

*The Transatlantic Constitution: Colonial Legal Culture and the Empire.* By MARY SARAH BILDER. Cambridge, Mass.: Harvard University Press, 2004. 304 pages. \$49.95 (cloth).

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Surely one consequence of the ever-growing commitment by early Americanists to Atlantic history will be a resurgence of interest in constitutionalism. The topic has attracted little attention in recent decades, though a small group of scholarly articles and books—published mostly from the 1960s to the 1980s and all building to some extent on Charles H. McIlwaine’s seminal study, *The American Revolution: A Constitutional Interpretation* (1923)—have indicated just how central the topic must be to any effort to resituate colonial British American history in an Atlantic context. These works include Bernard Bailyn’s and Gordon S. Wood’s analyses of revolutionary-era political ideology; important (though often overlooked) legal studies by Barbara A. Black and John Phillip Reid; and Jack P. Greene’s several articles on the subject and especially his booklength study, *Peripheries and Center*.<sup>1</sup> Greene and others demonstrate that a largely unwritten imperial constitution structured relations between England and its seventeenth- and eighteenth-century colonies, setting the terms for political and legal debate within the empire and powerfully influencing the structure of the young United States government. Given its rich capacity for helping scholars to move beyond an anachronistic national framework for understanding early American history and to discern the interconnectedness of the first British Empire, the concept of the imperial constitution would appear tailor-made for the new Atlantic history. Mary Sarah Bilder’s *The Transatlantic Constitution* is an excellent example of the wealth of fresh insights that a focus on constitutionalism still has to offer. A legal scholar by training, Bilder approaches constitutionalism as Reid especially has urged scholars to do: as fundamentally a legal rather than simply political matter. Whereas nonlegal historians have tended to identify constitutional relations between the empire’s colonial periphery and metropolitan center as evolving largely as a result of battles over prerogative between colonial legislators and royal officials, Bilder concentrates on a more diverse transatlantic world of legislators, litigants, and lawyers whose concerns often concentrated as much on winning private cases as meeting broader political goals. Focusing on Rhode Island as a case study and applying a sophisticated conception of law as “a legal culture composed of people and practices” (6), Bilder leads readers into an alien world of colonial attorneys, painstakingly assembled law libraries, and legal maneuvers that, she convincingly argues, all had a bearing on colonial constitutional development. That the tour is fascinating and informative rather than bewildering is testimony to the lucidity of Bilder’s prose and her ability to explain the labyrinthine complexity of early modern English law in terms that even nonlegal historians can comprehend.

According to Bilder a particular principle structured political and legal debate in the empire from the beginning: the idea that a colony’s laws could not be repugnant to the laws of England, yet could diverge from them to accommodate local circumstances. Other historians have commented on this so-called repugnancy principle before, in part because it appeared explicitly in many colonial charters. Bilder, however, is the first to emphasize and demonstrate its centrality to colonial and imperial legal culture.

Indeed, what Bilder is able to show is that the repugnancy principle was so effective at embodying at once the principal ideal and the basic reality of early modern English imperialism—on the one hand, the desire for an empire of uniform English laws, on the other, the recognition of the inevitableness of regional diversity—that the concept served as the basis of virtually any debate on

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<sup>1</sup> Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607–1788* (Athens, Ga., 1986).

those most fundamental of imperial constitutional issues: “how and when the laws of England should apply in the colonies” (1). The idea was well in place in English law, Bilder shows, long before the settlement of the American colonies. It appeared, for instance, in the 1535 act incorporating Wales, in which laws deemed un-English, especially inheritance laws that did not conform to primogeniture, were abolished, whereas other supposedly “necessary” (32) divergent local laws were allowed to persist. In Rhode Island the concept played a crucial role any time deliberation over the application of English law emerged, a development, Bilder deftly shows, that changed in accordance with the colony’s own changing circumstances. In the seventeenth century, when the colony was still struggling to achieve some stability, contests over the application of English law took place primarily in relation to the statutes that colonial legislators were devising; in the eighteenth century, when the substance of colonial statutes was a less pressing concern in England, these contests occurred instead in relation to private cases that were appealed from colonial courts to the Privy Council in London.

By focusing on these private appeals as key sites of constitutional contestation, Bilder has brought readers quite far from the locations usually associated with such debate, such as assemblies and the public media (newspapers and pamphlets). Yet Bilder makes a strong case that it was as a result of the many mundane efforts by individual attorneys to navigate the appeals process on behalf of their clients that much of the substantive, if often incremental, developments in the evolution of the transatlantic constitution occurred. In three of the book’s most engrossing chapters, Bilder patiently depicts this process by walking readers through the three most common types of appeals that Rhode Islanders brought before the Privy Council: inheritance cases that dominated the transatlantic appeals of the 1720s and 1730s; a fascinating thirty-year case concerning ministerial lands that generated debate about how religious orthodoxy would be defined in the colony (a case that, amazingly, resulted in the Privy Council’s concession that “orthodoxy in New England did not have to mean that of the Church of England” [165]); and cases concerning commerce and especially the colony’s growing practice of issuing paper currency as the empire became increasingly associated with commercial rather than landed property in the 1750s. Bilder’s principal conclusion from these investigations, indeed, the central, pioneering thesis of *The Transatlantic Constitution*, is that throughout these deliberations the repugnancy principle’s inherent ambiguity—its deliberate lack of clarity about how and when English law should be applied to the colonies—was not problematic, as historians have sometimes emphasized, but was, instead, the main source of the empire’s strength. Bilder is most impressed by the “flexibility” (7) of the transatlantic constitution rather than its tendency to generate conflict. She follows other historians, especially Greene, in emphasizing the inevitably negotiated character of constitutional relations in this extensive overseas empire, yet she goes further, arguing that the ambiguities in this relationship were prized for their own sake. These ambiguities, she suggests, not only gave people on both sides of the ocean the maneuvering room they needed to argue whichever side of the law (repugnancy or divergence) they deemed most helpful in a particular instance but also created a legal culture that “revel[ed] in the existence and tension of dual authorities” (186). The empire could thus persist in the face of changing circumstances until the mid-1770s, when tensions became so intractable that, finally, “transatlantic legal culture came crashing to an end” (185). Yet, as Bilder suggests in a final, brief chapter, the logic of the transatlantic constitution did not go away entirely; instead, in Americans’ adjustment to independence, they ineluctably returned to this logic, creating in the federal system and in judicial review institutions that mirrored an essential aspect of the legal culture of the first British Empire.

Not all historians will agree that flexibility and accommodation were the hallmarks of imperial constitutional arrangements and scholars will question whether Bilder’s focus on Rhode Island, a colony that was unusual among nonroyal colonies in holding on to its original charter, makes her study unrepresentative of constitutionalism in most of British America. Nevertheless,

Bilder's argument is so compelling, and her delineation of transatlantic legal culture so revealing, that historians will undoubtedly feel the need to test her results elsewhere. Atlantic history will be all the richer for it.