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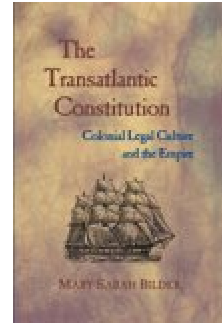
Mary Sarah Bilder. *The Transatlantic Constitution: Colonial Legal Culture and the Empire.* Harvard University Press, 2008. 308 pp. $22.95 (paper), ISBN 978-0-674-02719-0.



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Published on H-Law (April, 2009)
Commissioned by Christopher R. Waldrep

The Principle of "Repugnancy" as the Creative Force of the Transatlantic Legal Culture

As more attention is paid to the interconnectedness of the Atlantic world, more books such as *The Transatlantic Constitution: Colonial Legal Culture and the Empire* will surely be forthcoming to illuminate the still murky corners of the genre. Mary Sarah Bilder has nicely combined the interest in Atlantic history with the resurgence in constitutional legal history. Her examination of the "transatlantic constitution" seems to be a natural and interesting continuation of the work of the maestros of constitutionalism–Bernard Bailyn, Gordon Wood, and Jack P. Greene: "While the empire that created the transatlantic constitution faded with the American Revolution, its legal culture survived to construct the skeleton of federalism and mold early national constitutionalism in the United States" (p. 1).

In her new book, Bilder argues that the "repugnancy principle" controlled the legal structures between England and her colonies. Simply stated, this principle required that colonial laws could not contradict the laws of England. More importantly, the corollary to this principle was the acceptance of "divergence" where the local conditions warranted and justified non-conformity. This is a new way of looking into the Atlantic legal relationship and the constitutional inheritance of America. Bilder argues persuasively that Rhode Island was negotiating both the intersections and voids between the colony's legal system (such as it was) and English laws and customs.

The bulk of the text is dedicated to careful, detailed analysis of various categories of case law in Rhode Island and their handling under Privy Council review. Bilder addresses first the issues associated with determining what the law actually stated and to whom it applied. English law was both formally codified and settled by usage and custom in particular areas. This characteristic simply exacerbated the issues presented to the Rhode Island colony which, spitefully, refused to present a codified version of its own laws to avoid English scrutiny. The transatlantic constitution seemed to be indefinite and in constant flux. A judgment of "repugnancy" versus "divergence" depended on the skill of legal argument: "If the English empire and Englishness required transatlantic uniformity, then some nonuniform colonial laws would be judged repugnant. If the colony could demonstrate that differences related to the nature of the colony and its people, then the colonial laws would be judged divergent" (p. 145). This uncertainty about where the line between divergence and repugnancy lay was the crux of the problem, and the dynamic thrill, artfully illustrated by the author.

The middle four chapters are dedicated to the areas of law that were the subject of the appeals. There did not appear to a consistent set of rules; each case was decided on its specific facts and many demonstrated the practical fact that divergence was necessary due to different customary practices and needs of the Rhode Island colony. Even so, the lawyers and judges did not disregard English practice, but opted instead to use those laws which were best suited for the situation, picking and choosing from

the legal offerings of English statutes. In order to accomplish this as seamlessly as it appeared, a small cadre of legal professionals controlled the appeals process on both sides of the ocean, creating and nurturing the transatlantic constitution.

While the cases brought by Rhode Islanders and argued before the Privy Council may be instructive, they are also limited. The problem in this analysis lies with the fact that Rhode Island was an acknowledged outlier–a colony composed of radical dissenters. Therefore, it is uncertain whether the conclusions from this "case study" can be applied to other colonies, particularly those in the South which were under more rigid and formal royal oversight. Further investigation into the possibility of expanding this argument needs to be done to determine whether this case study provides an insight into a consistent Atlantic legal culture or whether a wealth of alternate cultures and constitutions existed.

A second problematic area lies in wait for readers unfamiliar with British history. While Bilder argues for the significance of the interplay between England and Rhode Island, she leaves out the historical events happening in England contemporaneously with the cases brought before the Privy Council. In this regard, the reader is left without the background to place these conflicts in context to determine possible political or economic motivations behind the Privy Council's decisions. Knowing who was in power, and why they would have cared about the outcomes of these particular cases would provide insight beyond legal maneuvers to reveal potential political machinations.

But these two problems do not undermine the work as a whole. The most significant conclusion is Bilder's association between the role of the Privy Council during the colonial period and that of the newly burgeoning Supreme Court of the United States after independence. One cannot help but pause after reading her last chapter and wonder why this observation had not been made before, as the comparison is so striking. Both are the ultimate arbiters of the repugnancy of laws to the applicable constitution. Indeed, after referring back to the seminal case of judicial authority, *Marbury v. Madison* (1803), our esteemed Chief Justice John Marshall reasserted the principle of "repugnancy" and federal supremacy five separate times in his conclusion. "The legal culture that surrounded the transatlantic constitution had created judicial review (p. 196).

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Citation: Linda Spagnola. Review of Bilder, Mary Sarah, *The Transatlantic Constitution: Colonial Legal Culture and the Empire.* H-Law, H-Net Reviews. April, 2009.

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