c*.¹¹ In modernizing the spelling of “Constitution,” reprints of constitutional-era texts actually alter our understandings of those texts.¹²

Another seemingly apparent transformation is the rise of Constitutional law, what Hulsebosch has perceptively referred to as the “shift from common-law constitutionalism” to the “genre of constitutional law.”¹³ Hulsebosch points to Chief Justice John Jay’s 1794 reference in *Chisholm v. Georgia* to the “free course of Constitutional law and Government” as a statement that “readers” would understand.¹⁴ But precisely when and what did readers understand? In late eighteenth- and early nineteenth-century constitutional works, Constitutional law (where the phrase is a proper noun) can be hard to distinguish from constitutional law (where “constitutional” is an adjective describing a type of law).¹⁵ The phrase curiously does not seem to appear again in the printed Supreme Court reports until the arguments of counsel in *Ogden v. Saunders* in 1827.¹⁶ By the 1840s, publication of St. George Tucker’s lectures marks more widespread use of the phrase.¹⁷ Yet only in 1862 does Joel Parker adopt the single title *Constitutional Law* for a pamphlet.¹⁸ Only after the Civil War do treatises entitled simply “Constitutional Law” begin to appear.¹⁹ The recognition of a distinct body of law arising from the Constitution and conforming to certain interpretive traditions appears to postdate by some years the Constitution itself.

This difficulty in identifying the transformation occurs with constitutionalism. Used by late nineteenth-century political scientists, constitutionalism became influential when Andrew McLaughlin and Charles McIlwain concluded that it lay at the heart of liberal democracy.²⁰ In 1932, McLaughlin’s *The Foundations of American Constitutionalism* traced “certain essential principles” of limited

government—covenants, representation, social compact, judicial review, and federalism—in the pre-Revolutionary period.²¹ In 1940, McIlwain's *Constitutionalism: Ancient and Modern* looked back further and declared that "in all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government."²² In England, the "essential principles . . . were no less constitutional" because they were "unwritten."²³ Others sought greater precision respecting the type of limitation. Robert Schuyler suggested that the word "unconstitutional" underwent a shift from meaning "the act in question was contrary to established usage and convention" to signifying that "it was illegal or void."²⁴ Walton H. Hamilton's definition emphasized written-ness: "'Constitutionalism' is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order."²⁵ Constitutionalism itself thus fluctuates between a narrative of continuity in legal limitations on government and a narrative of discontinuity in the specific written form of limitations.

How do we talk about the continuities and discontinuities created as the world in which British constitutionalism involved legal limitations not written in one document gave way to an American constitutionalism in which a single written document was the limitation? The sense of an abrupt transformation in the 1780s is reinforced because no word describes the constitutional state of affairs before the Revolution. Reserving constitutionalism for the period of written constitutions overemphasizes the post-1776 or perhaps even post-1787 American construction of constitutionalism. Focusing on common law, the ancient constitution, and the British constitution overemphasizes the English (as opposed to colonial) construction of constitutionalism.²⁶

Considering the transformation of colonial constitutional law to postcolonial constitutional law solves these problems. Harold Hazeltine, John Reid, and Jonathan Bush have described the relationship between American colonial law and England and Great Britain as a constitutional law.²⁷ As Eliga Gould and other Atlantic historians have demonstrated, situating American colonial constitutionalism within the context of the empire allows for a periodization in which the Revolution and the Constitution mark neither beginning nor ending points.²⁸ The term "colonial constitutional law" traditionally describes the law that governed other colonies within the British Empire.²⁹ The legal opinions of Crown law officers on colonial questions were called *Cases and Opinions on Constitutional Law*; American colonial opinions were included in an earlier collection of similar materials.³⁰ The term is not wholly anachronistic. Eighteenth-century contemporaries perceived a distinct constitution of the colonies. Thomas Pownall referred to the "constitution of the colonies" and their "constitutional dependence" on Britain.³¹ James Abercromby discussed the "different Constitutions of the Colonies."³² Pre-Revolutionary Pennsylvanians characterized people as "Friends to our present Constitution."³³ Stephen Hopkins referred to Rhode Island judges as "under a peculiar constitution."³⁴ We might thus consider colonial constitutional law.

This essay reconsiders the transformation to Constitutions, Constitutionalism, and Constitutional law. In arguing for a "historicist interpretation of constitutional law," H. Jefferson Powell writes, "Constitutional law is thoroughly historical, dependent throughout on the contingencies of time and political circumstances, and . . . a coherent tradition of argument."³⁵ As a coherent tradition, the transformation of constitutional law does not map neatly onto the 1776–90 period. A first essential transformation in constitutionalism occurred long before 1776 when seventeenth-century colonists created a new conception of the written and published charter as the location of authority and liberties. A second essential transformation occurred only after 1790 when appeals in judicial cases began to be publicly reported in print, thereby creating a stable and analyzable body of law. A third essential transformation occurred in 1787—but with implications not immediately appreciated. Privy Council review of colonial legislation ended and no similar review took its place, thus leaving the judiciary the sole arbiter of constitutional law. These three transformations created modern American constitutionalism—a law two centuries in the making.

PATENTS TO CHARTERS

The shift from charter to constitution is central to American constitutional scholarship. The early reliance on charters is often cited as creating a culture that would favor written constitutions, either because of the written nature of the charter's liberties or because of the habit of defending charters against the Crown.³⁶ As recent scholarship demonstrates, however, English boroughs had a long, robust history of dealing with and defending charters and chartered liberties.³⁷ Nevertheless, English law does not produce a culture favoring written constitutions—indeed, arguably the contrary. In part, a written constitution may be the product of the necessity of declaring independence. If the English boroughs had attempted to declare independence, perhaps they too would have founded their authority solely on a written document. The American colonists nonetheless were extremely taken with written documents as sources of and limitations on government.

Admittedly, prior to 1776, colonists dealt with charters; after 1776, they wrote constitutions. Yet this verbal transformation may not signify the immediate transformation that we assume. Within the larger British Empire, this same semantic shift occurred over two centuries. Charters governed the early seventeenth-century Canadian settlements for Nova Scotia (1621),³⁸ Avalon (Newfoundland) (1623), and Ruperts Bay (the Hudson's Bay Company) (1670).³⁹ Charters remained relevant even as Americans turned toward constitutions. New South Wales's Charter of Justice (1787) established court jurisdictions prior to settlement governance.⁴⁰ The East India Company continued to govern India pursuant to a charter

into the nineteenth century.⁴¹ By the mid-nineteenth century, however, the empire began to shift toward constitutions. Unlike American documents, these took the form of either a letters patent⁴² or a parliamentary act such as the British North America Act (1867), often referred to as the Constitution Act, and the Commonwealth of Australia Constitution Act (1900).⁴³ The latter was a British statute passed by Parliament after colonial convention, ratified, and approved by Parliament with amendments.⁴⁴ Rhetorically the empire moved from charter to constitution—but substantively, the shift in authority was more transitional and subtle. The word “constitution” continues to carry a different meaning than it does for Americans.⁴⁵

The shift from charters to constitutions on the American side may also be misleading. A more crucial shift occurred a century earlier when the colonists developed a conception of the charter as opposed to a patent. Colonists did not initially refer to what we think of as a charter as a charter; rather they called it a patent, short for “letters patent.” The leading scholar on the Connecticut charter, Albert Bates, concluded that the words “charter” and “patent” were used interchangeably.⁴⁶ This conclusion seems true with respect to English charters. Those in corporate towns referred to their incorporating letters patent as letters patent and charters.⁴⁷ Among trading companies, a similar use of the word “charter” seems to have been common. The published charter of the Worshipful Company of Shipwrights (c. 1612) included numerous self-references to charter.⁴⁸ Historians have made their own distinctions. Historians have conventionally used “patent” to refer to a document with less authority (for example, the Peirce Patent or the Plymouth Patent) and reserved “charter” for the document that appears to be the genealogical ancestor of a state constitution. But this distinction is modern.

What was the historic difference between a patent and a charter? Throughout the medieval period, although both were issued under the Great Seal, charters were grants in perpetuity, in Latin, attested to by witnesses, addressed to a particular group of officials and nobility, and recorded in the Charter Rolls. “Letters patent” referred to a more general type of document, so called because they were literally open letters as opposed to letters close and were addressed “to all whom these presents come.” After 1516, grants creating rights in perpetuity under seal—charters—were created by letters patent and copied into the patent rolls.⁴⁹ Yet “patent” retained a separate meaning as a more temporary grant of privileges, a point reinforced by the debate over monopolies and the Statute of Monopolies (1623).⁵⁰ Some commentators suggest that the charter/patent distinction continued in the color of the wax seal used: green for charters, yellow (or red) for temporary patents.⁵¹

Neither charters nor patents were designed as physical documents to facilitate precise public knowledge. The documents were written on multiple sheepskin parchments, with a depiction of the king, an ornate border, and rows of tiny writ-

ing not organized in paragraphs. "Publishing" the charter in the sense of enabling the community to learn of its provisions had been a problem since the thirteenth century, when in theory Henry III had ordered the Great Charter of John read aloud.⁵² Relatively few English patents or charters were published in print before the seventeenth century.

Colonists in the early decades of the seventeenth century used the word "patent" over "charter." In Virginia, "patent" appears where we would expect the word "charter."⁵³ The *Orders and Constitutions* (1619–20) listed books to be held by the secretary. The first book was to include copies of the "Kings Letters Patents to the Companie"; the third book was to include "Patents, Charters, and Indentures" granted by the company.⁵⁴ While the company itself gave a "greate Charter or commission of privileges, orders, and laws" delegating its authority to the local political corporation in 1618, it continually referred to the document from the Crown as a "patent."⁵⁵ The distinction is particularly noticeable in the 1620s when the Crown attempted to call in the Virginia charter. The Crown described the document as a charter; the settlers responded by talking about the letters patent.⁵⁶ Moreover, the Virginia Company made no effort to publish these documents in print.⁵⁷

A similar preference for the word "patent" appears in Massachusetts Bay. One of the few references to a charter appears in the Form of Government adopted by the company in April 1629. The company declared that "his Majesty's said charter" had given "power and authority" sufficient to "settle and establish an absolute government."⁵⁸ Yet the famous vote transferring the government of the company to Massachusetts Bay referred only to the "Patent."⁵⁹ John Winthrop later wrote with respect to the clause: "For it being the manner for such as procured Patents for Virginia, Bermudas and the Weste Indies, to keep the chiefe Government in the hands of the Company residing in England . . . this clause is inserted in this and all other Patents."⁶⁰ Throughout the 1630s, the word "patent" repeatedly appeared. In *New Englands Prospect* in 1634, William Wood discussed "our Patent for the Massachusetts Bay."⁶¹ In 1641, Emmanuel Downing wrote to Hugh Peter about the quo warranto action, noting it had been brought "against our Patentees, thinking to damme our patent."⁶² As in Virginia, no publication of the charter or patent appeared. John Cotton's *An Abstract; or, The Lawes of New England* in 1641, Nathaniel Ward's manuscript version of the *Body of Liberties* in 1641, and the *Laws and Liberties* of 1648 did not contain references to a charter. Perhaps governing authorities operating outside the authority conveyed had little to gain from publication.⁶³ Charter as both word and substantive document lacked positive political resonance—the colonists had patents.

Public declarations of the political connotation of the word "charter" as an important document providing authority occur with the Maryland proprietary. Unlike the Massachusetts Bay and Virginia "charters," the 1632 letters patent given to Lord Baltimore was in Latin, although without the elaborate greetings of

the medieval charters. It described itself as “hanc presentem Chartam nostrum”—“this our present Charter.”⁶⁴ (Note the unusual *ch* spelling of the Latin word for charter.) Contemporaries referred to it as a charter. In 1635, *A Relation of Maryland* included the “Charter to the Lord *Baltimore*, translated into English.”⁶⁵ Although a few English trading company charters had been printed, the Maryland charter appears to have been the first printed colonial charter.⁶⁶ In 1637, Lord Baltimore referred to the document as a charter.⁶⁷ A proprietor given expansive powers under the charter may have gained from a publicly available document.

With the English Revolution, the political meanings of “charter” and “patent” begin to separate. On one hand, in Massachusetts, John Winthrop clings to patent. In his “Discourse on Arbitrary Government” of 1644, he focused on the legal authority conveyed by the “foundation” of the government under the “patent.”⁶⁸ Winthrop closely read the clauses to establish a “Regulated” government.⁶⁹ The Committee of Deputies in response argued that they found no “such distinction in the Patent.”⁷⁰ Yet elsewhere that same year, the word “charter” seems to be growing in appeal. Parliament gave Rhode Island a “free Charter of Civil Incorporation and Government.” (Historians interestingly call it a patent.) By 1649, Plymouth leader Edward Winslow called the Plymouth patent “their Charter.”⁷¹ In 1654, a Barbados “charter” was published. The growing appeal of the word “charter” to convey authority was evident in the fact that the document was not a charter but Articles of Agreement (1651) between Crown commissioners and Lord Willoughby of Parnham.⁷² Conversely, by the 1650s, a pamphlet attacking Baltimore’s grant refused to call it a charter, referring throughout to “the illegality of his patent.”⁷³

The return of royal power did not dampen the growing preference for charters. Like the letters patent for Massachusetts and the one for Virginia, the 1662 and 1663 Connecticut and Rhode Island documents did not call themselves charters. Indeed, in England, John Winthrop described the Connecticut document as a patent while conducting negotiations.⁷⁴ Yet colonists had no doubt they had gained charters. In 1662, the General Assembly read the “Patent or Charter” and thereafter referred to it continually as a charter.⁷⁵ Rhode Island law provided for the transfer at the governor’s death of “the Charter, with his Majesty’s letters, and such other papers as concern the colony.”⁷⁶ By 1665, Massachusetts Bay residents similarly began to refer to the 1629 document as a charter.⁷⁷ The 1663 charter for Carolina and the 1681 charter to William Penn followed earlier proprietary charters explicitly describing themselves as charters. Indeed, the charter to William Penn for Pennsylvania apparently has a green seal, as sometimes has been suggested to signify charter.⁷⁸ This transformation from patent to charter may explain why the letters patent from the Crown to Virginia in 1676, which declared itself to be a letters patent, is rarely referred to as a charter, despite John Burk’s titling the document such in his publication.⁷⁹

By choosing "charter" over "patent," the mid-seventeenth-century colonists absorbed into their documents the connotation of an ancient grant of liberties, customs, and self-governance. Catherine Patterson notes that in English boroughs, the charter had "an almost sacred quality in the minds of most citizens."⁸⁰ Sacredness was hard to establish in a recently granted document, never mind one often replaced and possibly revoked. Indeed, the changing orthography of "Magna Carta" reinforced this association between a charter and ancient liberties and authority.⁸¹ By the mid-seventeenth century, the majority of political treatises preferred the *ch* spelling—"Magna Charta"—with its visual insistence on charter. Henry Care's *English Liberties; or, The Free-Born Subjects Inheritance* of 1682 is the most notable of these works.⁸² By 1689, Gershom Bulkeley referred to "ancient Charter-privileges" of the decidedly un-ancient Connecticut charter.⁸³

Ironically, by the 1680s, charters had become vulnerable to writs of quo warranto, legal proceedings to revoke a charter. The Crown, for the "first time in centuries, fought quo warrantos all the way to final judgment."⁸⁴ Most shocking for colonists was the revocation of London's perceived ancient charter in 1681–83. In England, after 1680, the controversy produced multiple print publications of London's charter and books on the quo warranto proceedings—many of which traveled across the Atlantic to interested observers. The title pages of these charter publications emphasized the importance of their appearance in print "verbatim" with explanations for the public.⁸⁵

Although these publications had not prevented loss of London's charter, colonists perceived the publication as a method for declaration of lawful and local authority. Colonial charters soon began to appear in print, Carolina in 1682 and 1684, and Pennsylvania in 1687. In 1689, Samuel Green even produced a posthumous printing of the 1629 Massachusetts charter, which was legally revoked in 1684. The publication attempted to create and legitimize local authority after the loss of the charter and the ascension of William of Orange.⁸⁶

In these new printed charters, colonial authority was literally written large. The 1691 Massachusetts charter appeared in print in 1692. On the title page, CHARTER and NEW-ENGLAND loomed in substantial typeface, dwarfing the far smaller acknowledgement "Granted by their Majesties King William and Queen Mary."⁸⁷ By the eighteenth century, colonial statute collections that began with the charter visually insisted that legal authority arose from the charter.⁸⁸ Printing the charters distanced them from Crown prerogative and converted them to matters of right. Thus in 1721, Jeremiah Dummer wrote *A Defence of the New-England Charters* to explain the "Right which the Charter Governments have to those Privileges."⁸⁹ This perception that the charters represented independent colonial authority rather than royal grants grew even greater by the 1760s. In 1764, John Dickinson thus wrote of Pennsylvania's colonial constitution, "Let any impartial person reflect how contradictory some of these privileges are to the most ancient principles of the English constitution, and how directly opposite other of them are to the

settled prerogatives of the crown."⁹⁰ The printed charters had become the property of the colonists, not the Crown.

Charters thus embodied colonial constitutions. The 1765 *Laws of Maryland* aimed to include matters "relative to the Constitution" of the province, central of which was the charter, demarcated on the title page in large letters.⁹¹ In 1774 and 1775, the Continental Congress framed its responses to British actions in Massachusetts as violations and subversions of the charter.⁹² The South Carolina constitution of March 1776 condemned material alterations in the "chartered constitution of government." By 1776, Thomas Paine explained that "the articles or charter of government" should precede the choice of men to execute the government.⁹³ He proposed a "CONTINENTAL CHARTER, or Charter of the United Colonies; (answering to what is called the Magna Charta of England)" for the new nation.⁹⁴ The Declaration of Independence echoed this repositioning of the charter as a colonial right. It condemned the king for "taking away *our* charters."⁹⁵

The new Americans would write documents that they would come to refer to as constitutions because they literally constituted new forms of government. Gradually "constitution" became the name of such documents.⁹⁶ Indeed, James Madison initially described the Articles of Confederation as a "federal Constitution" in his 1787 notes of the Constitutional Convention.⁹⁷ These written documents were based on the colonial conception of a charter, in which public authority, not Crown authority, was declared and defined. Thus Rhode Island and Connecticut initially were completely comfortable with retaining colonial charters once the references to the Crown had been struck.⁹⁸ As late as 1819, James Madison could write, "It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter."⁹⁹ The Constitution was a type of charter—a particular type that the colonists had been attempting to claim for years.

Rather than a dramatic step from charter to Constitution that bifurcates the colonial period from the constitutional one, the adoption of the term "constitution" was perhaps initially a less dramatic step.¹⁰⁰ The technical replacement of the people for the Crown as the ultimate source of governmental authority was significant but did not mean that constitutional understandings based on practice under the colonial charters vanished. The modes of legal practice in the chartered world continued to prove relevant for legal practice in a Constitutional world. Relocating this transformation in the late seventeenth century in the growing belief in a publicly available printed charter as the source and limit of governmental authority would suggest a constitutional tradition that crosses over the founding period rather than commencing in it.

PRINTED CASES TO THE PRINTED REPORTS

If the transformation from patent to charter suggests that the American constitutional tradition stretches back with historical and legal continuity to the late

seventeenth century, a transformation involving colonial appeals to the Privy Council stretches this tradition into the nineteenth century. Because the decisions in these appeals were not reported in print, they have not been seen as creating a body of colonial constitutional law.

Yet Americans after the Revolution did not uniformly embrace printed and published reports. No cases from the Supreme Court appeared in a reported volume until 1798, an official court reporter was not appointed until 1817, and only in 1834 did the Court conclude that the copyright in the opinions rested with the public.¹⁰¹ Although unreported in print, the decisions in Privy Council appeals were known to elite colonial and English lawyers. If a body of colonial constitutional law existed, then law in the early national period likely related to it either by continuing or rejecting substantive boundaries and interpretive conventions.

For Americans, appeals to the Privy Council are part of an obscure and less well-understood historical jurisdiction. In much of the former British Empire, however, appeals to the Privy Council, or more accurately, the Judicial Committee of the Privy Council, remain a significant and contested aspect of British constitutionalism. The Judicial Committee, created in its present form in 1833, continues to operate as “the court of final appeal for the UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.”¹⁰² Until 1949 Canada fell within this jurisdiction; until 1986, Australia; and until 2004, New Zealand.¹⁰³ Over twenty-five various territories, states, republics, and islands remain under the controversial jurisdiction. The membership of the committee is comprised of the former and present Lord Chancellors, certain Privy Counselors with judicial experience, various overseas members (senior judges and former judges from countries where there is a right of appeal), and Lords of Appeal. In 2007, ninety-three overseas appeals were entered.¹⁰⁴ The committee remains important in areas such as the death penalty.¹⁰⁵ In 2004, the committee concluded that Jamaica’s mandatory death penalty in cases of murder was “inhuman.”¹⁰⁶ But it has been commercial litigants who have been one of the major forces in favor of retention, approving of the committee’s perceived expertise and uniformity.¹⁰⁷

Until the mid-nineteenth century, Privy Council judgments were not reported.¹⁰⁸ At Macquarie University, Bruce Kercher has published unreported Privy Council appeals on the Web.¹⁰⁹ He explains that “we were taught at law school in the early 70s that Australian law nearly always followed that of England. Now a number of us have found that to be quite wrong.”¹¹⁰ A similar problem occurred with respect to the colonial American appeals. George Chalmers pointed out that Blackstone’s *Commentaries* “were barren on such legal topics, as relate to our colonies.” Blackstone was unable to “obtain materials,” as appeals from the colonies “lay to the king in his council” rather than in his bench. If appeals had been to the bench, “there would there have been many reports laid before the public” and Blackstone could have drawn on these reports. However, there “have been

scarcely any reports of cases, which were decided, on such appeals, and were accessible to research."¹¹¹

The perception that constitutional law must begin with the Supreme Court is the product of this fact that colonial constitutional law prior to the Revolution did not appear in print. In fact, what understanding we have of the appeals has been the product of print publication. One appeal in 1728, *Winthrop v. Lechmere*, has received the most attention because of the mid-nineteenth-century publication of the Connecticut governor's papers with extensive discussion of the appeal. In *Winthrop*, the Privy Council addressed whether Connecticut's intestacy law requiring partible inheritance (real property to be divided among children) was permissible. The Privy Council declared the statute "null and void." The appeal has often been seen as a precedent for judicial review. As a result, however, the appeal is idiosyncratic. Two later appeals from Massachusetts and Connecticut both upheld partible inheritance. Similarly, an English solicitor who handled an extensive number of the colonial appeals noted that the "null and void" language "was never done in any one Case, before or since, to my Knowledge."¹¹² It was due in part to the defendant's apparently terrible defense and to the fact that Connecticut laws were not subject to prior review. In other colonies, with the exception of Rhode Island, appeals involved laws that had been previously reviewed by the council.¹¹³

The colonial appeals to the Privy Council demarcate a body of colonial constitutional law. Extant appeals briefs—often referred to as Printed Cases—can help describe the boundaries and interpretive traditions of colonial constitutional law. Four large collections contain briefs collected by English barristers and judges, in particular, George Lee and Charles Yorke, who argued before the committee and later served on the committee.¹¹⁴ The Columbia collection is believed to be that of William Samuel Johnson of Connecticut, who traveled to England between 1767 and 1771 and collected Printed Cases in a variety of English appeals. Briefs also survive for the New England intestate cases *Phillips v. Savage* and *Winthrop v. Lechmere*. Additional briefs likely survive, particularly in the papers of the English solicitors, barristers, and judges and among family papers of those involved in the appeals.

Colonial appeals were repeatedly structured by the constitutional requirement in charters and instructions that colonial law not be repugnant to the laws of England.¹¹⁵ The centrality of this requirement is made clear in a brief in the Massachusetts *Phillips* appeal in 1734. *Phillips* raised the same intestate issue as had been raised in *Winthrop*. After *Winthrop*, Rhode Island had repealed its partible intestate law, Connecticut had stopped deciding intestate cases while attempting to figure out how to reverse the appeal, and Massachusetts worried about its own statute.¹¹⁶ The appeal argued that partible inheritance was repugnant to the laws of England. The colonial assembly had the power under the charter only to make laws "as are not repugnant or contrary to the Laws of England," and the

laws subverted “the established Rules and Principles of Law” relating to descents of real estates. To emphasize the importance of repugnancy as the constitutional standard, the lawyer underlined on the brief the quoted charter sentence relating to repugnancy.¹¹⁷

With repugnancy as a constitutional standard, decisions with respect to one colony might have bearing on another colony. In the same brief in the *Phillips* appeal, the second argument was that “the Point in Question hath already received a Determination by his Majesty’s Order in Council on the Appeal in *Winthrop*, which is conceived to be a Case in Point.”¹¹⁸ To the English counsel arguing the case, other appeals—in this instance *Winthrop*—held some relevant value. Moreover, after the committee decided *Phillips* in favor of the colony’s intestate act under the theory that partible inheritance was an ancient colony custom, a second appeal was brought from Connecticut, and a similar result followed.¹¹⁹ The Connecticut agent made reference to the “Precedent” of the *Winthrop* case in noting that it was likely to be alterable.¹²⁰

Colonial legal observers perceived a body of colonial constitutional law. While in England, Johnson attended hearings of the Privy Council Committee, the House of Lords, and other courts. His handwritten notes, with one or two exceptions, are only on the briefs from the colonies.¹²¹ Some comments related to the appeal practice. In *Freebody v. Brenton*, Johnson made a note that it was better to introduce colonial acts in writing under seal, as the judges had refused in one appeal to hear read to them “several Laws of Rho[d]e Island out of the Printed Colony Law Book.”¹²² Almost always, Johnson included the outcome: “reversed” or “affirmed.” Sometimes, Johnson wrote more extensive comments explaining the reasons for the decision. Two examples involving Caribbean appeals indicate that colonial constitutionalism appears to have been characterized by a flexible or at least contextual interpretation of repugnancy and that the boundaries of substantive law were not our familiar private/public law divide.

The contextual nature of repugnancy appears in an appeal from Grenada. The issue was whether a Roman Catholic mother would lose guardianship of her child after the father’s death (a possibility under English law). Grenada had been recently brought within the empire after the Treaty of Paris of 1763. The Privy Council Committee reversed the lower judgment barring her guardianship. The mother and her new husband won. In analyzing the appeal, Joseph Smith applied a rigid theoretical theory of the extension of English law to the plantations and concluded that the “Committee demonstrated little understanding of the question posed” and that the reversal was on “untenable and patently nonlegalistic grounds.”¹²³ Rather than betraying that the committee misunderstood applicable law, the comment reveals the degree to which the appeals were decided under a constitutional jurisprudence that differed from common law. The brief had argued that the laws in England against Catholics should not be executed with rigor in “the new ceded governments” where “they were allowed the free Exercise of their

Religion . . . so far as is not repugnant to the Laws of Great Britain."¹²⁴ Johnson's interest in the appeal likely stemmed from the question of whether colonial laws and practices in favor of Roman Catholics were repugnant to the laws of England. Johnson interpreted the appeal to support non-repugnancy. He concluded, "The Laws agst Roman Catholicks are not executed with that rigour in England that the Mother should be deprived of the Guardianship of her Child, much less should they be so in the ceded Islands where it would be contrary to Justice and to all sound Policy. Even a Jewiss has been permitted to be Guardian in England, a fortiori a Roman Catholic."¹²⁵ "Justice" and "sound Policy" mattered. Free exercise of religion for Roman Catholics appeared not repugnant in the colonies.

What Smith bemoaned as the "patently nonlegalistic" decision in appeals may have significance for understanding the way in which early constitutional cases were argued and decided. While colonial appeals often raised questions of technical interpretation and careful construction, they also provided a forum in which claims about the colonies' place in the empire and the relationship of law to society was openly invited. From the colonial perspective, colonial constitutional law was a body of law in which law, policy, and justice intertwined. Bruce Kercher in a recent article on judicial interpretation of repugnancy in Australia points out that "colonial judges were in a very different position from their counterparts in England, on whom they were supposed to model themselves." He concludes that Australian judges "did not take these repugnancy provisions to mean just a conflict of one particular rule with another, but took a much broader, constitutional approach."¹²⁶ Did early Supreme Court justices model their interpretation on the English common-law bench or on the Privy Council that had overseen the validity of colonial law?

Free exercise of religion is a familiar area of modern constitutional law. However, a Virginia appeal in 1766, *Corbin v. Lomax*, reflects the differing dimensions of colonial constitutionalism. Nothing about the appeal seems constitutional to our notion of constitutional jurisprudence. Among other issues, it involved whether an Elizabethan statute, the Statute against Fraudulent Conveyances (1585), applied in Virginia. As a technical matter, the case involved the validity of a fee tail in a situation involving a conveyance after marriage without monetary consideration. The committee affirmed the colony's judgment.¹²⁷ Johnson explained succinctly, "Stat. of 27 Eliz. doth not extend to Plantations."¹²⁸ Although the appeal had only involved Virginia, Johnson drew a conclusion about the statute applicable to all the American colonies.

The appeal indicates the significant transformation in the substance to this constitutional law after the Constitution. During the colonial period, what we would think of as common-law and private law issues arose in this constitutional framework. In other appeals, the Privy Council ultimately decided whether colonial constitutional law required two witnesses or three to a will or whether colonies had to follow primogeniture. With the Constitution, these issues fell out of

the national constitutional framework. What had been a colonial constitutional issue—whether a colony had to follow the Statute of Fraudulent Conveyances, the Statute of Frauds, other English statutes, and common law—became by default a matter of state common law. Neither the Constitution nor federal law attempted to occupy much of the substantive legal space previously occupied by the “laws of England.” In property, contract, and commercial law and bankruptcy, “English” and “American” rules came into existence as states followed colonial decisions or reached new conclusions. The Constitution’s inclusion of criminal jury trials, habeas corpus, and bills of attainder would transfer colonial constitutionalism in these areas, and national criminal common-law jurisdiction remained a subject of much contest.¹²⁹ Yet for most “private” law matters, nineteenth-century American law thus de-constitutionalized colonial constitutional law.¹³⁰

The late eighteenth-century Supreme Court did not quickly replace these traditional constitutional cases with a new substantive constitutional jurisprudence. According to Julius Goebel, the small size of the Philadelphia bar and the absence of reports meant that the practice was conducted “in a manner approximating the club-like atmosphere that prevailed contemporaneously in the English High Court of Admiralty.”¹³¹ In short, the Court continued to operate in the early years in a manner not markedly different from the Privy Council. The absence of printed reports limited jurisprudential knowledge of the decisions largely to the Philadelphia bar.¹³² Volume 2 of Dallas’s *Reports* (1798) included cases to 1793; volume 3 (1799) included cases through 1799. Volume 4, including *Cooper v. Telfair* and other cases from 1799 to 1800, however, did not appear until 1807, while William Cranch’s competing volume of Supreme Court reports from 1801 to 1803, including *Marbury v. Madison*, preceded it in 1804. The types of cases also left constitutional law somewhat underwhelming. The Court disposed of eighty-seven cases between 1789 and 1801. Thirty-five of these were admiralty cases; forty-two were various law cases (debt, assumpsit, ejectment, case, covenant, and dower), nine equity cases, and one probate case to affirm a will.¹³³ These cases raised issues arising under the Constitution: *Chisolm v. Georgia* was an assumpsit case; *Ware v. Hylton* was a debt case. Yet, repeatedly, the issues explored in these early cases remained jurisdictional rather than substantively constitutional. Constitutional law would become jurisprudential—but not for some years.

REVIEW OF LAW TO JUDICIAL REVIEW

American Constitutional law is the province of courts. Unlike the other two transformations, this aspect of constitutionalism was the product of 1787. In a book on control of colonial legislation, D. B. Swinfen defined review broadly as the process by which “colonial laws could either be ratified, amended, or rejected by the Crown or have their constitutional validity tested by the courts, colonial

and imperial."¹³⁴ The functional loss of Privy Council review of legislation left control and constitutional validity of state legislation to courts alone. The rejection at the Philadelphia Convention of various models for negating both state and congressional legislation left the Supreme Court the most plausible arbiter of constitutional issues.

In the British Empire, review of legislation was ubiquitous. The Board of Trade (under the Privy Council) oversaw review in the seventeenth and eighteenth centuries; the Colonial Office oversaw it in the nineteenth. Review was conducted usually pursuant to a requirement that colonial laws be not repugnant to the laws of England. During the nineteenth century, the Colonial Office reviewed thousands of colonial laws, disallowing significantly fewer than 5 percent a year. Swinfen argues that the process was helpful in "pruning colonial laws" of "provisions which might be, probably inadvertently, repugnant," encouraged in "individual cases" some desirable uniformity of law, and could be used as an instrument of political control.¹³⁵ For the sympathetic Swinfen, these fall into categories such as "imperial affairs," "humanitarianism" (under which Swinfen saw the Privy Council as a "champion" for "slaves, apprentices, immigrants, criminals, and ex-convicts"), or protecting "vested interests." In 1865, this review became substantively formalized under the Colonial Laws Validity Act, the "great legal landmark in colonial constitutional law."¹³⁶ The act "clarified and narrowed" the understanding of repugnancy and left to "the colonial legislatures the responsibility for managing their own affairs."¹³⁷

In the colonies, review was *the* significant form of imperial legislative control and an omnipresent aspect of colonial government. Privy Council instructions, governors' correspondence, and legislative sneakiness (suspension acts, etc.) reveal this reality. During the American colonial period, 8,563 acts were reviewed. As a statistical piece, the number of disallowed laws was not large: 469, or 5.5 percent.¹³⁸ (This number is similar to the statistics during the later empire.) In comparison, the Supreme Court needs to review only a relatively small number of cases to have a significant influence. In the 2006 term, the Supreme Court heard oral arguments in 78 of the 8,857 cases filed and issued signed opinions in only 67.¹³⁹

Review of legislation conjures up a list of specific acts being sent to England. As practiced, review was far more comprehensive—at least with respect to transmission of information. Between the late seventeenth century and the Revolution, the American colonies—with the noticeable exception of Rhode Island and Connecticut—sent the legislation and minutes of their legislative bodies. In 1909, Charles Andrews published a list "of the journals and acts of the councils and assemblies of the thirteen original colonies, and the Floridas, in America, preserved in the Public Record Office, London." The list was over one hundred pages long with twenty to forty collections of laws on each page. Massachusetts, for example, sent their printed collections of the charter, acts, and laws (often in

duplicate); various manuscript acts; minutes of the council; and the journals of the assembly. Tens of thousands of pages of legislative records sailed to England.

Unfortunately, despite review's overwhelming importance in the colonial period, comparably little study has been given to the topic. Even to date, the only significant, admittedly outstanding, work remains Elmer Russell's *Review of American Colonial Legislation by the King in Council* of 1915. There is no comprehensive list of disallowed acts. Volumes 2 through 5 of *Acts of the Privy Council: Colonial Series* contain appendices with acts confirmed or disallowed between 1680 and the Revolution.¹⁴⁰ Only a few contain titles, leaving the substance of many to the imagination. Although Russell's discussion suggested categories of the types of acts disallowed or confirmed, a general colonial historian has little way of easily learning whether the act being referred to remained in force, and there has been no verification of Russell's conclusions. Similarly, outside of a few specific instances, no one has sought to combine the extant law officer opinions and comments of the counsel to the Board of Trade and Plantations with the acts.¹⁴¹ Moreover, although Russell discussed general colonial evasion (for example, failure to transmit laws, temporary laws, reenactment), no one has investigated systematically the colonial response to disallowance of particular acts.

This neglect is due largely to review's abandonment with the Convention. As has been often remarked on, the 1787 Constitution did not replace this practice. James Madison, and others at the Convention, wanted it to continue. In one of his many comments about the negating power, he wrote, "This was the practice in Royal Colonies before the Revolution and would not have been inconvenient; if the supreme power for negating had been faithful to the American interest, and had possessed the necessary information."¹⁴² After the Convention, Madison offered an additional rationale: "A constitutional negative on the laws of the States seems equally necessary to secure individuals agst. encroachments on their rights."¹⁴³ Yet for various and divergent reasons, the different negating proposals eventually lost. The executive veto alone survived.

Near the end of the Convention, once the negative had been abandoned, two lawyers familiar with imperial practice added the "Constitution" to the grant of the Supreme Court's jurisdiction and the clause respecting state legislation. William Samuel Johnson, author of the comments on the appeals briefs, and John Rutledge, who had studied in London at the Middle Temple, ensured that the Supreme Court at least would inherit some aspect of the review of colonial legislation.¹⁴⁴ Connecticut's Oliver Ellsworth then ensured that the First Judiciary Act would explicitly give jurisdiction over state legislation respecting the Constitution explicitly to the Supreme Court.¹⁴⁵

The transformation of colonial constitutionalism was largely the result of this loss of legislative review. Rhode Island and Connecticut alone had had charters that barred Privy Council review of legislation and permitted review only of judicial appeals. The loss of legislative review placed the new Supreme Court—a court

comprised of judges, not judges and other members of the legislative and executive branches—with a jurisdiction peculiar to the colonial world. The Court—and the Court alone—became the arbiter of the Constitution. By the nineteenth century, printed reports of the Court’s decisions began to create a constitutional jurisprudence that turned away from “private law.” The Constitution as an interpretable public law document grew out of these other practices.

Horwitz correctly saw a transformation in American private law between 1780 and 1860. This transformation, however, did not occur against a stable or preconceived notion of Constitutional law that sprang into being with the 1787 written Constitution. The transformation in American private law was dependent on an intertwined transformation of colonial constitutionalism to American Constitutionalism. The transformation of American law between 1780 and 1860 was not only *in* private law but *of* the very notion of private and public law itself. Out of the great binary pairs of English law—*lex scripta* and *lex non scripta*, common law and statutory law—slowly grew another far more powerful legal construct, Constitutional law, with unconstitutional its sole opposing companion.

NOTES

1. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977), xii. Horwitz, with characteristic incisiveness, described colonial law as a “known and determinate body of legal doctrine” (4). In particular, he emphasized the colonists’ success in “establishing the proposition that they carried the English common law with them” and the “authority of common law rules” (6). He concluded, “The overwhelming fact about American law through most of the eighteenth century is the extent to which lawyers believed that English authority settled virtually all questions for which there was no legislative rule” (8). In addition, Horwitz noted a distinction between “common law doctrines . . . derived from natural principles of justice” and statutes as “acts of will” and perceived a “strict conception of precedent” (7–8).

2. Stanley N. Katz, “The Problem of a Colonial Legal History,” in *Colonial British America: Essays in the New History of the Early Modern Era*, ed. Jack P. Greene and J. R. Pole (Baltimore, Md.: Johns Hopkins University Press, 1984), 463.

3. See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); Alexander Haskell, *Colonization as Commonwealth-Building: The Legal and Constitutional Implications of an Early-Seventeenth-Century Anglo-American Political Discourse* (paper presented at the American Society for Legal History, 2006); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), 254; Daniel J. Hulsebosch, “The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence,” *Law and History Review* 21 (2003): 439–82; Alison LaCroix, “The Authority for Federalism: Madison’s Negative and the Transition from Imperial to Federal Supremacy” (unpublished manuscript); David Thomas Konig, “Virginia and the Imperial State: Law, Entitlement, and the ‘Crooked Cord of Discretion,’” in *The British and Their Laws in the Eighteenth Century*, ed. David Lemmings (Woodbridge, Suffolk, UK: Boydell

Press, 2005), 230, 249; David Thomas Konig, "Constitutional Contexts: The Theory of History and the Process of Constitutional Change in Revolutionary America," in *Constitutionalism and American Culture: Writing the New Constitutional History*, ed. Sandra F. VanBurkleo, Kermit L. Hall, and Robert J. Kaczorowski, 3–28 (Lawrence: University Press of Kansas, 2002); Bernadette A. Meyler, "Towards a Common Law Originalism," *Harvard Law Review* 59 (2006): 551–600; William M. Offutt, "The Atlantic Rules: The Legalistic Turn in Colonial British America," in *The Creation of the British Atlantic World*, ed. Elizabeth Mancke and Carole Shammas, 160–81 (Baltimore, Md.: Johns Hopkins University Press, 2005); Ellen Holmes Pearson, "Revising Custom, Embracing Choice: Early American Legal Scholars and the Republicanization of the Common Law," in *Empire and Nation: The American Revolution in the Atlantic World*, ed. Eliga H. Gould and Peter S. Onuf, 93–111 (Baltimore, Md.: Johns Hopkins University Press, 2005); Carla Pestana, *The English Atlantic in an Age of Revolution, 1640–1661* (Cambridge, Mass.: Harvard University Press, 2004); Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120 (2006): 387–458; James S. Hart and Richard J. Ross, "The Ancient Constitution in the Old World and the New," in *The Worlds of John Winthrop: Essays on England and New England, 1588–1649*, ed. Francis J. Bremer and Lynn A. Botelho, 237–89 (Boston: Massachusetts Historical Society, 2005); George Van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 601–46 (with comments by Hulsebosch and Ruth Paley); Craig Yirush, *Conquest Theory and the Metropolitan Assertion of Authority in the first British Empire* (paper presented at the American Society for Legal History, 2006); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004).

4. See, e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* (Birmingham, Ala.: Palladium Press, 2001); Gordon Wood, *The Creation of the American Republic* (Chapel Hill: Published for the Institute of Early American History and Culture at Williamsburg by the University of North Carolina Press, 1998); Gerald Stourzh, "Constitution: Changing Meanings of the Term from the Early Seventeenth Century to the Late Eighteenth Century," in *Conceptual Change and the Constitution*, ed. Terence Ball and J. G. A. Pocock, 34–54 (Lawrence: University Press of Kansas, 1988) (and Stourzh's other essays on this subject). This shift may account for the late eighteenth-century rise and fall of both the words "constitutionalist"—"one who studies or writes" on constitutions or was an "adherent" of constitutional principles—and "constitutionist"—a zealot for an established constitution. See *The Oxford English Dictionary*, 2d ed., s.v. "Constitution."

5. Hulsebosch, *Constituting Empire*, 254. Given the nature of the British constitution as dependent on history, "constitutional history" was often the phrase used to describe the change over time in the British constitution. See, e.g., *The parliamentary or constitutional history of England; being a faithful account of all the most remarkable transactions in Parliament, from the earliest times. Collected from the journals of both Houses, the records* (London: T. Osborne and W. Sandby, 1751–61); Gilbert Stuart, *Observations concerning the Public Law, and the Constitutional History of Scotland* (London: John Murray, 1779); Joseph Story, *Commentaries on the Constitution of the United States: With a preliminary review of the constitutional history of the colonies and states, before the adoption of the Constitution* (Boston: Hilliard, Gray, 1833).

6. On the historiography of the invention of judicial review, see Mary Sarah Bilder, "Idea or Practice: A Brief Historiography of Judicial Review," *Journal of Policy History* 20 (2008): 6–26.

7. Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861).

8. Hulsebosch, *Constituting Empire*, 9–10.

9. Henry St. John Viscount Bolingbroke, *A Dissertation upon Parties* (1735), 108; see Donald Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis, Ind.: Liberty Fund, 1998), xxiii, xxxiv–xxxv.

10. *Essay on Political Society* (1800), 197 (contested attribution to Samuel W. Dana).

11. J. R. Pole's recent edition retains this original capitalization.

12. Clinton Rossiter modernized punctuation and capitalization in his version of *The Federalist Papers*, resulting in a consistently capitalized "Constitution."

13. Hulsebosch, *Constituting Empire*, 8–9.

14. 2 U.S. 419, 479 (1793); see Hulsebosch, *Constituting Empire*, 254. In 1800, the author of *Essay on Political Society* somewhat similarly writes, "Expounding and administering the constitutional law, the American tribunate is of various use in the order of society" (197).

15. For adjectival uses, see, e.g., *The Federalist Papers*, No. 57 (James Madison, referring to "just and constitutional laws"); Edmund Burke, *Reflections on the Revolution in France* (Dublin: W. Porter, 1791), 135 ("They do not hold the authority they exercise under any constitutional law of the state"); *The Petition of the Freemen of the Town of Hartford in the State of Connecticut* (1796) ("our duty, as the faith of the nation is pledged in the Constitution, in a manner equally solemn, as in the case of any constitutional law whatever"). The *OED* does not include a reference for "constitutional law" but does include one for "constitutionality" in 1801. See *The Oxford English Dictionary*, 2d ed. (citing the Ann. Reg. 1800 at 60).

16. 25 U.S. 213 (1827) ("Cotemporaneous construction had always been considered as of great weight in matters of constitutional law; and in the question relating to the power of Congress to establish such corporations as the Bank of the United States, was considered as decisive"). The plural adjectival "constitutional laws" appeared more frequently.

17. Henry St. George Tucker, *Lectures on Constitutional Law: For the Use of the Law Class at the University of Virginia* (Richmond, Va.: Printed by Shepherd and Colin, 1843); see also William Goodell, *Views of American Constitutional Law: In Its Bearing upon American Slavery*, 2d ed. (Utica, N.Y.: Lawson & Chaplin, 1845); Daniel Raymond, *The Elements of Constitutional Law* (Baltimore, Md.: Cushing, 1845); E. Fitch Smith, *Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction* (Albany, N.Y.: Gould, Banks & Gould, 1848); Theodore Sedgwick, *A Treatise on the Rules which govern the Interpretation and Application of Statutory and Constitutional Law* (New York: J. S. Voorhies, 1857). The first treatise to use the term in the title appears to have been J. E. Hall's *Tracts on the Constitutional Law of the United States* (Philadelphia: J. Maxwell, 1817), in which the word never arises in the text; see also *Constitutional law: Comprising the Declaration of Independence, the Articles of Confederation, the Constitution of the United States, and the constitutions of the several states . . .* (Washington: Gales and Seaton, 1819); Thomas Sergeant, *Constitutional law: Being a View of the Practice and Jurisdiction of the Courts of the United States, and of Constitutional Points Decided*, (1822); George Tucker, *The Life of Thomas Jefferson, Third President of the United States: With . . . Notices of his Opinions on Questions of Civil Government, National Policy, and Constitutional Law* (Philadelphia: Carey, Lea & Blanchard, 1837).

18. Joel Parker, *Constitutional law: With reference to the present condition of the United States* (Cambridge: Welch, Bigelow, 1862).

19. See, e.g., H. von Holst, *The Constitutional Law of the United States*, trans. Alfred Bishop Mason (Chicago: Callaghan, 1887; J. I. Clark Hare, *American Constitutional Law* (Boston: Little, Brown, 1889).

20. For early uses, see works by Edwin Seligman and John W. Burgess. See, e.g., Edwin R. A. Seligman, "Changes in the Tenets of Political Economy with Time," *Science* 7 (1886): 377; John W. Burgess, *Recent Changes in American Constitutional Theory* (1923), 56.

21. Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (1932; Union, N.J.: Lawbook Exchange, 2002), 135; see also Ray Forrest Harvey, *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism* (Chapel Hill: University of North Carolina Press, 1937).

22. Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, N.Y.: Cornell University Press, 1947), 21; see also McIlwain, *Constitutionalism and the Changing World* (Cambridge: University Press, 1939).

23. McIlwain, *Constitutionalism: Ancient and Modern*, 15 (noting that "limitations on arbitrary rule have become so firmly fixed in the national tradition that no threats against them have seemed serious enough to warrant the adoption of a formal code"). McIlwain suggested that the early written constitutions "consist mainly of a codification of institutions and principles long in actual force," and that "our independence constituted a break in continuity here requiring a written code" (15).

24. Robert Livingston Schuyler, *Parliament and the British Empire: Some Constitutional Controversies concerning Imperial Legislative Jurisdiction* (Hamden, Conn.: Archon Books, 1929), 117–18. McIlwain's interest in constitutionalism had previously led to his argument over the "correctness" of the American Revolutionary claim that Parliament had no lawful authority over the colonies. Charles Howard McIlwain, *The American Revolution: A Constitutional Interpretation* (Clark, N.J.: Lawbook Exchange, 2005). For revision of this debate, see articles by Barbara Black and Liam Seamus O'Mellin.

25. Walton Hamilton, "Constitutionalism," in *Encyclopedia of the Social Sciences*, ed. Edwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1931), 4:255; see Richard S. Kay, "American Constitutionalism," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Cambridge: Cambridge University Press, 2001), 16 (quoting Hamilton); Gerhard Casper, "Constitutionalism" in *Encyclopedia of the American Constitution*, 2d ed., ed. Leonard W. Levy and Kenneth L. Karst (New York: Macmillan Reference, 2000), 480 (quoting Hamilton). For other definitions, see, e.g., Francis D. Wormuth, *The Origins of Modern Constitutionalism* (New York: Harper, 1949), ix (discussing a series of "devices, the most familiar of which are the separation of powers, bicameralism, the written constitution, and judicial review"); David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989) (exploring foundations in political theory, particularly that of John Locke).

26. See James R. Stoner Jr., *Common-Law Liberty: Rethinking American Constitutionalism* (Lawrence: University Press of Kansas, 2003); Wormuth, *The Origins of Modern Constitutionalism*, 207–8 (suggesting the seventeenth-century common-law limits as the origins of judicial review); Lois G. Schworer, "British Lineages and American Choices," in *The Bill of Rights: Government Proscribed*, ed. Ronald Hoffman and Peter J. Albert, 1–41 (Charlottesville: Published for the United States Capitol Historical Society by the University Press of Virginia, 1997) (discussing multiple lineages of common law, Magna Carta, petition of right, the Bill of Rights,

commonwealth ideology, and natural law). On the ancient constitution, see, e.g., J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: University Press, 1957); Ellis Sandoz, ed., *The Roots of Liberty: Magna Carta, Ancient Constitution and the Anglo-American Tradition of Rule of Law* (Columbia: University of Missouri Press, 1993); Glenn Burgess, *The Politics of the Ancient Constitution* (University Park: Pennsylvania State University Press, 1992); Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven, Conn.: Yale University Press, 1996), chaps. 5 and 6; Corinne C. Weston, "England: Ancient Constitution and Common Law," in *The Cambridge History of Political Thought, 1450–1700*, ed. J. H. Burns, 374–411 (Cambridge: Cambridge University Press, 1991); J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, Md.: Johns Hopkins University Press, 2000); Colin Kidd, *British Identities before Nationalism: Ethnicity and Nationhood in the Atlantic World, 1600–1800* (Cambridge: Cambridge University Press, 1999), 75–98; Janelle Greenberg, *The Radical Face of the Ancient Constitution: St. Edward's "Laws" in Early Modern Political Thought* (Cambridge: Cambridge University Press, 2001).

27. Harold Hazeltine, "The Influence of Magna Carta on American Constitutional Development," *Columbia Law Review* 17 (1917): 1–33; John Phillip Reid, "Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge," *New York University Law Review* 64 (1989): 963 (discussing Pownall's book as "the leading treatise on colonial constitutional law"); Jonathan A. Bush, "Free to Enslave: The Foundations of Colonial American Slave Law," *Yale Journal of Law & the Humanities* 5 (1993): 417. See also "Comments," *Green Bag* 17 (1905): 373 (describing a colonial case as "colonial constitutional law").

28. See, e.g., Eliga H. Gould, *Lines of Plunder or Crucible of Modernity: Towards a Legal History of the English-Speaking Atlantic, 1660–1825* (paper presented at Seascapes, Littoral Cultures, and Trans-Oceanic Exchanges, Library of Congress, Washington, D.C., Feb. 12–15, 2003), <http://www.historycooperative.org/proceedings/seascapes/gould.html>.

29. For a variety of examples, see Patrick McAuslan's discussion in "In the Beginning," *Federal Law Review* 21 (1992–93): 272; Christopher Staker, "Australian Cases Involving Questions of Public International Law, 1992," *Australian Year Book of International Law* 14 (1992): 321 (*Mabo v. Queensland*); W. P. M. K., "Notes and Documents: Colonial Constitutional Law," *University of Toronto Law Journal* 6 (1945–46): 234 (complaining of the absence of a treatise on colonial constitutional law); Jocelyn Gagne, "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim," *Saskatchewan Law Review* 47 (1982–83): 310 (discussing aboriginal title and "theories of colonial constitutional law"); Bernard O'Brien, "The Law Applicable in Federal Jurisdiction," *University of New South Wales Law Journal* 2 (1977–78): 56 (describing colonial constitutional law as "divided into two major divisions" of conquered or settled colonies); W. S. Holdsworth, "The History of the Law as to the Status," *Tijdschrift voor Rechtsgeschiedenix* 3 (1922): 188 (describing principles of colonial constitutional law, including *Calvin's Case*); R. D. Lumb, "The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change," *University of Queensland Law Journal* 15 (1988–89): 3 (discussing "colonial constitutional law" involving the doctrine of extra-territoriality and the doctrine of repugnancy); John Salmond, "The Limitations of Colonial Legislative Power," *Law Quarterly Review* 33 (1917): 117, 120. However, we should recall that in "its early years the British Empire wasn't an empire and it wasn't British." Jerry Dupont, *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Littleton, Colo.: F. B. Rothman, 2001), xiii.

30. William Forsyth, *Cases and Opinions on Constitutional Law, and Various Points of English Jurisprudence* (London: Stevens & Haynes, 1869); George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, chiefly concerning Colonies, Fisheries, and Commerce of Great Britain* (London: Reed and Hunter, 1814). A century later, decolonization led the update by D. P. O'Connell and Ann Riordan to describe itself as *Opinions on Imperial Constitutional Law* (Melbourne: Law Book, 1971).

31. Thomas Pownall, *The Administration of the British Colonies*, 3d ed. (London: Printed for J. Walter, 1766), table of contents, 53, 62.

32. Jack P. Greene, Charles F. Mullett, and Edward C. Papenfuss Jr., eds., *Magna Charta for America: James Abercromby's "An examination of the acts of parliament relative to the trade and the government of the American colonies" (1752)*, (Philadelphia: American Philosophical Society, 1986), 306.

33. *To the Freeholders and Electors of the City and County of Philadelphia* (Oct. 1, 1764), quoted in David L. Jacobson, "John Dickinson's Fight against Royal Government, 1764," *William and Mary Quarterly* 19 (1962): 64, 81.

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

35. H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: Chicago University Press, 2002), 7.

36. See, e.g., McLaughlin, *The Foundations of American Constitutionalism*, 47 (accounting among other factors "the probable effect—psychological effect . . . of living for years under a government whose authority was confined, in theory, within written limitations"); Benjamin F. Wright Jr., "The Early History of Written Constitutions in America," in *Essays in History and Political Theory in Honor of Charles Howard McIlwain*, 344–71 (Cambridge, Mass.: Harvard University Press, 1936).

37. See the work of Catherine Patterson and Paul Halliday.

38. John George Bourinot, *Builders of Nova Scotia* (Toronto: Copp-Clark, 1902), 104–21; "Translation of the Charter of Nova Scotia, 1621," *Transactions of the Royal Canadian Institute* 14 (1922): 89–116 (reprinting document). The charter described itself as "hanc nostrum car-tam" (112–13).

39. *An Incorporacion of Prince Rupert . . . into one body politique by the name of Governours and Adventurers trading to Hudsons baye* (1670) has been described as "nearly seven thousand words of tortured English legal phrases, lettered in eye-straining characters on five large sheets of parchment, and a gigantic seal." Douglas MacKay, *The Honorable Company: A History of the Hudson's Bay Company* (London: Cassell, 1936), 36, 37–38. On early efforts in Canada, including the Northwest Passage Company, the Bristol efforts for Newfoundland, the Nova Scotia Company (1622), and the Canada Company (1627), see E. E. Rich, *Hudson's Bay Company, 1670–1870* (New York: Macmillan, 1960), 1:1–8. Charters did not govern all English colonies, only those where no "Christian Prince or State" had an initial prior claim. Seventeenth-century settlements acquired from another European power were governed initially pursuant to treaties. Jamaica, for example, fell under the Treaty of Madrid (1670). Frances Gardiner Davenport, ed., *European Treaties Bearing on the History of the United States and Its Dependencies* (Washington, D.C.: Carnegie Institution of Washington, 1929), 2:187–97.

40. See also Tasmania's Charter of Justice.

41. See C. H. Philips, *The East India Company, 1784–1834* (Manchester, 1940); H. V. Bowen, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833* (Cambridge: Cambridge University Press, 2006).

42. See E. C. S. Wade and G. Godfrey Phillips, *Constitutional Law*, 4th ed. (London: Longmans, Green, 1952), 400 (noting that constitutions could arise by formal instructions from the Crown to the governor).

43. For documents relating to the nineteenth-century constitutions of the “British imperial commonwealth,” see James Brown Scott, *Autonomy and Federation within Empire: The British Self-Governing Dominions* (Washington, D.C.: The Endowment, 1921). For discussion of the imperial model and the U.S. Constitution, see the letter of A. Inglis Clark, Sept. 2, 1891, in David Eastman, *The Founding Documents of the Commonwealth of Australia* (Australia: D. Eastman, 1995), 1 (explaining influential draft for the Constitution). The Australian “constitution” also includes various letters patent.

44. 30–31 Vict., c. 3; see B. L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968), 5.

45. A nice example of this shift appears on the title page of a document of the Australian attorney general and solicitor department. “Constitution” is in a larger font; “letter patent” and “acts” are in smaller font. See *The Constitution as in Force on 1 June 2003 . . .* (Canberra, Australia: Office of Legislative Drafting, Attorney-General’s Department, 2003).

46. Albert Carlos Bates, *The Charter of Connecticut* (Hartford: Connecticut Historical Society, 1932), 5.

47. Thanks to Catherine Patterson for assistance with this point.

48. *Worshipful Company of Shipwrights* (c. 1612) (including charter, acts and ordinances, and confirmation of them by Ellesmere, Fleming, and Coke).

49. Shelagh Bond and Norman Evans, “The Process of Granting Charters to English Boroughs, 1547–1649,” *English Historical Review* 91 (1976): 102–20; *Royal Grants: Letters Patent and Charters, 1199–Present Day*, National Archives. For early charters, see *Calendar of Charter Rolls*, 2 vols. (1906).

50. See *An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures*, 21 Jac. 1, c. 3, sec. 6 (1622) (compare fourteen-year “patents” with excluded “charters, customs, corporations, companies, fellowships, and societies, and their liberties, privileges, powers, and immunities”).

51. Bates, *The Charter of Connecticut*. On the Great Seal, see H. C. Maxwell-Lyte, *Historical Notes on the Use of the Great Seal of England* (London: H. M. Stationery Office, 1926).

52. For discussion of whether or not this occurred, see Reginald L. Poole, “The Publication of Great Charters by the English Kings,” *English Historical Review* 28 (1913): 444, 449–53.

53. William Bradford referred to Virginia and Plymouth documents as patents. See William Bradford, *Of Plymouth Plantation, 1620–1647: The Complete Text* (New York: Knopf, 1952), 38; see also 215 (concerning “Mr. Allerton’s proceeding about the enlarging and confirming of their Patent”); Sherley and Haterford to Bradford, Mar. 16, 1629/30 (describing “our main business, the patent, was granted” and adding that they had made them a corporation so “to enable you to make and execute laws in such large and ample manner as the Massachusetts Plantation hath it”). What we think of as the Peirce Patent, Thomas Weston called a “charter, the best we could, which is better than your former, and with less limitation.” Thomas Weston to Bradford, July 6, 1621, *Of Plymouth Plantation*, 93. See also Copy of Order of the Privy Council (Jan. 19, 1632/33), 421–22 (discussing problems with the New England “Patents”).

54. “Orders and Constitutions . . . 1619 and 1620,” in *The Records of the Virginia Company of London*, ed. Susan Myra Kingsbury (Washington, D.C.: U.S. Government Printing Office,

1906), 3:352–53; see also 1:257 (“the Inhabitants hauing had great ioy by the Charters of Graunts and Liberties lately sent by Sr Geo: Yeardley,” Quarter Court, Nov. 3, 1619).

55. John Pory, “A Reporte of the Manner of Proceeding in the General Assembly convened at James City 1619,” in Kingsbury, *The Records of the Virginia Company*, 3:158; “Treasurer and Company, An Ordinance and Constitution for Council and Assembly in Virginia, July 24, 1621,” in Kingsbury, *The Records of the Virginia Company*, 3:484.

56. See, e.g., Kingsbury, *The Records of the Virginia Company*, 2:469 (Court Record, Oct. 1623).

57. *For the colony in Virginea Britannia. Lawes diuine, morall and martiall, &c.* (London, 1612) contained no references to the charter or patent.

58. Form of Government, quoted from Young’s “Chronicles of Massachusetts,” in Charles Deane, “The Forms in Issuing Letters Patent by the Crown of England,” *Proceedings of the Massachusetts Historical Society* 11 (1871): 166, 178. The 1628 grant by the Council of Plymouth to Rosewell was described as a “Charter” in the docket accompanying the 1629 charter. Docket (Feb. 1628/29), in Deane, “The Forms,” 173.

59. “The Agreement at Cambridge (Aug. 1629),” in John Winthrop, *Winthrop Papers* (Boston: Massachusetts Historical Society, 1931), 2:151, 152.

60. John Winthrop, *Arbitrary Government Described* (1644). On the controversy, see Ronald Dale Karr, “The Missing Clause: Myth and the Massachusetts Bay Charter of 1629,” *New England Quarterly* 77 (2004): 89–107.

61. William Wood, *New Englands Prospect* (1634), 44; see also Thomas Lechford, *Note-book kept by Thomas Lechford, Esq., lawyer in Boston . . . (1638–1641)*, ed. Edward Everett Hale Jr. (Cambridge, Mass.: J. Wilson and Son, 1885), 278.

62. Emmanuel Downing to Hugh Peter, July 29, 1641, in *Winthrop Papers* (1944), 4:340, 341; see also [Unknown] to John Winthrop Jr., ca. May 1637, in *Winthrop Papers* (1931), 3:397, 403 (noting that “your Patent is called in and condemned, and the Patentees haue renounced”).

63. See Michael P. Winship, “Godly Republicanism and the Origins of the Massachusetts Polity,” *William and Mary Quarterly* 63 (2006): 427, 443–52.

64. *Proceedings of the Council of Maryland, 1636–1770* (Baltimore: Maryland Historical Society, 1885), 3:1–12. The language is very similar to that used in the early proprietary charters of Nova Scotia and Avalon.

65. Thomas Cecil, *A Relation of Maryland* (1635), title page. The twenty-five pages of the charter appear following page 56.

66. The Maryland Archives includes an early corrected copy of the 1632 charter in English. Constitutional Records, 1632–1851, <http://aomol.net/megafile/msa/speccol/sc4800/sc4872/003145/html/m3145--0012.htm>. The Archives implies the printing is London 1632; however, that date does not appear on the document.

67. *Proceedings of the Council of Maryland*, 3:43–44.

68. John Winthrop, “Discourse on Arbitrary Government” (1644), in *Winthrop Papers*, 4:468.

69. *Ibid.*, 471. Winthrop notably remarked that he “might shewe a clear Rule out of the Patent it selfe” (472).

70. *Ibid.*, 483.

71. Edward Winslow, *The danger of tolerating leuellers in a civil state* (1649), 78 (a later publication of *Hypocrisy Unmasked*).

72. [Acts and statutes] of the island of Barbados made and enacted since the reducement of the same, unto the authority of the Common-wealth of England and set forth the seventh day of September, in the year of our Lord God 1652, by the Honourable governour of the said island, the worshipfull the council, and gentlemen of the assembly; together with charter of the said island, or articles made on the surrender, and rendition of the same; published for the publick good (1654). The East India Company Charter was published in 1661, and that of the Bahama Islands in 1670.

73. *Virginia and Maryland; or, The Lord Baltimore's printed case, uncased and answered shewing the illegality of his patent and usurpation of royal jurisdiction and dominion there* (1655). Baltimore's own pamphlet also used patent language. *The Lord Baltremores case concerning the province of Maryland, adjoining to Virginia in America* (1653).

74. Bates, *The Charter of Connecticut*, 11–21.

75. *Ibid.*, 21–24.

76. Bilder, *The Transatlantic Constitution*.

77. Session laws 1665, p. 2; 1661.

78. Linda A. Ries and Jane Smith Stewart, "The Charter to William Penn: This Venerable Document," *Pennsylvania Heritage* (Winter 2000): 18–25. Nonetheless, distinguishing charters from patents on the basis of seal color is a less-than-fruitful endeavor. The seal of the 1629 Massachusetts Bay charter, for example, looked "mustard-color" in the early twentieth century, and the current archivist reports that it is now best described as brown. Yet the Massachusetts Bay document stated repeatedly that the grant was "forever," and a company was obviously incorporated. "The Charter of Massachusetts Bay," *Proceedings of the Massachusetts Historical Society* 92 (1930): 228, 233.

79. The letters patent from the Crown to Virginia is unusual in this respect in declaring itself only a "letters patent." John Burk, *The History of Virginia* (Petersburg, Va.: Dickson & Pescud, 1805), 2:lxii–lxiii.

80. Catherine F. Patterson, *Urban Patronage in Early Modern England: Corporate Boroughs, the Landed Elite, and the Crown, 1580–1640* (Stanford, Calif.: Stanford University Press, 1999), 165. On the ancient constitution in colonial Massachusetts, see Hart and Ross, "The Ancient Constitution."

81. On Magna Carta in the colonies, see A. E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University of Virginia Press, 1968).

82. Lois G. Schwoerer, *The Ingenious Mr. Henry Care: Restoration Publicist* (Baltimore, Md.: Johns Hopkins University Press, 2001), 232 (describing American and English reception). As Schwoerer notes, the document provided "constitutional documents, English precedents, and compelling language on the rights and liberties of Englishman" and served as a "handbook that made Magna Charta and other documents readily available." She points out that Penn "silently lifted a sizeable portion" into *The Excellent Priviledge of Liberty & Property* (1687). (233). One of the early advocates of the *ch* spelling appears to have been, not surprisingly, Edward Coke.

83. Gershom Bulkeley, *The People's Right to Election; or, Alteration of Government [sic] in Connecticut* (1689), 2, 15.

84. Paul D. Halliday, *Dismembering the Body Politic: Partisan Politics in England's Towns, 1650–1730* (Cambridge: Cambridge University Press, 1998), 26. Halliday writes that those "spec-

ulating on the nature of corporations liked to say that the exact form of words in the charter was unimportant to establishing the corporation or to defining its privileges. But in the decades after 1660, charter terms were more thoroughly defined." As he quotes, Sir Robert Atkyns stated, "The charter gives the only rule" (40-41).

85. See, e.g., *The abridgement of the charter of the city of London being every free-man's privilege / exactly translated from the original record and rendered faithfully into English according to the said record itself from the time of William the Conquerour . . . to the time of our now Sovereign Lord King Charles the Second . . .* (London, 1680); *The royal charter of confirmation granted by King Charles II to the city of London. Wherein are recited verbatim, all the charters to the said city, granted by His Majesties royal predecessors, kings and queens of England. / Taken out of the records, and exactly translated into English by S.G. gent.; Together with an index or alphabetical table, and a table explaining all the obsolete and difficult words in the said charter* (London, 1680).

86. A copy of *The Kings Majesties charter, for incorporating the Company of the Massachusetts Bay in New-England in America granted in the fourth year of His Highness reign of England, Scotland, France and Ireland, anno Dom. 1628* (1689); *The Answer of the subscribers to the declaration given in by the representatives, of the several towns of the colony of the Massachusetts, which was publicly declared at the town-house. Boston, May 24. 1689. Upon the occasion of the revolution of the late government under Sir Edmond Andros. . . . We who are of the persons chosen and sworn governour, deputy governour, and assistants (according to charter) in the year 1686 . . . do consent to accept the care and government of the people of this colony . . .* (1689).

87. *The charter granted by Their Majesties King William and Queen Mary, to the inhabitants of the province of the Massachusetts-Bay, in New-England* (1692). The charter was reprinted in 1699. *The charter granted by Their Majesties King William and Queen Mary, to the inhabitants of the province of the Massachusetts-Bay in New-England* (1699). For other charters, see Hudson Bay (1690), the City of New York (1694), and Carolina (1698).

88. See, e.g., *The charter granted by Their Majesties King William and Queen Mary, to the inhabitants of the province of the Massachusetts-Bay in New-England* (1714) (preceding *The Acts and Laws*). For others, see *A Collection of charters and other publick acts relating to the province of Pennsylvania, viz. I. The royal charter to William Penn, Esq. II. The first frame of government, granted in England, in 1682. III. Laws agreed upon in England. IV. Certain conditions or concessions. V. The act of settlement, made at Chester, 1682. VI. The second frame of government, granted 1682. VII. The charter of the city of Philadelphia, granted October 25. 1701. VIII. The new charter of privileges to the province, granted October 28, 1701* (1740); *A Defence of the legislative constitution of the province of Pennsylvania, as it now stands confirmed and established, by law and charter. With some observations on the proceedings published by sixteen members of Assembly, in a paper, entitled, The votes and proceedings of the House of Representatives: Recommended to the consideration of all the free-men of the province* (1728); *The charter granted by His Majesty King Charles the Second, to the colony of Rhode-Island, and Providence-Plantations in America* (Boston, 1719); *The charter granted by His Majesty King Charles II. to the governour & company of the English colony of Connecticut in New-England in America* (1718).

89. Jeremiah Dummer, *A defence of the New-England charters* (1721).

90. John Dickinson, "Speech on a Petition for a Change of Government of the Colony of

Pennsylvania, May 24, 1764," in *The Writings of John Dickinson*, ed., Paul Leicester Ford (Philadelphia: Historical Society of Pennsylvania, 1895), 1:44, quoted in Jacobson, "John Dickinson's Fight," 73–74.

91. *The Laws of Maryland* (1765).

92. *Journal of the Continental Congress*, Oct. 10, 1774; June 2, 1775; June 9, 1775.

93. Thomas Paine, *Common Sense* (1776), sec. 4.

94. *Ibid.*, sec. 3.

95. Emphasis added.

96. On the evolving distinction between constitution and government, see Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, trans. Rita and Robert Kimber (1973; Lanham, Md.: Rowman & Littlefield, 2001), 19.

97. *Documentary History of the Constitution* (Washington, D.C.: Department of State, 1900), 3:7 (May 14, 1787). Madison subsequently revised this phrase to be "federal system of Government."

98. Other colonies wrote new documents that were little more than reworked versions of the charter. Those in New Jersey, for example, according to one commentator, "while freely admitting the absurdities and defects of their constitution were content to retain their archaic charter," which "did violence to the dogma of the Separation of Powers." Charles R. Erdman Jr., *The New Jersey Constitution of 1776* (Princeton, N.J.: Princeton University Press, 1929), vii. At the Convention, Ellsworth referred to the Articles of Confederation as a charter.

99. Madison to Judge Roane, Sept. 2, 1819, *The Records of the Federal Convention*, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966), vol. 3, doc. 131. He continued, "More especially those which divide legislation between the general and local governments; and that it might require a regular course of practice to liquidate and settle the meaning of some of them. But it was anticipated, I believe, by few, if any, of the friends of the Constitution, that a rule of construction would be introduced as broad and pliant as what has occurred."

100. See Patrick H. Hutton, "The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions," *Vermont History* 56 (1988): 154; Michael Warner, *Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America* (Cambridge, Mass.: Harvard University Press, 1990).

101. Morris L. Cohen and Sharon Hamby, "A Bibliography of the Early Reports of the Supreme Court of the United States," *Legal Reference Services Quarterly* 1 (1981): 43–144.

102. "Judicial Committee: Overview," <http://www.privacy-council.org.uk/output/page5.asp>.

103. For recent discussion, see Paul von Nessen, "Is There Anything to Fear in Transnationalist Development of Law? The Australian Experience," *Pepperdine Law Review* 33 (2006): 883–92.

104. Privy Council Office, <http://www.privacy-council.org.uk/output/Page34.asp>.

105. See, e.g., Dennis Morrison, "Caribbean Legal Affairs: The Judicial Committee of the Privy Council and the Death Penalty," *Nova Law Review* 30 (2006): 403–25; Mia Amor Mottley, "Caribbean Legal Affairs: Walking the Tightrope," *Nova Law Review* 30 (2006): 425–43; Brian D. Tittmore, "The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System," *William and Mary Bill of Rights Journal* 13 (2004): 445–521; Joanna Harrington, "The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean," *American Journal of International Law* 98 (2004): 126–40.

106. *Watson v. The Queen*, 2004 WL 1372515 (Jamaica); Caroline Byrne, "UK Privy Council

Loses Appeal in Modern Commonwealth," Caribbean Net News (Aug. 17, 2006), <http://www.caribbeanetnews.com/cgi-script/csArticles/articles/000028/002822.htm>.

107. See New Zealand Business Roundtable, *Submission on Appeals to the Privy Council* (2001) (noting in particular the concern that "in a small country judges cannot always be relied on to uphold the rule of law, as opposed to being swayed by politically correct or even majority opinion").

108. Privy Council judgments begin to be reported around 1808 but even after 1833, Judicial Committee judgments were not officially reported. In 1865, the Privy Council appeals appear. Ellis Ames and Joseph Willard, "The Case of *Phillips v. Savage*," *Proceedings of the Massachusetts Historical Society* 5 (1860–62): 165, 170.

109. See "Unreported Judicial Decisions of the Privy Council, on Appeal from the Australian Colonies before 1850," Macquarie Law, <http://www.law.mq.edu.au/pc/Introduction.htm> (containing records of twenty cases); Bruce Kercher, "Unreported Privy Council Appeals from the Australian Colonies Before 1850," *Australian Law Journal* 77 (2003): 309.

110. E-mail to author (Oct. 17, 2006).

111. George Chalmers (1742–1825) probably assumed he would become an American colonial lawyer. After studying law in Edinburgh, Chalmers moved to Maryland in 1763 and began to practice law. Only in the fall of 1775 did Chalmers return to England. Chalmers, *Opinions of Eminent Lawyers*. Sharon O'Connor is currently compiling a finding guide to the American Privy Council appeals.

112. Paris to James Allen, July 26, 1738, in *Collections of the Connecticut Historical Society* (1892), 5:78–79; see Bilder, *The Transatlantic Constitution*, 122–36, 136–37 (discussing *Winthrop*).

113. See Ames and Willard, "The Case of *Phillips v. Savage*," 170 (suggesting distinction as reason for different result in *Winthrop* and *Phillips*).

114. Apart from scattered appeals briefs in various archives, collections remain in the British Library, the New York Public Library, the Library of Congress, and the Columbia Law School Library, each with handwritten notations. Unfortunately, some of the notes on the Columbia collection were shaved to fit the bound volume. See [Charles Yorke] briefs, Additional Mss. 15489, 36216–8220, British Library; [George Lee], Great Britain, Privy Council, Judicial Committee, Library of Congress, Law Division, Rare Books; [William Lee and George Lee], "Prize Appeals, 1736–1758," 2 vols., New York Public Library; William Samuel Johnson Collection, Diamond Law Library, Columbia University.

115. See Bilder, *The Transatlantic Constitution*; Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *Yale Law Journal* 116 (2006): 502

116. Bilder, *The Transatlantic Constitution*, 137–38.

117. *Gillam Phillips v. Faith Savage (The Case of the Respondent Faith Savage)* (Jan. 1737), Henry Phillips Papers, 1728–38, Harvard Law School, handwritten notations (noting also that it created a new jurisdiction over real estates by allowing the probate judge to partition the property).

118. Appellant's case, *Gillam Phillips v. Hannah Phillips* (Jan. 1737), Phillips Papers. The brief correlated closely to the opinion that Ryder had previously given to Phillips's agent relating to the case in 1734. Jonathan Sharpe to Silas Hooper, Nov. 7, 1734 (Copy of Ryder Opinion), Folder 1–11, Phillips Papers.

119. Bilder, *The Transatlantic Constitution*, 139 (discussing *Clark v. Tousey*).

120. Lord Chancellor Hardwick had declared himself against the result in *Winthrop*. Allen to Gov. Talcott, Nov. 13, 1738, in Joseph Talcott, *Joseph Talcott Papers: Correspondence and Documents during Joseph Talcott's Governorship of the Colony of Connecticut, 1724–41*, Connecticut Historical Society Collections 4 (Hartford: Connecticut Historical Society, 1895), 5:71–72.

121. Johnson's notes on noncolonial appeals emphasized legal interpretations that affected colonial legal interpretations. See case of the appellant William Earl of Chatham (describing dispute among judges over whether the words "heirs male of the body" were words of limitation or of purchase and the consequence for perpetuities).

122. *Brenton v. Freebody* (1769), William Samuel Johnson Collection, Diamond Law Library, Columbia Law School; see Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Octagon Books, 1965), 296 (mentioning note).

123. Smith, *Appeals to the Privy Council*, 495. Smith framed the legal question as whether "acts of Parliament disabling Roman Catholics extended" to Grenada (493). Smith discusses *Scott v. Brebner* at 493–95.

124. Al. Wedderburn and J. Dunning, brief in *Scott v. Brebner*, 5, Johnson Collection.

125. *Scott v. Brebner* (July 1771), Johnson Collection.

126. Bruce Kercher, "Judges and the Application of Imperial Law in Eastern Australia, 1788–1836," in *The British and Their Laws in the Eighteenth Century*, ed. David Lemmings (Woodbridge, Suffolk, UK: Boydell Press, 2005), 230, 249.

127. Charles Yorke represented the appellant, Corbin, who had lost in the Virginia courts. Johnson wrote: "Estate Tail Confirmed." Smith again thought the committee had failed to understand the technical distinctions involved. Smith, *Appeals to the Privy Council*, 493 (citing Add. Ms. 36,220/19). He noted, "Yorke appears to have questioned the soundness of this holding on the ground that Virginia was not colonized until more than twenty years after the passage of the statute, which was a useful regulation of property in an infant or an improved colony." Unclear is whether Smith is referring to Yorke's argument or his comment with respect to the holding going against him.

128. Smith discusses *Corbin* as part of a discussion (in which there seems to have been little pattern) over whether the pre-settlement statutes extended to the colonies. Smith, *Appeals to the Privy Council*, 487–95.

129. See Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence* (Norman: University of Oklahoma Press, 1990).

130. For two interesting recent discussions of this common-law struggle, see Meyler, "Towards a Common Law Originalism"; Pearson, "Revising Custom, Embracing Choice." Another application would be in the fight over whether the Supreme Court had jurisdiction over common-law crimes.

131. Julius Goebel Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 666.

132. Goebel notes that the newspaper account of *West v. Barnes* provided exceptionally unusual coverage. *Ibid.*, 666 n. 7.

133. *Ibid.*, 804.

134. D. B. Swinfen, *Imperial Control of Colonial Legislation, 1813–1865* (Oxford: Clarendon Press, 1970), 2.

135. *Ibid.*, 6–7.

136. Wade and Phillips, *Constitutional Law*, 420; 28–29 Vict., c. 63 s. 2 (requiring colonial

laws to be void for repugnancy to "any Act of Parliament extending to the Colony to which such Law may relate, or . . . to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force or Effect of such Act"). The act responded to actions of Justice Boothby of the Supreme Court of South Australia in striking down colonial laws under a wider definition of repugnancy. See Wade and Phillips, *Constitutional Law*, 6–8. Beginning in 1859, Justice Boothby declared a right to decide on the validity of colonial legislation. Boothby adopted a broad notion of repugnancy under which "English law should control that enacted by the local legislature" (171). Swinfen adds, "To him repugnancy meant more than conflict with imperial acts extending to the colony or with fundamental principles of English law" (171). Thus he concluded that the Australian legislatures could not "override the common law of England." *Liebelt v. Hunt*, SAPP 141 L.C. (1861).

137. Wade and Phillips, *Constitutional Law*, 183.

138. Elmer Russell, *Review of American Colonial Legislation by the King in Council* (New York: Columbia University, 1915), 221.

139. *2007 Year End Report on the Federal Judiciary* (Jan. 2007), 9.

140. *Acts of the Privy Council of England: Colonial Series* (Hereford, UK: Printed for H.M.S.O. by Anthony Brothers, 1908–12).

141. Opinions appear in Chalmers, *Opinions of Eminent Lawyers*. The comments of Francis Fane on the Connecticut laws appear in his *Reports on the Laws of Connecticut*, ed. Charles M. Andrews (New Haven, Conn.: Tuttle, Morehouse & Taylor Press, 1915).

142. *Records of the Federal Convention* (June 8, 1787), 1:168. Before the Revolution, Pownall had written that a colonial administration should have a court for "a constitutional conformity to the laws of the mother country; but would also maintain that dependency therein, which is the essence of colonial administration." Pownall, *The Administration of the British Colonies*, 85. Jack Rakove describes Madison's suggestion as "his most radical proposal of all: to give the national government an unlimited negative (or veto) over all state laws." Jack N. Rakove, *Declaring Rights: A Brief History with Documents* (Boston: Bedford Books, 1998), 105. For the classic article on the negating power, see Charles Hobson, "The Negative on State Laws: James Madison, the Constitution and the Crisis of Republican Government," *William and Mary Quarterly* 36 (1979): 215–35.

143. Madison to Jefferson, Oct. 24, 1787, in *The Records of the Federal Convention*, 3:131, doc. 137. yes

144. For brief discussion, see Bilder, "The Corporate Origins of Judicial Review," text accompanying notes 249–252.

145. Sec. 25 of the *First Judiciary Act*, 1 Stat. 73, ch. 20 (1789).