

NOTE

COLONIAL VIRGINIA: THE INTELLECTUAL INCUBATOR OF JUDICIAL REVIEW

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What is the historical origin of judicial review in the United States? Although scholars have acknowledged that British imperial “disallowance” of colonial law was an influential antecedent, the extant historical scholarship devoted to the mechanics of disallowance is sparse. This limited exploration is surprising. Not unlike modern judicial review, the guiding question imperial overseers considered when disallowing colonial legislation was whether it was ‘repugnant’ to the laws of England. In response, this Note’s first contribution is to explain the process by which the so-called repugnancy principle was enforced against inferior colonial law. Even fewer scholars have attempted to connect the ultimate repugnancy assessment to the historical context surrounding disallowed colonial laws. This Note’s second contribution is thus to augment existing literature by exploring colonial Virginia’s specific experience under imperial supervision.

Among the scholars that have explored the connection between colonial disallowance and the origins of judicial review, some have documented the link between imperial legislative review of colonial legislation and James Madison’s proposed constitutional solution to the problem of unrestrained state legislatures in the aftermath of independence. What remains to be explored, however, is how Madison explicitly drew on the history of imperial review of colonial Virginia’s laws as he argued at the Constitutional Convention for a federal power to “negative” state laws. Accordingly, this Note’s third contribution is to reveal that the historical practice of imperial review in Madison’s native Virginia

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animated his proposed solution to check the unrestrained popular will of state legislators. Although his proposed solution was ultimately rejected at the Convention, that rejection was conditioned on the judiciary possessing the power of judicial review. By exposing this hidden link, this Note demonstrates that colonial Virginia rightly may be regarded as the intellectual incubator of judicial review.

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INTRODUCTION

During the British imperial era, the supreme laws of England trumped conflicting inferior colonial law. Colonial assemblies—by the terms of their colonial charters—were prohibited from enacting legislation repugnant to the laws of England. The British monarch, to both monitor the colonial assemblies and to ensure compliance with the superior laws of England, empowered the Board of Trade (“Board”) and the Privy Council with the duty to enforce the so-called repugnancy principle. That principle required the Privy Council and the Board to compare colonial legislation to English law. If the colonial legislation was, upon that comparison, deemed repugnant to the laws of England, then the law was

disallowed.¹ The historical record suggests that the imperial power of legislative review was not one the Privy Council and the Board were hesitant to exercise. Indeed, from 1696, when the Board of Trade was established, to 1776, when the United States declared its independence, scholars have estimated that more than 8,500 colonial laws were reviewed,² and over 400 colonial laws were disallowed for being repugnant to the laws of England.³ This historical system of oversight and disallowance echoes a similar, more modern institution: American judicial review. The similarity between British imperial oversight and modern judicial review has not gone unnoticed. In the words of one historian, the Privy Council and the Board subjected colonial “provincial laws to a kind of constitutional test.”⁴

Within the last decade, Mary Bilder and Alison LaCroix have explored the connection between the disallowance of colonial legislation and the origin of judicial review.⁵ The argument is that “recurrent administrative

¹ Disallowance was the term used to proclaim that colonial law was legally inoperative as it diverged from the laws of England. See Dudley Odell McGovney, *The British Privy Council’s Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto*, 94 U. Pa. L. Rev. 59, 81 (1946); see also Robin L. Einhorn, *American Taxation, American Slavery* 15 (2006) (equating disallowance to a “veto”); Robert J. Steinfeld, *The Rejection of Horizontal Judicial Review During America’s Colonial Period*, 2 *Critical Analysis L.* 214, 218 n.19 (2015) (“[D]isallowance operated as a ‘repeal’ of the statute.”).

² Mary S. Bilder, *The Corporate Origins of Judicial Review*, 116 *Yale L.J.* 502, 538 (2006).

³ Jonathan R.T. Hughes, *Social Control in the Colonial Economy* 13 n.12 (1976); see also Leon T. David, *Councillors and the Law Officers in the Colonies in America*, 12 *Am. U. L. Rev.* 23, 32 (1963) (“Of some 8,563 acts submitted for approval, it disallowed 469.”); Sharon Hamby O’Connor & Mary Sarah Bilder, *Appeals to the Privy Council Before American Independence: An Annotated Digital Catalogue*, 104 *Law Libr. J.* 83, 85 (2012) (“The Council could disallow a law; approximately 8563 were sent for review and 469 (5.5%) disallowed.”).

⁴ Oliver Morton Dickerson, *American Colonial Government 1696–1765*, at 234 (1912).

⁵ See Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (2004); Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 *Law & Hist. Rev.* 451, 466–69 (2010). But see Philip Hamburger, *A Tale of Two Paradigms: Judicial Review and Judicial Duty*, 78 *Geo. Wash. L. Rev.* 1162, 1174–75 n.38 (2010). His research shows that “judges had for centuries done their duty by holding government acts unlawful and void. They had done this as to sovereign acts of the king and even as to legislation, other than acts of Parliament. As a result, early American judges did not need to establish precedents for a power of judicial review.” *Id.* Although Professor Hamburger offers a compelling alternative account, he overlooks the fact that even though crown officials “consistently recognized the assemblies’ authority to pass laws, they always insisted that those bodies were subordinate institutions.” Jack P. Greene, *Law and Origins of the American Revolution in The Cambridge History of Law in America* 447, 449 (Michael Grossberg & Christopher Tomlins eds., 2008). The insubordination of colonial assemblies beneath the British imperial apparatus thus also provides a historical antecedent

testing of colonial statutes against a ‘constitutional’ standard exemplified in the laws of England helped pave the way for acceptance of the doctrine of judicial review in the new nation.”⁶ Yet the extant historical scholarship devoted to this striking similarity hardly touches upon the mechanics of imperial disallowance.⁷ In this respect, this Note’s first contribution is to explain the mechanics by which the repugnancy principle was enforced against inferior colonial law.

By a similar token, even fewer scholars have attempted to connect colonial legislation and the law’s surrounding historical context to the Board and the Privy Council’s ultimate repugnancy assessment.⁸ The reason for the dearth of scholarly literature linking together these narratives is that there exists “no comprehensive list of disallowed acts.”⁹ This lacuna in source material also explains why “comparably little study has been given to the topic” of imperial review of colonial law in general.¹⁰ In response, this Note’s second contribution is to augment the existing literature by exploring the colonial experience under imperial supervision, specifically in the Colony of Virginia.

Colonial Virginia, after all, “had the largest population of any colony in North America,” possessed an influential economic and legal system, and “produced great leaders,” many of whom would go onto shape the Constitution’s structural framework.¹¹ Virginia was, on balance, “the jewel in the crown” of Britain’s overseas empire.¹² This fact alone makes the absence of a thorough analysis of colonial Virginia’s interaction with the Privy Council remarkable. And this historical gap is only compounded by the fact that the “father of the Constitution,” James Madison, was

from which Americans, like James Madison, could derive intellectual inspiration for American judicial review.

⁶ Joseph H. Smith, *Administrative Control of the Courts of the American Plantations*, 61 *Colum. L. Rev.* 1210, 1253 (1961).

⁷ Astonishingly, Oliver Morton Dickerson’s *American Colonial Government*, which was published in 1912, remains the authoritative source on the mechanics of imperial disallowance.

⁸ See Mary Sarah Bilder, *Colonial Constitutionalism and Constitutional Law*, in *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz* 28, 43 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

⁹ *Id.*

¹⁰ *Id.*

¹¹ William E. Nelson, *The Law of Colonial Maryland: Virginia Without Its Grandeur*, 54 *Am. J. Legal Hist.* 168, 198–99 (2014).

¹² Mary Carroll Johansen, *The Relationship Between the Board of Trade and Plantations and the Colonial Government of Virginia, 1696–1775*, at 38 (1992) (unpublished M.A. thesis, The College of William & Mary) (on file with The College of William & Mary Libraries).

himself a son of colonial Virginia.¹³ In modern times, Madison is rightly memorialized for his profound influence on the Federal Constitution's structure and for "laying the foundations of the Republic."¹⁴ He understood the "overall logic of the new order better than anyone else at the time."¹⁵ His understanding of the new order was, as it turns out, deeply shaped by his experience with the old. According to Alison LaCroix, the "centerpiece of Madison's plan to reconstitute the Republic . . . sprang directly from the institutions and practices of the British Empire, the thralldom of which the American colonies had escaped."¹⁶ Likewise, Michael Zuckert contends that Madison had both "an unparalleled understanding of the political nature of the Constitution," and possessed "an unexcelled understanding of what judicial review was to be in the new system."¹⁷ Yet underappreciated, until now, is the influence that Privy Council disallowance of his own commonwealth's legislation had on Madison's frame of mind and his approach to subordinating the will of state and national electorates to the supreme law of the land.

Herein lies this Note's third contribution. In short, I seek to enrich the existing scholarship on the origins of judicial review by offering a targeted analysis of the experience in colonial Virginia. Many scholars have argued that the concept of judicial review originated from Madison's proposals at the Constitutional Convention.¹⁸ The general story tracing the link between the Privy Council, the Constitutional Convention, and the federal courts' ability to disallow repugnant legislation has been

¹³ Michael P. Zuckert, *Judicial Review and the Incomplete Constitution: A Madisonian Perspective on the Supreme Court and the Idea of Constitutionalism*, in *The Supreme Court and the Idea of Constitutionalism* 53, 55 (Steven Kautz et al. eds., 2009).

¹⁴ Charles Evans Hughes, *James Madison*, 18 *A.B.A. J.* 854, 854 (1932) (referring to Madison as the "Father of the Constitution"); see also Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 *Wm. & Mary L. Rev.* 1239, 1269 (2018) ("His theory of factional checks and balances is why many consider him the most thoughtful constitution maker.").

¹⁵ Zuckert, *supra* note 13, at 55.

¹⁶ LaCroix, *supra* note 5, at 464.

¹⁷ Zuckert, *supra* note 13, at 55.

¹⁸ See Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 *Nw. U. L. Rev.* 1419, 1450–51 (2019) (building on James Bradley Thayer's discussion of Madison's proposed continuation of the imperial practice of legislative review); see also Sean Gailmard, *Imperial Politics, English Law, and the Strategic Foundations of Constitutional Review in America*, 113 *Am. Pol. Sci. Rev.* 778, 788 (2019) ("My argument is that delegates to the Constitutional Convention of 1787 recognized and sought to preserve benefits of Crown review by the Privy Council as an external bound on legislation.").

told.¹⁹ Against the backdrop of these abstract accounts, this Note restricts the study of Privy Council oversight specifically to colonial Virginia. This narrow focus better facilitates an understanding of how Madison, through his knowledge of actual practice, envisioned the will of subordinate legislatures conforming to the supremacy of the new Federal Constitution.²⁰ As this Note uncovers, Madison himself thought deeply about imperial review of colonial legislation—particularly that of colonial Virginia—in the years leading up to the Constitutional Convention. And it was from Madison’s Privy Council-influenced proposals that judicial review ultimately sprung. This Note, therefore, confines itself to the study of Privy Council oversight of colonial Virginia and explores the story of three Virginian colonial acts, and their interaction with the British imperial system, to cast useful light on Madison’s vision of judicial review and constitutional theory more generally.

This Note is divided into three Parts. Part I discusses the history of the Board of Trade and the Privy Council’s enforcement of the repugnancy principle. Surprisingly, that enforcement process, and the innerworkings of both the Privy Council and the Board, has received remarkably little scholarly attention. Part II details the three Virginian Acts in chronological order. Discussing each Act’s historical context and ultimate demise brings to the surface some of the major issues that plagued colonial society. It also calls attention to the process and general cultural perception of legislative review in colonial Virginia. Part III turns to the influence imperial oversight of Virginia’s colonial legislation had on Madison—an influence that inspired Madison’s proposed federal constitutional framework. In short, the influence that both the Privy Council and Board’s scrutiny of Virginia’s colonial legislation had on Madison’s attempt to restrain the democratic will of state and national

¹⁹ Section 25 of the Judiciary Act of 1789 granted federal courts jurisdiction over state courts in matters where “the validity of a statute” is drawn into question “on the ground of their being repugnant to the constitution.” Judiciary Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85. In essence, the federal courts were empowered, much like the Board and the Privy Council, with the duty to enforce the repugnancy principle against state and federal legislation that conflicted, not with the laws of England, but with the text of the Constitution.

²⁰ Indeed, Professor Jordan Cash has observed that “judicial review had long been practiced in Virginia, and the English jurisdictional tradition continued to be influential into the early national period.” Jordan T. Cash, *The Court and the Old Dominion: Judicial Review Among the Virginia Jeffersonians*, 35 *Law & Hist. Rev.* 351, 365 (2017). Although less general than most accounts, Professor Cash’s assertion still paints with too broad a brush, as it does not explore British imperial oversight’s influence upon Madison’s proposed constitutional solutions.

electorates may help us more clearly understand the imperial, colonial origin of judicial review.

I. THE PRIVY COUNCIL AND THE REPUGNANCY PRINCIPLE

A. *Colonial Charters, the Repugnancy Principle, and the Laws of England*

Colonial charters, issued by the British monarch, conveyed legislative power to the colonial assemblies. Those charters, however, did not delegate sweeping grants of unchecked lawmaking authority.²¹ Instead, colonial assemblies were expressly forbidden from making laws repugnant to the laws of England.²² This was so because the colonies “were viewed as personal holdings of the King and were thus ruled by the King” and subject to his prerogative, “royal power.”²³ In other words, the right of colonial assemblies “to make laws at all rested on the king’s will.”²⁴ Colonial assemblies thus only wielded the “the power to make laws within certain bounds.”²⁵ In the words of historian Charles Andrews, the charters “confine[d] the colonial legislatures within the constitutional bounds of their powers.”²⁶ For example, the Virginia Charter, issued by King James I in 1612, provided that the colony had the “full Power and

²¹ Calabresi, *supra* note 18, at 1434 (“These written charters limited and enumerated the powers of colonially elected assemblies, royal governors, governor’s councils, and relations with the mother country.”).

²² See Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 *Harv. L. Rev.* 385, 411 (2006); see also David, *supra* note 3, at 36 (“English colonial charters conferred local legislative powers only so long as the enactments ‘be not contrary to the laws of England.’”); Bernadette Meyler, *Daniel Defoe and the Written Constitution*, 94 *Cornell L. Rev.* 73, 75 (2008) (“Colonial charters, which contained language requiring that colonial laws not be repugnant or contrary to English law, afforded a basis for Privy Council review of the colonies’ enactments.”).

²³ L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 *Ariz. J. Int’l & Comp. L.* 93, 97 (1998).

²⁴ Charles M. Andrews, *The Royal Disallowance*, 24 *Proc. Am. Antiquarian Soc’y* 342, 343 (1914); see also Gailmard, *supra* note 18, at 781 (“Thus, unlike England’s Parliament, the American colonial assemblies were limited and subject to external legal review from the beginning. In this way, a limit on legislative authority provided by specific, entrenched sources (including written documents) was built in to the American colonists’ legislative tradition.”).

²⁵ Bilder, *supra* note 5, at 40.

²⁶ Andrews, *supra* note 24, at 344; see also Mary Sarah Bilder, *English Settlement and Local Governance*, in *The Cambridge History of Law in America Volume 1: Early America (1580–1815)* 63, 103 (Michael Grossberg & Christopher Tomlins eds., 2008) (“[A]n assembly held the lawmaking authority limited by the requirement of non-repugnancy to the laws of England, and the Crown through the Privy Council supervised the boundaries of colonial authority.”).

Authority, to ordain and make such Laws and Ordinances, for the [colony's] Good and Welfare."²⁷ At the same time, however, Virginia's colonial laws could not be "contrary to the Laws and Statutes of this our Realm of England."²⁸ In practical terms, then, Virginia's colonial assembly, the first established representative legislature in the colonies,²⁹ was confined by the text of the King's charter.

In like vein, the repugnancy principle, which "formed the legal basis for the review of colonial legislation," was used to either confirm or disallow colonial laws depending on "whether they were or were not deemed to be repugnant to British law."³⁰ Yet the repugnancy clause of colonial charters "defined, in vague terms, the limit of acceptable governance."³¹ In fact, the content of the repugnancy principle was never made clear.³² Not only was the "meaning of repugnancy to the laws of England . . . contested,"³³ but English authorities also found no need to "develop any general conceptions of repugnancy, either in judgments, textbooks or digest headings."³⁴ The Privy Council "did not explain why it invalidated colonial statutes," nor did the British authorities "convey English law to the colonists."³⁵ As a result, Privy Council review of

²⁷ 7 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3806 (Francis Newton Thorpe ed., 1909).

²⁸ *Id.* (emphasis omitted).

²⁹ James Miller Leake, *The Virginia Committee System and the American Revolution* 12 (1917). It bears mentioning that every colony incorporated the repugnancy principle into its own charter. Indeed, the repugnancy "restriction was inserted into all . . . charters, with some little variation." Alexander Hamilton, *The Farmer Refuted*, in 1 *The Papers of Alexander Hamilton* 81, 112 (Harold C. Syrett ed., 1961).

³⁰ Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788*, at 30 (1986); see also Bilder, *supra* note 5, at 1–4 (discussing the transatlantic constitution in which the repugnancy principle formed the basis of a continuous dialogue between colonial and imperial actors); Lochlan F. Shelfer, *Intergovernmental Federalism Disputes*, 52 *Ga. L. Rev.* 831, 853 (2018) ("After reviewing the statute, the Privy Council would issue a declaration of the validity or invalidity of the statute.").

³¹ Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 *Law & Hist. Rev.* 439, 477 (2003).

³² *Id.*

³³ Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 *J. Pol'y Hist.* 6, 7 (2008) ("For decades, colonial and English lawyers and government officials argued over the application of the limit in numerous specific cases and contexts.").

³⁴ Geoffrey Sawyer, *Repugnancy and Inconsistency of Legislation*, 11 *Cambrian L. Rev.* 101, 105 (1980).

³⁵ Hulsebosch, *supra* note 31, at 477.

colonial statutes “generated little coherent doctrine.”³⁶ The obscurity inherent to the repugnancy principle enabled the Privy Council to take “into account a range of political factors,”³⁷ which made a finding of repugnancy ultimately “a legal and political decision” rather than a detached analysis.³⁸

Because the repugnancy principle operated in conjunction with the laws of England, Britain’s laws “were to provide the model, and the standard, for all colonial laws.”³⁹ But the uncertainty surrounding what exactly constituted “the laws of England” made the repugnancy principle’s application incredibly broad.⁴⁰ To be sure, a colonial law in direct conflict with a statute of Parliament, which undoubtedly constituted a law of England, stood little chance of escaping disallowance.⁴¹ But the laws of England were understood to encompass far more than just Parliament’s legislation.⁴² Laws and statutes, government edicts, English customs, and British policy and proceedings were frequently labeled the laws of England.⁴³ Nevertheless, there existed a constant tug-of-war

³⁶ *Id.*

³⁷ Damen Ward, *Legislation, Repugnancy and the Disallowance of Colonial Laws: The Legal Structure of Empire and Lloyd’s Case* (1844), 41 *Victoria U. Wellington L. Rev.* 381, 382 (2010).

³⁸ O’Connor & Bilder, *supra* note 3, at 85.

³⁹ Jack P. Greene, *Creating the British Atlantic: Essays on Transplantation, Adaptation, and Continuity* 104 (2013); see also Bilder, *supra* note 5, at 9–10 (arguing that “[t]he phrase *laws of this our realm of England* was used as the baseline against which to judge the possibly repugnant laws,” yet the principle was messy and hard to pin down).

⁴⁰ Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* 23 (2011) (elaborating on both the breadth of repugnancy and the laws of England—stating “[s]uch language . . . despite its superficial implication of legal uniformity, in fact provided for a great deal of variation, flexibility, and independence”); see also Lauren Benton & Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850*, at 13 (2016) (“There was strategic deference to the principle that colonies should not adopt laws repugnant to the laws of England. Beyond these spare rubrics, variation and improvisation ruled and uncertainty prevailed about the shape and reach of metropolitan legal authority and the role of the common law.”).

⁴¹ See McGovney, *supra* note 1, at 80–81; see also Anne Twomey, *Fundamental Common Law Principles as Limitations upon Legislative Power*, 9 *Oxford U. Commonwealth L.J.* 47, 58 (2009) (“[C]olonial legislatures were ‘legally competent’ to pass any law as long as it was not repugnant with an Imperial statute intended by Parliament to be binding on the colony.”).

⁴² Hulsebosch, *supra* note 31, at 450–51 (“English law was not simply [a] body of rules or principles located in a statute book, code, or treatise.”).

⁴³ Bilder, *supra* note 26, at 68–69. The general consensus was that the laws of England included “the Common Law of England.” McGovney, *supra* note 1, at 81; see also Twomey, *supra* note 41, at 57–58 (“Some doubted whether the doctrine of repugnancy ever extended beyond repugnancy to British Acts of Parliament applying to a colony, while others considered that it applied to laws that were repugnant to the common law and still others remained

between political institutions as to who possessed the authority to define the laws of England.⁴⁴ With that being the case, the Privy Council and the Board considered “all the law governing ordinary social and business relations,” “the decisions of the courts and semi-authoritative private law books,” as well as “nearly all of the law of contracts, of civil wrongs, of crimes, of domestic relations, and of property.”⁴⁵ The significant discretion facilitated by this massive corpus was further compounded by its unavailability to colonists. “From 1688 to 1788, not a single treatise on law was published in the English colonies.”⁴⁶ The absence of official reporting of judicial opinions made it difficult for colonists to comprehend what exactly the governing precedent was.⁴⁷ The lack of clarity and a scarcity of reference material left plenty of room for argument over what constituted the laws of England.⁴⁸ Thus, whenever colonial legislation came under scrutiny, English authorities could consult anything tangentially related to the laws of England. The reviewing authority’s consequent ability to strike down virtually any colonial act facilitated England’s main goal of “promoting uniformity between English and local law.”⁴⁹

Despite the uncertainty surrounding the meaning of both the repugnancy principle and what constituted the laws of England, both concepts would be nothing more than “mere verbiage” but for an effective imperial enforcement apparatus.⁵⁰ At the very least, then, the British crown needed an organizational structure capable of deciding “in specific instances whether colonial laws and customs fell outside the bounds of an

doubtful, referring to the doctrine of repugnancy to the common law as a ‘vague limitation which was supposed to exist.’”).

⁴⁴ Hulsebosch, *supra* note 31, at 450.

⁴⁵ McGovney, *supra* note 1, at 81.

⁴⁶ David, *supra* note 3, at 35.

⁴⁷ *Id.*; see also Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1238 (1985) (noting that “there were virtually no American case reports available until some years after the Revolution”).

⁴⁸ See David, *supra* note 3, at 36; see also Bilder, *supra* note 5, at 39 (“[T]he relationship between English law and the colonies was an evolving set of arguments, not a simple rule.”); Jay, *supra* note 47, at 1237 (“Throughout the pre-Revolutionary period there had been significant ambiguity associated with the idea of law. This ambiguity was rooted in a conflict over the extent to which British law applied in the colonies . . .”).

⁴⁹ Enid Campbell, *Colonial Legislation and the Laws of England*, 2 U. Tasmania L. Rev. 148, 148 (1965); see also Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*, at 35 (2010) (discussing imperial England’s need to balance frequent “tensions between local authority and imperial oversight”).

⁵⁰ Bilder, *supra* note 2, at 537.

imperial conception of English law and customs.”⁵¹ The Privy Council and the Board were ultimately tasked with reviewing colonial legislation “to ensure no repugnancies to the laws of England.”⁵² A thorough understanding of these bodies’ history and operational structure is needed to understand how their authority to review Virginia’s colonial legislation influenced Madison’s constitutional solutions, and ultimately the origins of judicial review itself.⁵³ Hence, this Note turns next to its first contribution: an explanation of the mechanics by which the repugnancy principle was enforced against inferior colonial law.

B. The Privy Council, the Board of Trade, and the Disallowance of Colonial Legislation

As early as 1619, Virginia’s colonial laws were recognized as subject to England’s “right of disallowance.”⁵⁴ But in the colony’s formative years, the system of imperial oversight was disorganized and ineffective. At first, the King delegated extensive supervisory powers—including the authority to disallow colonial legislation repugnant to the laws of England—to various committees under his supervision.⁵⁵ In 1660, Charles II established “a Privy Council committee for trade and plantations, whose members were known as the Lords of Trade, reporting to the Privy Council as a whole.”⁵⁶ This subcommittee was designed to tighten the Crown’s “control over the colonies by expanding the Privy Council’s jurisdiction to review colonial legislative acts.”⁵⁷ Yet this administrative arrangement was generally bogged down and unproductive.⁵⁸ And because of general procedural ineffectiveness, these

⁵¹ Bilder, *supra* note 26, at 89.

⁵² *Id.* at 82.

⁵³ See P.E. Corbett, *The Privy Council*, 3 *Canadian B. Rev.* 273, 274 (1925).

⁵⁴ Andrews, *supra* note 24, at 344.

⁵⁵ Dickerson, *supra* note 4, at 17; see also Twomey, *supra* note 41, at 57 (“The doctrine of repugnancy applied, either expressly or impliedly, to laws enacted by colonial legislatures. Such laws were void to the extent that they were repugnant to the ‘law of England.’” (footnotes omitted)).

⁵⁶ David, *supra* note 3, at 30; see also Bilder, *supra* note 26, at 89 (“The Crown established the separate Lords Commissioners for Trade and Plantations (the Board of Trade), composed of state officers (initially the chancellor, president, treasurer, high admiral, secretary of state, and chancellor of the exchequer) and eight appointed and paid commissioners, usually members of Parliament, to advise as to colonial laws among other duties.”).

⁵⁷ LaCroix, *supra* note 5, at 468.

⁵⁸ David, *supra* note 3, at 30.

committees never exercised their repugnancy powers.⁵⁹ Colonial legislation throughout the seventeenth century thus went unsupervised and the assemblies were largely left “to their own devices.”⁶⁰

Alarmed by the situation, Charles II transferred “the entire control of trade and foreign plantations” to the Privy Council.⁶¹ Historically understood as a body of advisors to the King,⁶² the Council was recast in the sixteenth century as a court of final resort to decide important matters, including the management of the “overseas dependencies of the Crown.”⁶³ Hindered by minimal resources and a sluggish procedural decision-making process, the Council failed to effectively supervise colonial assemblies on its own.⁶⁴ Historian Joseph Smith has documented that throughout much of the seventeenth century, imperial oversight of colonial legislation was basically non-existent.⁶⁵

Perturbed by unrestrained colonial assemblies, Parliament made a determined attempt to bring under its control the administration of colonial affairs.⁶⁶ On January 31, 1695, a resolution was submitted in the House of Commons to establish a “Council of Trade” with the necessary powers to carry out “the more effectual Preservation of the Trade of this

⁵⁹ See Dickerson, *supra* note 4, at 17; see also Alan Taylor, *American Revolutions: A Continental History, 1750–1804*, at 31 (2016) (“British imperial officials were too few and too busy to supervise the colonies closely.”).

⁶⁰ See Dickerson, *supra* note 4, at 17.

⁶¹ *Id.* at 19.

⁶² Note, *Decline of the Judicial Committee of the Privy Council—Current Status of Appeals from the British Dominions*, 60 *Harv. L. Rev.* 1138, 1139 (1947) [hereinafter *Decline of the Judicial Committee*]; see also O’Connor & Bilder, *supra* note 33, at 84 (“Over many centuries, the Privy Council of England evolved from the monarch’s most trusted inner circle into a formal body of advisers, counseling the sovereign on administrative, legislative, and judicial matters.”); Shelfer, *supra* note 30, at 852–53 (“The Privy Council was the ‘principal council belonging to the King,’ a body of advisers made up of ministers of state, royal officials, bishops, and other noblemen.”) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 222 (1765)).

⁶³ *Decline of the Judicial Committee*, *supra* note 62, at 1139; see Calabresi, *supra* note 18, at 1434 (“The King selected the members of the Privy Council, and through them he exercised his prerogative powers over affairs in the thirteen colonies.”); see also 1 Blackstone, *supra* note 62, at 223–25 (noting the same); Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 53 (M. Flesher ed., 1644) (noting the same).

⁶⁴ Dickerson, *supra* note 4, at 17; see also Einhorn, *supra* note 1, at 15 (noting the temporal lag in the review process as the process of sending the colonial law across the ocean, reviewing the law once it arrived, and then returning the ultimate repugnancy assessment took the authorities in London a great deal of time).

⁶⁵ Smith, *supra* note 6, at 1210.

⁶⁶ Sir Hubert Llewellyn Smith, *The Board of Trade* 15 (1928).

Kingdom.”⁶⁷ But the establishment of the Council of Trade would have the practical effect of wresting power from the hands of the King. Unwilling to allow parliamentary encroachment on his prerogative power,⁶⁸ King William III preempted the “[b]ill for a parliamentary-controlled council of trade” by issuing a royal warrant establishing his own Board of Trade.⁶⁹ With that royal warrant, the King, for the first time in English history, “appointed a board whose members’ sole responsibility was the monitoring of England’s colonial possessions.”⁷⁰

The Board, formally commissioned on May 15, 1696,⁷¹ was allocated an “imposing array of duties.”⁷² The Board was responsible for managing England’s trade and overseeing colonial affairs,⁷³ which included the obligation to scrutinize colonial legislation.⁷⁴ As Professor Sean Gailmard has pointed out, the Board capably wielded the supervisory power of repugnancy as the imperial administrative body “took first-cut review of colonial laws.”⁷⁵ Composed largely of parliamentarians with little expertise over colonial affairs,⁷⁶ the Board nevertheless worked to

⁶⁷ 11 Journals of the House of Commons (1695), at 423 (UK); see also Johansen, *supra* note 12, at 5 (“The Board of Trade and Plantations, as constituted by William III in 1696, had a supervisory role in the government of Britain’s colonies in America.”).

⁶⁸ Winfred T. Root, *The Lords of Trade and Plantations, 1675–1696*, 23 *Am. Hist. Rev.* 20, 41 (1917).

⁶⁹ I.K. Steele, *Politics of Colonial Policy: The Board of Trade in Colonial Administration 1696–1720*, at 16 (1968).

⁷⁰ Johansen, *supra* note 12, at 2; see also Greene, *supra* note 39, at 122 (“[T]his body, assisted by several new Crown officers in the colonies, provided, for the first time since the beginning of English overseas colonization nearly three-quarters of a century earlier, vigorous and systematic supervision—insofar as oversight was possible for politics at such a distance.”).

⁷¹ David, *supra* note 3, at 31 (noting that the Board was “composed of two nobles and eight commons”); see also Ralph Paul Bieber, *The Lords of Trade and Plantations, 1675–1696*, at 28 (1919) (explaining that the Board of Trade was officially commissioned by the King on May 15, 1696); Gailmard, *supra* note 18, at 780 (“The Board included both members of Parliament and the crown’s inner circle of advisors, and focused entirely on colonial matters.”).

⁷² Dickerson, *supra* note 4, at 24.

⁷³ *Id.*

⁷⁴ An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade 1695–96, 7 & 8 Will. 3 c. 22, § 8 (stating that any colonial law “repugnant” to any law of the “Kingdome” will be disallowed as “illegall null and void”); see also Shelfer, *supra* note 30, at 853 n.111 (“The Board of Trade was the body authorized ‘to examine into and weigh such acts of the Assemblies of the Plantations respectively as shall from time to time be sent or transmitted hither for our approbation.’”).

⁷⁵ Gailmard, *supra* note 18, at 780.

⁷⁶ See Dickerson, *supra* note 4, at 22–37.

solidify British supremacy over colonial legislation.⁷⁷ The actual process of scrutinizing colonial legislation consisted of examining the laws passed by colonial assemblies to determine “which ones were fit to be confirmed and which one should be disallowed” as repugnant to the laws of England.⁷⁸ Mary Bilder has characterized the Board’s repugnancy determination as “a matter of interpretation,” one in which the Board decided whether a law impaired the laws of England, or more generally, British mercantilist policy.⁷⁹

The Board “called upon a great variety of counsellors for advice” to make the repugnancy determination.⁸⁰ In addition to solicitors, departments of government, agents of the colonies, and merchants, the Crown’s regular law officers played a crucial role.⁸¹ Akin to modern day jurists, the legal officers were appointed by the King as legal advisors with comprehensive knowledge of the laws of England, enabling them to identify potential conflicts.⁸² By all accounts, the Board’s legal officers were responsible for the real work of comparing the colonial legislation against the laws of England.⁸³ In making their repugnancy determination, the legal officers considered a number of factors, including English law,

⁷⁷ See Stanley Katz, Book Review, 42 *J. Mod. Hist.* 249, 250 (1970) (reviewing I.K. Steele, *Politics of Colonial Policy: The Board of Trade in Colonial Administration, 1696–1720* (1968)) (noting that the Board’s “major concern” was colonial affairs and that the Board enjoyed “success and prestige” based on both its “able personnel” and their “heroic and well-conceived management”).

⁷⁸ Dickerson, *supra* note 4, at 25.

⁷⁹ Bilder, *supra* note 5, at 41. British mercantilism was an economic policy designed to advance imperial economic interests by “gain[ing] for the nation a high degree of security or self-sufficiency.” Curtis P. Nettels, *British Mercantilism and the Economic Development of the Thirteen Colonies*, 12 *J. Econ. Hist.* 105, 105 (1952); see also Bilder, *supra* note 5, at 141 (describing a “world without written reports of colonial or Privy Council decisions”).

⁸⁰ Andrews, *supra* note 24, at 346.

⁸¹ *Id.*; see also Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* 30–40 (2017) (describing the law officers and colonial administrators and their dynamic role in relation to governing colonial subjects).

⁸² Muller, *supra* note 81, at 37 (“Law officers were likely better positioned to weigh local peculiarities than were the common law courts . . .”); see also Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 63 (1915) (discussing the legal officers and their role in relation to the Board’s work).

⁸³ Gwenda Morgan, ‘The Privilege of Making Laws’; The Board of Trade, the Virginia Assembly and Legislative Review, 1748–1754, 10 *Am. Stud.* 1, 3 (1976); see also Johansen, *supra* note 12, at 59 (“A Crown counselor serving as the Board’s legal adviser reviewed all colonial legislation; he ensured that the laws would not conflict with British constitutional law or with parliamentary law regulating colonial trade, and would not be detrimental to the royal prerogative.”).

British trade interests, and the soundness of the colonial legislation.⁸⁴ Upon examination of the colonial legislation, the legal officers advocated for either the law's validation or for its disallowance.⁸⁵ Shortly thereafter, the Board would consider the legal officers' recommendation when deciding whether the law was "unobjectionable" or "clearly objectionable."⁸⁶ As a mere "advisory body to the Privy Council," the Board's determination formally conveyed only "the power of persuasion" and not the force of law.⁸⁷ Accordingly, the Board transmitted its non-binding assessment to the Privy Council for final determination.⁸⁸

Despite its opinions being merely persuasive as a formal matter, the Board possessed de facto binding influence on the Privy Council's ultimate repugnancy determination.⁸⁹ One reason was because the Board "served as an information clearinghouse"⁹⁰ for the "mountainous" amount of "[i]nformation about the American political system flowing into the British Privy Council."⁹¹ The Board's control of the information flow meant that the relevant committee of the Privy Council "invariably indorsed without question" the Board's recommendation,⁹² habitually finding the Board's rationales persuasive.⁹³ Consequently, the Board's initial assessments, although not formally binding in the legal sense, had

⁸⁴ Andrews, *supra* note 24, at 349; see also Gailmard, *supra* note 18, at 780 ("Review of colonial legislation in the Board and Privy Council was based on both legal and substantive considerations.").

⁸⁵ Morgan, *supra* note 83, at 3.

⁸⁶ Russell, *supra* note 82, at 50.

⁸⁷ Steele, *supra* note 69, at 18; see Shelfer, *supra* note 30, at 853 n.111 ("The Board was thus the body in charge of reviewing colonial legislation, and would forward its recommendation to the King in Council, which would take ultimate action."); see also Edmund S. Morgan, *The Birth of the Republic, 1763–89*, at 11 (2013) [hereinafter Morgan, *The Birth of the Republic*] (describing the Board of Trade as "a sort of Chamber of Commerce with purely advisory powers").

⁸⁸ Russell, *supra* note 82, at 53; see also Greene, *supra* note 39, at 130 ("Unlike the Lords of Trade, which as a committee of the Privy Council had direct access to that body and was able to put its measures into effect, the Board of Trade was always a purely advisory body.").

⁸⁹ See generally Russell, *supra* note 82, at 48–54 (describing the process by which the Privy Council tended to accommodate the Board's recommendations); Gailmard, *supra* note 18, at 780 ("In practice, the Privy Council almost always followed the Board's advice . . .").

⁹⁰ Johansen, *supra* note 12, at 45.

⁹¹ Hulsebosch, *supra* note 14, at 1255.

⁹² Russell, *supra* note 82, at 82.

⁹³ Jack P. Greene, 'A Posture of Hostility': A Reconsideration of Some Aspects of the Origins of the American Revolution, 87 *Proc. Am. Antiquarian Soc'y* 27, 49 (1977) (noting that although "the Board had no authority to enforce its recommendations . . . the Privy Council followed its suggestions for the disallowance of a number of colonial laws").

the practical effect of determining the legality of colonial legislation.⁹⁴ In essence, the Board conducted “[t]he real work of considering colonial laws,” because “practically every approval or disapproval was made upon [the Board’s] recommendation.”⁹⁵ The Privy Council merely took the final step of formally recording the disallowance determination.⁹⁶ Once the Board was established in 1696, it became the principal body tasked with both supervising colonial assemblies and disallowing repugnant legislation.⁹⁷ King William III’s royal warrant creating the Board thus “heralded a renewed metropolitan effort to bring the chartered colonies to heel by drawing them into the ambit of the Crown’s appellate power.”⁹⁸ What is more, the Privy Council’s ability to review and disallow colonial legislation, coupled with the Board’s crucial administrative support, allowed the crown to maintain “a fairly systematic oversight of the work of the colonial assemblies, curtailing both legal and political excess on the part of those bodies.”⁹⁹

As should now be clear, this imperial supervisory framework exhibited several features similar to modern judicial review.¹⁰⁰ Given that the colonial laws were “interpreted” and the repugnancy principle “enforced by the King’s own Privy Council,” reference to the Privy Council as “an imperial Supreme Court” is unsurprising.¹⁰¹ As Professor LaCroix has aptly put it, the repugnancy principle granted the Privy Council

a power over the colonies that modern legal scholars would now call legislative review: that is, the power to evaluate the acts of colonial legislatures, unattached to a specific case or set of parties, and to declare

⁹⁴ Johansen, *supra* note 12, at 59 (“The Board, in light of this evidence, then made its final recommendation for confirmation or disallowance to the Privy Council; in the majority of cases the Privy Council accepted the recommendations.”).

⁹⁵ Dickerson, *supra* note 4, at 227–28.

⁹⁶ *Id.* at 227.

⁹⁷ Robert E. Riggs, *Substantive Due Process in 1791*, 1990 *Wis. L. Rev.* 941, 967; see also Andrews, *supra* note 24, at 346 (“Generally the board accepted the opinion of those consulted But the Privy Council, almost without exception, approved the report of its committee and embodied that report in an order in Council.”).

⁹⁸ LaCroix, *supra* note 5, at 470.

⁹⁹ Wroth, *supra* note 23, at 101.

¹⁰⁰ Cf. *infra* pp. 801–07 (exploring Madison’s early conception of legislative review under the Constitution).

¹⁰¹ Calabresi, *supra* note 18, at 1434.

those acts either valid or invalid as applied prospectively to all persons and all scenarios.¹⁰²

In other words, the “disallowance of American colonial laws on the ground of repugnancy to the laws of England were in truth disallowances because of unconstitutionality of the statutes.”¹⁰³ Although this process of imperial legislative review corresponds to the United States system of judicial review,¹⁰⁴ “[f]ewer scholars have focused on the impact of this parallel practice of legislative or administrative review” of colonial legislation.¹⁰⁵ And with the dearth of historical literature in mind, this Note turns next to its second contribution: colonial Virginia and its interaction with the imperial supervisory system.

II. DISALLOWANCE OF VIRGINIA’S COLONIAL LEGISLATION

Throughout the eighteenth century, the colonial assemblies developed into fully functioning lawmaking bodies.¹⁰⁶ Colonial assemblies, Virginia’s included, were promulgating statutes at a breakneck pace.¹⁰⁷

¹⁰² LaCroix, *supra* note 5, at 466. As a general matter, Professor LaCroix’s observation is true. Yet it is worth mentioning that the Privy Council cannot be seamlessly equated with the United States’ judiciary, for “the Privy Council was not a court.” William Renwick Riddell, *The Judicial Committee of the Privy Council*, 44 *Am. L. Rev.* 161, 163 (1910). Rather, the Privy Council was more of a royal executive committee that considered certain legal questions on the King’s behalf. *Id.* at 169. In addition, “English courts owed their existence to royal prerogative and were subject to the sovereign power.” James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 *Harv. L. Rev.* 1613, 1626 (2011). The American judiciary, by contrast, was a stand-alone, separate branch. Regardless of how one wishes to characterize the Privy Council, Professor LaCroix’s insightful connection still stands despite the Privy Council’s peculiar characteristics and unique functions. The same holds true for Professor Bilder’s similar and equally insightful historical connection, see *supra* note 5.

¹⁰³ McGovney, *supra* note 1, at 82.

¹⁰⁴ Alison G. Olson, *The Board of Trade and London-American Interest Groups in the Eighteenth Century*, in *The British Atlantic Empire Before the American Revolution* 33, 38 (Peter Marshall & Glyn Williams eds., 1980) (noting that the repugnancy “examination thus became in effect an antecedent of the modern judicial review, and the fact that it was handled in its early stages by the Board gave English interests a chance to work there to obtain the allowance or disallowance of laws affecting their American associates”); see also Meyler, *supra* note 22, at 75 (“[S]everal scholars have elaborated upon the English and American precursors to judicial review as we know it, demonstrating that the exercise of judicial review before *Marbury* was much more common than previously recognized, and that colonial structures of judicial appeal bore substantial resemblance to what would later emerge as the practice of judicial review under the Constitution.”).

¹⁰⁵ LaCroix, *supra* note 5, at 466.

¹⁰⁶ Peter Charles Hoffer, *Law and People in Colonial America* 59 (1992).

¹⁰⁷ *Id.*

These statutes were, unlike the laws of England, printed and publicly circulated.¹⁰⁸ A better understanding of the legislative process and greater access to its byproduct facilitated a deeper connection between the assembly and the general population.¹⁰⁹ The colonial electoral system was also far “more democratic” and far “less aristocratic” than the English system.¹¹⁰ Naturally, then, the white-male-landowning class was more intimately connected with the legislative process, as lawmakers realized their power rested upon the approval of the electorate.¹¹¹ As founding father James Wilson aptly put it, “the people [could] make a distinction between those who have served them well, and those who have neglected or betrayed their interest.”¹¹² This close connection enabled “colonists to control their own destiny and achieve greater self-government.”¹¹³

Yet as previously mentioned, the colonial charter’s repugnancy principle guarded against unrestrained democracy and cabined legislators’ ability to resort to legislation to appease constituents. At the same time though, fluctuating economic conditions throughout colonial America alongside “[s]hortages of specie” meant that “most individuals . . . relied on credit to meet their day-to-day needs.”¹¹⁴ And as debts mounted, assemblies tested the boundaries of the repugnancy principle with the promulgation of relief legislation. A closer look at three specific acts of the Virginia assembly provides a microcosm of the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Robert J. Dinkin, *Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689–1776*, at 209 (1977); see also Einhorn, *supra* note 1, at 21 (asserting that it was “clear that larger fractions of the free male adults in the colonies could vote,” and the colonial assemblies were thus “unusually democratic eighteenth-century governments”); Taylor, *supra* note 59, at 33 (“The assemblies were more responsive to a broader electorate than in Britain.”).

¹¹¹ Alison G. Olson, *Eighteenth-Century Colonial Legislatures and Their Constituents*, 79 *J. Am. Hist.* 543, 551 (1992) (“As colonists turned increasingly to the assemblies to get things done . . .”); see also Dinkin, *supra* note 110, at 61 (noting that lawmakers recognized that “their power inevitably rested upon the approval of the electorate”); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 *J. Early Republic* 219, 220 (2013) (noting that in comparison to Britain both before and after independence, “the right to vote had always been extraordinarily widespread—at least among adult white males”).

¹¹² James Wilson, *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* 8 (William Bradford & Thomas Bradford eds., 1774).

¹¹³ Dinkin, *supra* note 110, at 27.

¹¹⁴ K. Tawny Paul, *Credit and Ethnicity in the Urban Atlantic World: Scottish Associational Culture in Colonial Philadelphia*, 13 *Early Am. Stud.* 661, 663 (2015).

common types of debtor relief legislation throughout the era.¹¹⁵ The interaction between the Virginia assembly and the imperial oversight also highlights British supervision of colonial lawmaking authority. And it was colonial Virginia's experience with imperial legislative review that profoundly influenced Madison's proposal to control unrestrained state legislatures. Madison drew heavily from colonial Virginia's experience under the watchful eye of the Privy Council when formulating his own theory of national review for state legislatures' democratic excesses.

A. *Statute of Limitations Act of 1705*

Merchants, both in England and throughout the colonies, were fully aware of the repugnancy principle. They were also "extremely sensitive about any burdens" colonial laws placed on their economic wellbeing.¹¹⁶ Their desire for lax colonial regulations, coupled with their "access to certain kinds of information the government needed," meant that the merchants knew their greatest strength came from "careful dissemination of this information" to the Board.¹¹⁷ The Board, moreover, welcomed the merchants' information and invited input about colonial legislation. In fact, the Board both hired agents to "solicit the opinions of merchants as a group" and held meetings "to provide the interest groups in advance with notices of hearings" on whether to recommend the disallowance of colonial laws.¹¹⁸ With such a system in place, it is unsurprising that merchants "were always prepared to urge the repeal of any provincial law which they found objectionable."¹¹⁹ In light of the fact that the "Board's primary responsibility was to promote England's trade,"¹²⁰ the Board paid careful attention "to the complaints and representations of the merchants."¹²¹ In Virginia particularly, the assembly's laws that conflicted with the British merchant-classes' vision of the "proper place of colonies in the British commercial and imperial scheme" were prime

¹¹⁵ Dickerson, *supra* note 4, at 252–53 (noting that debtor relief legislation took several forms in colonial America, including: usury laws, stay laws, statute of limitations, legal tender acts, and numerous versions of bankruptcy laws).

¹¹⁶ *Id.* at 239.

¹¹⁷ Alison G. Olson, *The London Mercantile Lobby and the Coming of the American Revolution*, 69 *J. Am. Hist.* 21, 25 (1982).

¹¹⁸ Olson, *supra* note 104, at 39.

¹¹⁹ Dickerson, *supra* note 4, at 239.

¹²⁰ Johansen, *supra* note 12, at 7.

¹²¹ Russell, *supra* note 82, at 59.

targets for disallowance.¹²² The merchant-classes' response to Virginia's Statute of Limitations Act of 1705 provides a model example of the Board's supervisory role over the colony's legislation.

In the early eighteenth century, the general conditions of recession and fluctuating crop prices left many of Virginia's planters unable to pay their debts.¹²³ In the midst of a souring economy, the Virginia assembly contemplated "a variety of devices, such as floors on the price at which execution sales may be had (upset prices), assignment of assets to creditors at appraised values, redemption rights exercisable either before or after sale or assignment to creditors, and outright moratoria" on debt collection to alleviate Virginia's indebted colonists.¹²⁴ In 1705, the Virginia assembly formally responded to the economic situation by enacting the Statute of Limitations Act, which prohibited any "action" brought to recover or obtain a "judgment for any debt due" unless the action was "commenced and prosecuted" within the limitations specified by statute.¹²⁵ In an effort to avoid repugnancy, the assembly patterned the law "on the English statute of 1623."¹²⁶ But by its terms, Virginia's law established either a three-year or a five-year statute of limitation to bring suit to recover on "debts, bonds, judgments, accounts, and officers' fees."¹²⁷ That fixed time period was at least a year shorter than England's statutory range.¹²⁸ Making it more difficult for merchants to collect on their outstanding debts, the law provoked the ire of merchants desiring to collect on their outstanding colonial contracts.

According to a Board's journal entry, a "memorial"—effectively, a letter—was "presented to the Board" on behalf "of the merchants trading to Virginia," to have the Statute of Limitations Act disallowed as

¹²² Andrews, *supra* note 24, at 361; see also Olson, *supra* note 104, at 33 ("By the standards of developing nations Britain was remarkably successful in accommodating interest groups in the early eighteenth century, and the Board of Trade appears to have contributed substantially to its success.").

¹²³ Priest, *supra* note 22, at 421.

¹²⁴ Stefan A. Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 *Mich. L. Rev.* 691, 727 (1973).

¹²⁵ Act of Oct. 4, 1705, ch. 34, *in* 3 *Statutes at Large; Being a Collection of All the Laws of Virginia* 377 (W. Hening ed., 1823) [hereinafter *The Statute of Limitations Act*].

¹²⁶ John R. Pagan, *Civil Rights and "Personal Injuries": Virginia's Statute of Limitations for Section 1983 Suits*, 26 *Wm. & Mary L. Rev.* 199, 211 (1985).

¹²⁷ *Id.* at 210–11; accord *The Statute of Limitations Act*, *supra* note 125, at 377.

¹²⁸ Pagan, *supra* note 126, at 211.

repugnant to the laws of England.¹²⁹ The Virginian merchants, a particularly powerful force during the era,¹³⁰ complained that the law injured England's economic interests and conflicted with the laws of England.¹³¹ It is important to recall that the Board "viewed with the utmost disfavor" any act "that affected in any way the creditor class, to which as a rule the British merchants belonged."¹³² The Board thus vigilantly considered the Virginian merchants' complaints, and a week later, "[o]rdered" the Act "be sent to Mr. Fane,"—the Board's legal officer, an appointee of the King, and an expert on the laws of England.¹³³ The Board sought Mr. Fane's "opinion thereupon in the point of law" about whether the Act was repugnant.¹³⁴ In mid-March, Mr. Fane recommended that the Statute of Limitations Act be disallowed.¹³⁵ Soon after, the Board also ordered Peter Leheup, Virginia's principal agent,¹³⁶ to attend a meeting and present "proof" to ascertain the "damage" caused by the Act to creditors' economic interests.¹³⁷ After four days of deliberation, the Board made a "representation for repealing" the Act,¹³⁸ deciding that "the law conflicted with an English act that made rights

¹²⁹ 6 Journal of the Commissioners for Trade and Plantations from January 1728–9 to December 1734, at 8 (1969).

¹³⁰ Walter E. Minchinton, *The Political Activities of Bristol Merchants with Respect to the Southern Colonies Before the Revolution*, 79 Va. Mag. Hist. & Biography 167, 168 (1971) ("And both as groups and as individuals, merchants were in touch with the colonial agents, and particularly those of Virginia . . .").

¹³¹ *Id.* at 173–74; see also Priest, *supra* note 22, at 421–22 ("English creditors then complained to the Board of Trade about a 1705 Virginia law establishing a three- to five-year statute of limitations (depending on the type of debt) for bringing a suit against a debtor.").

¹³² Andrews, *supra* note 24, at 356; Bilder, *supra* note 5, at 68 (discussing Francis Fane's role as "the Board of Trade's legal advisor").

¹³³ See 6 Journal of the Commissioners for Trade and Plantations, *supra* note 129, at 10.

¹³⁴ *Id.* at 10, 15 (explaining that Mr. Fane's report upon the act was reported and read to the board).

¹³⁵ *Id.* at 15.

¹³⁶ As "Agent for this Colony relating to the publick Affairs of the Government," 4 Executive Journals of the Council of Colonial Virginia 53 (H.R. McIlwaine ed., 1930), Leheup was tasked with ensuring that colonial Virginia remained faithful to imperial policy. Percy Scott Flippin, *The Royal Government in Virginia, 1624–1775*, at 187 (1919); Johansen, *supra* note 12, at 17 (noting that other duties of the colonial agent "included: securing approval of colonial legislation; promoting colonial trade; protesting and lobbying against Parliamentary legislation detrimental to the colonies; handling appeals of the colonies to the Privy Council; drafting and presenting petitions to Parliament and the Board of Trade; and serving as clearinghouses for information for both London and the colonies").

¹³⁷ 6 Journal of the Commissioners for Trade and Plantations, *supra* note 129, at 15.

¹³⁸ *Id.* at 19.

created by judgment or by bond unlimited in time.”¹³⁹ Once the Board recommended disallowance, an “Order in Council” was submitted to the Privy Council stating the same.¹⁴⁰

Almost a year later, the Privy Council affirmed the Board’s recommendation and disallowed the Act because it was both “repugnant to the Statutes of Limitation” of England and because “one [c]ause” of Virginia’s law had the effect of “limiting [the] time after which neither Bond nor Judgment shall be in force.”¹⁴¹ That clause, according to the Privy Council, appeared “to be of bad consequence to the Trade of this Kingdom” and a violation of the merchants’ rights.¹⁴² The disallowance of the Statute of Limitations Act of 1705 highlights the Board and Privy Council’s authoritative check on colonial legislatures. More fundamentally, the Privy Council, with the Board’s administrative support, “engaged in its parallel mode of legislative review” and “issued a sweeping declaration . . . disallowing a colonial legislative act.”¹⁴³ Suffice it to say, at the turn of the eighteenth century, Virginia’s assembly was confined by the terms of the colony’s charter, and thus yielded to imperial oversight.

B. Stay Act of 1749

By the 1740s, contractual debts plagued colonial Virginia.¹⁴⁴ Debt had become “such a constant companion of the Virginia planter that it seemed to be almost endemic to the plantation economy.”¹⁴⁵ Making matters worse, the rate of exchange between Britain’s sterling currency and the

¹³⁹ Priest, *supra* note 22, at 422 n.149.

¹⁴⁰ 6 *Journal of the Commissioners for Trade and Plantations*, *supra* note 129, at 46–47.

¹⁴¹ 3 *Acts of the Privy Council of England, Colonial Series, 1720–1745*, at 227 (W.L. Grant et al. eds., 1910). It appears that the King did not officially disallow the act until 1729 or 1730. See Smith, *supra* note 6, at 1249 n.198 (“In 1729 a Virginia act of 1705 that limited actions on judgments to seven years and on bonds or bills obligatory to five years was disallowed, being termed repugnant to the English act and of bad consequences to the trade of the kingdom.”); see also Priest, *supra* note 22, at 422 (“In 1730, the Crown repealed the Virginia statute of limitations by royal proclamation.”). But the historical record without a doubt demonstrates the Privy Council recommended disallowance shortly after 1706.

¹⁴² 3 *Acts of the Privy Council of England*, *supra* note 141, at 227.

¹⁴³ LaCroix, *supra* note 5, at 468.

¹⁴⁴ Lawrence H. Gipson, *Virginia Planter Debts Before the American Revolution*, 69 *Va. Mag. Hist. & Biography* 259, 259 (1961).

¹⁴⁵ Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 *Wm. & Mary Q.* 511, 517 (1962).

colony's bills of exchange fluctuated at remarkable levels.¹⁴⁶ As the value of the sterling currency increased rapidly in relation to Virginia's legal tender, the colonists struggled to defray their contractual obligations. Contrary to expectations, during a time when the debt situation approached crisis level, the Virginia colony itself "was growing in geographic size and in economic strength."¹⁴⁷ Given the development of the colony, the Virginia assembly was less willing to "tolerate controls on its political power."¹⁴⁸ Unsurprisingly, the assembly set its sights on alleviating the "private indebtedness of Virginia planters."¹⁴⁹ The assembly enacted the Stay Act of 1749, which sought to alter the legal tender required for colonists to fulfill contractual arrangements. To be more specific, the Act's twenty-ninth section permitted the execution of a court judgment to be stayed if the debtor paid in colonial Virginia's legal tender, instead of Britain's more valuable "sterling money."¹⁵⁰ The Act thus allowed colonists to repay creditors in colonial money "subject to sharp depreciation at the will of the General Assembly by the simple device of placing into circulation whatever quantity of paper money seemed desirable."¹⁵¹ The colonists' ability to pay debts back in less valuable Virginia tender no doubt "struck at the basis of the financial arrangements between merchant and planter" and clearly conflicted with England's financial interests.¹⁵² Shortly after the Act's passage, and in recognition of the Privy Council's power of repugnancy, the Virginia assembly "began work on amending the controversial act" in preparation for eventual disallowance.¹⁵³

Even though the Act altered contractual rights by modifying the acceptable species of exchange and undermined Britain's financial

¹⁴⁶ Joseph Albert Ernst, *Genesis of the Currency Act of 1764: Virginia Paper Money and the Protection of British Investments*, 22 *Wm. & Mary Q.* 33, 42 (1965).

¹⁴⁷ Johansen, *supra* note 12, at 38.

¹⁴⁸ *Id.*

¹⁴⁹ Gipson, *supra* note 144, at 259.

¹⁵⁰ An Act Declaring the Law Concerning Executions; and for Relief of Insolvent Debtors, ch. 12, *in* 5 *The Statutes at Large; Being a Collection of All the Laws of Virginia* 526, 540 (W. Hening ed., 1819) [hereinafter *The Stay Act of 1749*]; see also Ernst, *supra* note 146, at 44 ("Under the Virginia act of 1749 . . . protested sterling bills were payable in currency at 25 per cent advance on sterling, a provision which led the British merchants to protest when the actual rate of exchange rose . . .").

¹⁵¹ Gipson, *supra* note 144, at 261.

¹⁵² Minchinton, *supra* note 130, at 171.

¹⁵³ Joseph Albert Ernst, *Money and Politics in America, 1755–1775: A Study in the Currency Act of 1764 and the Political Economy of Revolution* 53 (1973).

welfare, the Board astonishingly did not find the Act “contrary to the laws” of England.¹⁵⁴ Shockingly, in fact, the Board recommended the act for “royal approbation”—the official term used for endorsing the Privy Council’s approval.¹⁵⁵ In a matter of weeks, the Privy Council, as it often did, endorsed the Board’s recommendation and approved the Stay Act of 1749.¹⁵⁶ This resulted in the Virginia assembly dropping the amendment it had been working on to align the Act with the laws of England, because the assembly claimed the Privy Council “could not repeal a law already approved by the crown.”¹⁵⁷

Once the merchants caught wind that the law had not been disallowed, a campaign was launched to highlight that the difference in exchange value between the English and Virginia currencies was more adverse than the Board had initially recognized.¹⁵⁸ The merchants argued that the Act “struck squarely” at the vast contractual debts owed by Virginia’s planters, altered contractual terms because sterling money would no longer be the only legitimate specie of exchange, and greatly diminished the value of preexisting contracts.¹⁵⁹ The Act thus undervalued debts owed to merchants from Virginia’s colonists.¹⁶⁰ Outraged by the Act’s royal approval, the merchants directed their memorials to the Board emphasizing that “the law was confiscatory in nature” and conflicted with the laws of England.¹⁶¹ In November of 1751, two of the creditors’ memorials were brought to the Board’s attention.¹⁶² In both memorials the merchant-creditors argued that the Act was “greatly injurious to his Majesty’s subjects” by altering contractual rights, and, as a consequence, the Act should be recommended for “royal disapprobation.”¹⁶³ In effect, the general grievance at the time “was that the act of 1749 made

¹⁵⁴ 9 *Journal of the Commissioners for Trade and Plantations from January 1749–1750 to December 1753*, at 198 (1932).

¹⁵⁵ *Id.*

¹⁵⁶ Ernst, *supra* note 146, at 42 (“Before the petitions of the merchants arrived at the Board of Trade late in 1751 the King had already confirmed the act of 1749. When the merchants appeared, the Board sent them to the Privy Council for relief.”). Of note, British historian Walter E. Minchinton lays the blame for the act’s non-disallowance at the feet of both the “carelessness of the Board” and the “failure of British merchants to complain in time.” Minchinton, *supra* note 130, at 171.

¹⁵⁷ Ernst, *supra* note 153, at 53.

¹⁵⁸ *Id.*

¹⁵⁹ Gipson, *supra* note 144, at 261.

¹⁶⁰ Morgan, *supra* note 83, at 12.

¹⁶¹ Gipson, *supra* note 144, at 261.

¹⁶² 9 *Journal of the Commissioners for Trade and Plantations*, *supra* note 154, at 230.

¹⁶³ *Id.*

executions for sterling debts payable in current money at the legal exchange rate” different from the actual market rate.¹⁶⁴ A week later, the Board regrettably informed the merchants that the Act had already been “confirmed by his Majesty in Council” based upon a prior positive “representation.”¹⁶⁵ Yet, the Board realized the King wielded the necessary prerogative power to force Virginia to change the law. To that end, the Board advised the merchants that “there was nothing to be done but to appeal to the crown directly for relief.”¹⁶⁶

In the Board’s opinion, which was relayed to the King, the risks inherent to fluctuations in the rate of exchange should be “borne by the Virginians alone” and not by English merchants.¹⁶⁷ The King responded by issuing a royal instruction to the Governor of Virginia calling for an amendment to the Act. In his view, the law conflicted with the laws of England as it was injurious to England’s economic interests.¹⁶⁸ Although hesitant to depart from the “wishes of those in the province,”¹⁶⁹ in the words of one representative from Virginia’s assembly, the colony owed the King the “most inviolable Fidelity.”¹⁷⁰ Consequently, the assembly “forfeit[ed] the great advantage that the confirmed law” granted Virginian debtors after redrafting the repugnant provisions of the Stay Act of 1749 to placate the King, the Board, and the merchants.¹⁷¹ The general assembly ultimately “amended the act of 1749 to allow courts of record to settle all executions for sterling debts in local currency—paper as well as coin—at a ‘just’ rate of exchange.”¹⁷²

The Stay Act of 1749’s circuitous path is demonstrative of Britain’s power of legislative review over Virginia’s colonial legislation. Even more remarkable, though, is that the Act went through numerous levels

¹⁶⁴ Ernst, *supra* note 153, at 53.

¹⁶⁵ 9 *Journal of the Commissioners for Trade and Plantations*, *supra* note 154, at 233.

¹⁶⁶ Minchinton, *supra* note 130, at 172.

¹⁶⁷ Ernst, *supra* note 153, at 52; see also Ernst, *supra* note 146, at 41 (“[T]he British merchants demanded absolute protection for their sterling debts and that the Virginians bear all the risks of a fluctuating rate of exchange.”).

¹⁶⁸ Gipson, *supra* note 144, at 262; see also Andrews, *supra* note 24, at 347 (“Occasionally the law would be returned to the colony with instructions to the governor to obtain its modification or repeal.”); Ernst, *supra* note 153, at 53–54 (noting that colonial Virginia received a “royal instruction to press for a law governing exchange without a clause prejudicial to merchant interests”).

¹⁶⁹ Gipson, *supra* note 144, at 262.

¹⁷⁰ *Journals of the House of Burgesses, 1752–1755, 1756–1758*, at 235 (H.R. McIlwaine ed., 1909).

¹⁷¹ Gipson, *supra* note 144, at 263.

¹⁷² Ernst, *supra* note 153, at 54.

of review.¹⁷³ Although this multi-tiered process of legislative review was a staple of colonial governance writ large, the Stay Act provides a clear example of its tangible effect in early Virginia. It was an experience that left a deep impression on Virginia's inhabitants. And one of those inhabitants, of course, would include Madison—"born a subject of the British monarchy" in the Colony of Virginia in 1751.¹⁷⁴

C. Bankruptcy Relief Act of 1762

During the Seven Years' War, Great Britain turned to the colony of Virginia for "recruitment, taxation, and the pressing needs of provisioning armies."¹⁷⁵ The war resulted in a "sharp rise in sterling exchange rates in the expanding and underdeveloped Virginia economy."¹⁷⁶ The rise in sterling rates caused Virginia's credit market to tighten, which, in turn, led British merchants to cut back short term loans to colonists.¹⁷⁷ Virginia's colonists predictably clamored for economic relief.¹⁷⁸ Responding to local pressure as the credit market collapsed and monetary conditions worsened, Virginia's governor implored the assembly to pass "a law that would lift the weight of private debts" from the shoulders of his indebted constituents.¹⁷⁹ In the midst of the economic downturn, the assembly responded by passing the "Act for relief of insolvent debtors,

¹⁷³ Interestingly, no scholar has made the following connection: Much like a case travels from district court to the appellate court and then to the Supreme Court, the Stay Act moved from the Board, then to the Privy Council, and eventually to the King—only after he agreed to involve himself in the matter of course. Seen in this way, the King's discretionary review resembles the Supreme Court's appellate jurisdiction and the Court's discretion to hear certain cases.

¹⁷⁴ Jeff Broadwater, *James Madison: A Son of Virginia and a Founder of the Nation*, at xiv (2012).

¹⁷⁵ Caroline Cox, *Back into the American Woods*, 32 *Revs. Am. Hist.* 471, 472 (2004) (reviewing Matthew C. Ward, *Breaking the Backcountry: The Seven Years' War in Virginia and Pennsylvania, 1754–1765* (2003)).

¹⁷⁶ Ernst, *supra* note 146, at 34. Joseph Ernst also points to "the expansion of population, the conversion of a barter economy into a rapidly growing market economy, the changing structure of the imperial economy, and the short-run depression in the tobacco trade" as reasons for the declining state of Virginia's economy at this time. Ernst, *supra* note 153, at 45.

¹⁷⁷ Ernst, *supra* note 146, at 56.

¹⁷⁸ See Evans, *supra* note 145, at 524 (suggesting that Virginia's colonists turned to the assembly for economic solutions to mitigate the economic situation).

¹⁷⁹ Gipson, *supra* note 144, at 268.

for the effectual discovery and more equal distribution of their estates,” which provided bankruptcy relief to insolvent colonists.¹⁸⁰

The Bankruptcy Relief Act of 1762 stipulated that upon “delivering” one’s “whole estate” to the insolvent’s “creditors,” the debtor “should be freed from all claims.”¹⁸¹ Simply put, the Act permitted a debtor to deliver virtually anything of material worth to defray outstanding debts. Even more remarkable than the breadth of the law was Virginia’s colonial government’s own recognition of the potential repugnancy of the law. Soon after the Act’s passage, Virginia’s Committee of Correspondence—a body tasked with communicating colonial developments to the Privy Council—was “instructed to defend the passing of an act of Assembly entitled, ‘An Act for the Relief of certain Creditors,’ and to support the act should its validity be called into question before the Privy Council.”¹⁸² Notes from the Committee’s proceedings show that the Act was debated at length.¹⁸³ The Committee listed the Act’s two main objects as the alleviation of inequalities to creditors and the release of a debtor “[e]ntirely from the terror of former incumbrances when he shall have complied with the law by delivering up everything he possesses.”¹⁸⁴ Despite the questionable character of the law, the Committee stated that “[i]t would be cruel to leave” a colonist “who is unable to pay his debts” to “the Oppression of his Creditors.”¹⁸⁵ At the same time, however, the committee recognized that the “mother Country” had not yet “introduc[ed] the Statutes of bankruptcy amongst us.”¹⁸⁶ Because England had not explicitly made its own bankruptcy statutes applicable

¹⁸⁰ Act for Relief of Insolvent Debtors, for the Effectual Discovery and More Equal Distribution of Their Estates, *in* 7 *The Statutes at Large; Being a Collection of All the Laws of Virginia* 549 (W. Hening ed., 1820) [hereinafter *The Bankruptcy Relief Act of 1762*]; see also Gipson, *supra* note 144, at 268 (“The solution of the financial difficulties of the people of Virginia seemed to the General Assembly to lie not in austerity, but in passing a law that would lift the weight of private debts from their shoulders. As a result on December 13, 1762, the House of Burgesses passed ‘An Act for relief of insolvent debtors, for the effectual discovery and more equal distribution of their estates.’”).

¹⁸¹ *The Bankruptcy Relief Act of 1762*, *supra* note 180, at 549.

¹⁸² Leake, *supra* note 29, at 104; see also *id.* at 93 (“The committee usually furnished the agent with reasons to be used by him in his arguments before the king or either of these bodies whenever any laws of the colony were called into question.”).

¹⁸³ See generally *Proceedings of the Virginia Committee of Correspondence, 1759–‘67* (Continued), 11 *Va. Mag. Hist. & Biography* 131, 132–36 (1904) (capturing the extensive debates allotted to the act).

¹⁸⁴ *Id.* at 136.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

to the colonies, the Committee assumed the law was repugnant to the laws of England.¹⁸⁷ This assumption is crucially important. It shows that colonial Virginia's government "acquiesced in the restriction on local legislative competence and formulated their policies with reference to it."¹⁸⁸ Hence, the laws of England, the Privy Council, the Board, and the repugnancy principle were embedded within Virginia's culture and politics.

While the Committee advocated for the approval of the Act, the merchant-creditor class petitioned the Board to urge rejection of the Act as injurious to their economic interests and repugnant to the laws of England.¹⁸⁹ The merchants' common complaint was that the Act altered the sterling currency that formed the basis of debt obligations "without consent of, or first paying off the British creditors."¹⁹⁰ For the merchants, then, the Act was "not only of the most pernicious consequence to the present creditors and to the future credit of the colony, but an act of the most manifest injustice."¹⁹¹ The Board ultimately agreed with the merchants' grievances, and decided that the law denied "justice to the merchants" because it did not "give security" to their contractual rights, and was of "great" economic "injury."¹⁹² In addition, the Board advocated for disallowance "since the legislation of Virginia had been wanting, not only in a proper respect to the crown, but also in justice to the . . . merchants."¹⁹³ Consequently, the Board recommended that "his Majesty" should grant "relief . . . [to] the merchants" by disallowing the law.¹⁹⁴

Upon inspecting both the Act and the Board's recommendation, the Privy Council nonetheless displayed empathy for the "Nature and Spirit"

¹⁸⁷ Based on the historical record and contemporaneous developments, the bankruptcy statutes the committee referenced seem to be Section 3 of the Limitations Act which altered the process for suing for personal actions and debts. See Pagan, *supra* note 126, at 210–11; see also Proceedings of the Virginia Committee of Correspondence, *supra* note 183, at 136 ("You may perceive this is a Step towards introducing the Statutes of bankruptcy amongst us. It appeared that the country was not ready to receive them in that extent they have been carried to in our mother Country.").

¹⁸⁸ Campbell, *supra* note 49, at 149.

¹⁸⁹ Andrews, *supra* note 24, at 356.

¹⁹⁰ Minchinton, *supra* note 130, at 173.

¹⁹¹ *Id.*

¹⁹² 11 Journal of the Commissioners for Trade and Plantations from January 1759 to December 1763, at 331 (1935); see also Morgan, *supra* note 83, at 11–12 (noting the merchants' disapproval of the act).

¹⁹³ Minchinton, *supra* note 130, at 173.

¹⁹⁴ 11 Journal of the Commissioners for Trade and Plantations, *supra* note 192, at 332.

of Virginia's "Bankrupt Law," because the law was "just and equitable in its abstract principle."¹⁹⁵ That said, the Privy Council was discomfited by the law's "execution" in practice and also how the Act both conflicted with the laws of England and undermined the merchants' economic well-being.¹⁹⁶ The Privy Council also "doubted whether the fair Trader did not receive more detriment than benefit from such a Law."¹⁹⁷ Accordingly, the "Bankrupt Law" was "deemed inadmissible on account of the Injustice of its Operation," and because it was "unequal to the Creditors in general."¹⁹⁸ In addition, the Privy Council determined that the Act violated the laws of England because it gave the insolvent debtor the "power to clear himself by a Voluntary Surrender of all his Effects, which the Creditors were obliged to accept."¹⁹⁹ Given all this, the Act could not "continue in force" because it conflicted with the laws of England.²⁰⁰ On July 20, 1763, the Privy Council approved the Board's disallowance recommendation and the King soon after disallowed the Act as repugnant.²⁰¹

The Statute of Limitation Act of 1705, the Stay Act of 1749, and the Bankruptcy Relief Act of 1762 represent just a microcosm of the widespread scrutiny colonial legislation endured throughout the eighteenth century. The three acts also shine light on colonial Virginia's interaction with imperial oversight. Of particular import, the subordination of colonial legislation to the laws of England induced colonial legislators to take account of the repugnancy principle when crafting legislation.²⁰² Likewise, the Virginia assembly's "concern over possible reaction by English authorities"²⁰³ subordinated the will of the colonial electorate to the dictates of the imperial overseer.²⁰⁴ Virginia's assembly was unable to execute the will of the electorate as the

¹⁹⁵ 4 Acts of the Privy Council of England, Colonial Series, 1745–1766, at 563 (James Munro & Sir Almeric W. Fitzroy eds., 1911).

¹⁹⁶ *Id.* at 563–64.

¹⁹⁷ *Id.* at 563.

¹⁹⁸ *Id.* at 563–64.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 565.

²⁰¹ Minchinton, *supra* note 130, at 173; see also Herbert A. Johnson, *Judicial Review: An American Graft on English Root Stock 2* (May 29, 2003), <https://perma.cc/P7GA-U8QS>, ("Unacceptable legislation was subject to disallowance (absolute veto) by the King acting on the recommendation of the Council.").

²⁰² Dickerson, *supra* note 4, at 274.

²⁰³ Bilder, *supra* note 5, at 54.

²⁰⁴ Priest, *supra* note 22, at 421–22.

repugnancy principle checked its lawmaking power.²⁰⁵ Altogether, the repugnancy principle and the Crown's ability to disallow repugnant colonial legislation "proved a pretty effective check upon" colonial laws.²⁰⁶ Under the watchful eye of the Privy Council, the legality of Virginia's colonial legislation was closely scrutinized and compared with the supreme laws of England.

Thus concludes this Note's second contribution—augmenting the existing literature by exploring colonial Virginia's specific experience under imperial supervision. Of significance, it was in this historical setting and political culture that Madison himself was reared. Madison spent most of the late 1770s "involved in Virginia politics" while such imperial supervision remained vibrant within the British system of colonial governance.²⁰⁷ Accordingly, this Note now turns to the profound influence Virginia's interaction with imperial oversight had on both Madison's view of government and his proposed constitutional solution to the problem of unrestrained state legislatures.

III. BRITISH IMPERIAL LEGISLATIVE REVIEW AND MADISON'S CONCEPTION OF NATIONAL REVIEW

A. *Colonial Virginia, the Privy Council, and the Madisonian Framework*

As mentioned previously, Mary Bilder and Alison LaCroix have documented the link between Privy Council legislative review and Madison's solution to the problem of unrestrained state legislatures in the aftermath of independence.²⁰⁸ What has yet to be explored is how Madison explicitly drew on the long history of Privy Council review of colonial Virginia's laws in particular "as he marshaled his arguments for giving the general government of the United States the power to negative state laws" at the Constitutional Convention.²⁰⁹ In short, Madison took a

²⁰⁵ See Dickerson, *supra* note 4, at 236.

²⁰⁶ *Id.* at 273.

²⁰⁷ Mary Sarah Bilder, James Madison, Law Student and Demi-Lawyer, 28 *Law & Hist. Rev.* 389, 396 (2010). See generally Smith, *supra* note 6, at 1248, 1252 (describing the disallowance of Virginia's colonial legislation well into the 1770s).

²⁰⁸ Bilder, *supra* note 8, at 43 ("James Madison, and others at the Convention, wanted [Privy Council Review] to continue.").

²⁰⁹ LaCroix, *supra* note 5, at 472. This previously unmade connection is of critical import because Madison was clearly thinking "of a republican replacement for the old imperial regime, complete with the prerogative to overturn provincial legislation that was incompatible

cue from his knowledge of colonial Virginia's experience under imperial supervision to develop a cure for the problem of unrestrained state legislatures. A solution was needed because once the colonies declared independence, state legislatures were no longer governed by an apparatus like the Privy Council to give effect to the repugnancy principle.²¹⁰ In the words of James Bradley Thayer, once the Revolution sprung, the colonies "cut the cord" that tied them "to Great Britain, and there was no longer an external sovereign."²¹¹ The non-existence of a national enforcer naturally created a repugnancy assessment vacuum. To make matters even more complex, the shift away from the laws of England and toward written constitutions doubly complicated the absence of a national repugnancy overseer.²¹² The state constitution's text, rather than the "flexible idea of 'the laws of England'"²¹³ would now outline the scope of the legislatures' permissible lawmaking authority.²¹⁴ Without the Board or the Privy Council to ascertain the limits of the lawmaking authority, Virginia, like the other nascent states, retained the power, in the absence of British imperial oversight, to legislate to its heart's content.²¹⁵

with the requirements of the 'empire' as a whole." Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 127 (1998).

²¹⁰ See generally Bilder, *supra* note 5, at 187 (describing how, in the aftermath of the Revolution, states' constitutions rather than the imperial apparatus served as the only check against the legislature's will). In fact, the Declaration of Independence's first grievance indirectly derided the repugnancy principle, and more generally, the subordination of colonial legislation to the laws of England. The Declaration of Independence (U.S. 1776) ("He has refused his Assent to Laws, the most wholesome and necessary for the public good.").

²¹¹ James Bradley Thayer, *Legal Essays* 4 (1908); see also Bilder, *supra* note 8, at 42 ("The functional loss of Privy Council review of legislation left control and constitutional validity of state legislation to courts alone."). But see Bilder, *supra* note 5, at 186 ("Although the formal structure of the transatlantic constitution ended in 1776, its legal arguments and cultural practices continued to influence the American nation.").

²¹² One of the first acts of the newly independent states was to substitute old colonial charters for written constitutions. See A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 204 (1968).

²¹³ Bilder, *supra* note 5, at 187.

²¹⁴ *Id.*

²¹⁵ To be sure, Mary Bilder has detailed that the state constitutions abandoned many components of their former charters, while also uniformly retaining the repugnancy principle. Bilder, *supra* note 5, at 186. Placing a "constitutional curb" on legislators, however, could only be effective if the "final neutral judge" was willing to confine legislation to the four corners of the constitution. John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 *N.Y.U. L. Rev.* 963, 989 (1989). Yet only a few state courts displayed an eagerness to invoke the repugnancy principle to void legislation contrary to their state constitution's text. See *Bayard v. Singleton*, 1 *N.C. (Mart.)* 5, 6–7 (*Super. Ct. Law & Eq.* 1787) (holding that an act denying jury trial was unconstitutional and

Taking full advantage of the lack of oversight, state legislatures experimented with laws similar to the Statute of Limitation Act of 1705, the Stay Act of 1749, and the Bankruptcy Relief Act of 1762.²¹⁶ This experimentation with virtually unrestrained democracy produced a flurry of laws that would not have survived imperial review prior to independence.²¹⁷ As Charles F. Hobson aptly put it, “legislation in the republican governments of the states frequently represented the selfish desires of interested majorities.”²¹⁸ State legislatures experimented with tender laws, specie manipulation schemes, stay laws, and various other forms of self-interested legislation.²¹⁹ South Carolina’s Pine Barren Act of 1785 provides one noteworthy example.

The Act, among other things, enabled debtors to tender, in place of specie, personal and real property to defray outstanding obligations.²²⁰ Seizing the opportunity, debtors tendered personal possessions, such as “hay, corn, pigs, [and] fodder,” forcing creditors to accept property of

void); *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 7 (Va. Ct. App. 1782) (concluding that the legislative act pardoning prisoners was “contrary to the plain declaration of the constitution; and therefore void”); Larry D. Kramer, Foreword: We the Court, 115 Harv. L. Rev. 4, 60 (2001) (“An argument to assign courts a role in enforcing the constitution may have been in the air, but it was hardly one that had achieved widespread approbation or that could be called established.”); see also James M. Varnum, The Case, *Trevett Against Weeden* 1, 27 (1787) (recording proceedings in *Trevett v. Weeden* (R.I. 1786), a case in which the state court held that Rhode Island’s legislation involving monetary currency was repugnant to the state constitution). Due to uncertainty about whether “the courts by themselves were able to enforce [state constitutions’] boundaries upon the legislatures,” judicial review was seldom utilized to police state legislatures. Gordon S. Wood, The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 Wash. & Lee L. Rev. 787, 795 (1999).

²¹⁶ See Leslie Friedman Goldstein, Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law, 48 J. Pol. 51, 61 (1986) (noting that states passed tender laws, specie manipulation schemes, and stay laws).

²¹⁷ Indeed, Leslie Friedman Goldstein has observed that the abuses of state legislative power throughout the 1780s “were legion.” *Id.*

²¹⁸ Charles F. Hobson, James Madison, the Bill of Rights, and the Problem of the States, 31 Wm. & Mary L. Rev. 267, 270 (1990).

²¹⁹ Goldstein, *supra* note 216, at 61.

²²⁰ Act for Regulating Sales Under Executions; and for Other Purposes Therein Mentioned, No. 1293, 4 The Statutes at Large of South Carolina 710–11 (Thomas Cooper, ed., 1838); see also J.M. Opal, Avenging the People: Andrew Jackson, the Rule of Law, and the American Nation 62 (2017) (discussing the “Pine Barren Act” and how it “enabled a debtor to pay with whatever assets he chose, provided that its assessed value equaled three-quarters of his debt”); Thomas D. Russell, The Antebellum Courthouse as Creditors’ Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation, 40 Am. J. Legal Hist. 331, 343 (1996) (“This statute, which became known as the Pine Barren Act, has gained infamy because debtors were successful in exchanging land of low value in South Carolina’s sand hills for their debts.”).

little to no value.²²¹ The controversial legislation encountered widespread criticism. A column in the *Pennsylvania Packet* claimed that the Pine Barren Act “white wash[ed] all debtors” and “surely cut” the people of South Carolina “off from all future connection with the rest of the world.”²²² A diary entry summarized the critics of the Act who lambasted the legislature for “interfering in private contracts fairly made” and for “unsettl[ing] all confidence,” making both “property uncertain” and the “people licentious & ungovernable.”²²³ Likewise, David Ramsay, a member of the Continental Congress from South Carolina, in speaking out against state legislation that impaired contractual rights, including the Pine Barren Act, vilified such laws for “destroy[ing] public credit” and “injur[ing] the morals of the people.”²²⁴

Suffice it to say, the “multiplicity of unwise and unjust laws was the bitter fruit of the establishment of independent republics in post-Revolutionary America.”²²⁵ And it was this bitter fruit, ripened by uncontrolled legislatures, that provided the catalyst for Madison and many of his peers to embrace the view that “popular state assemblies . . . had become . . . the principal source of injustice in the society.”²²⁶ In short, Madison needed a solution to check state legislatures in their rush to pass laws similar to those passed by the colonial assemblies.²²⁷ Yet despite concerns that the state legislatures were devolving into despotic lawmaking authorities with neither clear separation of powers nor effective checks and balances, Madison’s solution to the problem was to explore his commonwealth’s British imperial past. Madison concluded from his systematic study of

²²¹ Allan Nevins, *The American States During and After the Revolution, 1775–1789*, at 525–26 (1924) (criticizing the “indefensible” tactics of debtors who defrayed debts in the form of distantly located chattel property such that creditors often “preferred relinquishing [their] claim[s] to sending good money after bad”).

²²² *Foreign Intelligence*, *Pennsylvania Packet*, June 16, 1786. For a brief history of the *Pennsylvania Packet* see I J. Thomas Scharf & Thompson Wescott, *History of Philadelphia 1609–1884*, at 1966 (1884).

²²³ Timothy Ford, *Diary of Timothy Ford, 1785–1786 (continued)*, 13 *S.C. Hist. & Genealogical Mag.* 181, 194 (1912).

²²⁴ 2 David Ramsay, *Ramsay’s History of South Carolina, From Its First Settlement in 1670 to the Year 1808*, at 238 (1858).

²²⁵ Hobson, *supra* note 218, at 270.

²²⁶ Wood, *supra* note 215, at 791.

²²⁷ See Alison L. LaCroix, *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, 2007 *Sup. Ct. Rev.* 345, 352–53 (2008).

government generally,²²⁸ and colonial Virginia specifically, “that the lessons of the [British] empire could be applied to the problem of authority in the American republic.”²²⁹

Madison’s knowledge of colonial Virginia, and the assembly’s subordination to imperial authority, is unsurprising in light of the fact that he was a product of his “unshakable political, economic, and familial roots in Virginia.”²³⁰ From his earliest days, Madison demonstrated an “abiding interest in specific legal issues facing Virginians.”²³¹ He also possessed extensive knowledge of the laws of colonial Virginia.²³² It was in colonial Virginia’s government that Madison launched his career,²³³ and it was there that he became involved in the process of revising colonial Virginia’s laws after the colony declared independence.²³⁴ The

²²⁸ John P. Frank, *Historical Bases of the Federal Judicial System*, 13 *Law & Contemp. Probs.* 3, 9 (1948).

²²⁹ LaCroix, *supra* note 5, at 473; see generally Morgan, *The Birth of the Republic*, *supra* note 87, at 66 (noting that as the Americans were preparing to cast off the authority of Parliament, they “ransacked English and colonial history for precedents”).

²³⁰ Broadwater, *supra* note 174, at xiii. Madison was also a dedicated student of all subjects relating to government, including Britain’s imperial government. Bilder, *supra* note 207, at 395. Of principal import, Madison was familiar with books devoted to the study of England’s government and its law. *Id.* In 1783, he drafted book lists for the proposed Library of Congress which included one on the English common law as well as a “book on English statutes and one on parliamentary practice.” *Id.* In fact, Madison took notes on William Salkeld’s *Reports* which contained multiple cases detailing imperial oversight of colonial legislation and “the relationship of English law to the colonies.” *Id.* at 399–400. It is no surprise then that Madison was proficient in the *Laws of England* and their relationship to American law. *Id.* at 420–30. Madison was also “well versed” in “Lord Kames’s *Historical Law-Tracts* and *Principles of Equity*” and in “Scottish institutions more generally.” Pfander & Birk, *supra* note 102, at 1625–26 n.57.

²³¹ Peter S. Onuf, *The “Madison Problem” Revisited*, 28 *Law & Hist. Rev.* 515, 517 (2010).

²³² Bilder, *supra* note 207, at 402–03.

²³³ *Id.* at 403.

²³⁴ Madison cultivated his knowledge of the laws of colonial Virginia when he participated in revising the laws of the state of Virginia and piloted a bill revising such laws through Virginia’s House. Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 *Law & Hist. Rev.* 53, 69 (1983); see also J. Gordon Hylton, *James Madison, Virginia Politics, and the Bill of Rights*, 31 *Wm. & Mary L. Rev.* 275, 277 (1990) (“Madison’s effort to enact the proposed revisions of the Virginia Laws . . . was generally successful.”). During the revisal process, “the whole body of the British Statutes, the acts of [Virginia’s] assembly, and certain parts of the common law” were revised and reduced into a single code. Sallie E. Marshall Hardy, *Some Virginia Lawyers of the Past and Present II*, 10 *Green Bag* 57, 57 (1898). Because “[s]ome laws needed revision to meet new circumstances, while others needed to be abolished altogether” it is safe to assume Madison came across colonial Virginia’s disallowed laws. Charles T. Cullen, *Completing the Revisal of the Laws in Post-Revolutionary Virginia*, 82 *Va. Mag. Hist. & Biography* 84, 84 (1974). In 1786, Madison introduced a bill to appoint “a three-man commission to complete the task” of

goal of revision was to “completely overthrow the English legal system that had chained Virginia for 170 years.”²³⁵ Yet the process of revisal was a laborious undertaking. In the words of Thomas Jefferson, the revisions were adopted after “endless quibbles, chicaneries, perversions, vexations and delays of lawyers and demi-lawyers.”²³⁶ Despite the arduous task, Madison described the reformation of Virginia’s laws as “a mine of Legislative wealth, and a model of statutory composition.”²³⁷ At the same time, Madison approached his task with a deep understanding of his former colony’s experience under imperial review. This Note argues that it was this history of review that Madison sought to emulate as he confronted the problem of unrestrained legislatures in the years following the Revolutionary War.²³⁸

Madison’s correspondence prior to the Constitutional Convention displays his cultivated, well-informed understanding of the operation and mechanics of the Privy Council’s legislative review of colonial Virginia’s

revising Virginia’s law which highlights just how tedious and detailed the process turned out to be. *Id.* at 85. For an enlightening discussion on Madison’s views about judicial review in the state of Virginia in the 1780s, see Jessica K. Lowe, Thank You, Mr. Madison, 53 *Tulsa L. Rev.* 279, 287 (2018) (“Madison and the other Framers were certainly informed in practice by their experience of the 1780s.” (emphasis omitted)).

²³⁵ Willard Sterne Randall, *Thomas Jefferson: A Life* 285 (1993).

²³⁶ Paul M. Zall, *Jefferson on Jefferson* 44 (2002). It is worth mentioning that Jefferson opted for revising the colonial laws instead of abolishing the entire existing legal system and starting anew because that option would have been even more of “an arduous undertaking, of vast research, of great consideration & judgment.” Thomas Jefferson, *The Autobiography of Thomas Jefferson, 1743–1790, Together with a Summary of the Chief Events in Jefferson’s Life* 67–68 (Paul Leicester Ford ed., 1914). Yet revising the colonial laws remained a considerable challenge. Many of “[t]he statutes passed by the colonial legislative bodies [were] hand-written, each on a separate page, often of different sizes.” Erwin C. Surrency, *Revision of Colonial Laws*, 9 *Am. J. Legal Hist.* 189, 189 (1965). The promulgation of colonial law certainly changed over the years, but revising the colonial laws remained a daunting task after independence. *Id.* at 202 (“[O]ne of the first tasks of the General Assembly in Virginia during the Revolution was to revise its statutes under the direction of a committee chaired by Thomas Jefferson.”).

²³⁷ Letter from James Madison to Samuel Harrison Smith (Nov. 4, 1826), *in* 9 *The Writings of James Madison* 256, 257–58 (Gaillard Hunt ed., 1910).

²³⁸ See Nathan Boone Williams, *Independent Judiciary Born in Colonial Virginia*, 24 *J. Am. Judicature Soc’y* 124, 124 (1940) (“The delegates to that convention had before them the details of the system of government in their home commonwealths.”). Virginia’s transition from a frontier society to an economy of a prosperous plantation system within the British imperial order “laid the foundations for a colonial school of constitutional thought.” William F. Swindler, *Virginia Constitutional Commentaries: The Formative Period, 1776–1803*, 21 *Wm. & Mary L. Rev.* 358, 358 (1979); see also Neil M. Gorsuch, *A Republic, If You Can Keep It* 8 (2019) (“The founders studied history and sought to learn from the problems and build on the successes of past governments.”).

laws. In a letter to Edmund Randolph, who would become the nation's first Attorney General, dated April 9, 1782, Madison mentioned "a meeting of the Privy Council [on] July 3. 1633" which took "into consideration the Petition of the Planters of Virginia" who "made all the opposition to the encroachment" caused by "Arbitrary Acts."²³⁹ Likewise, in a letter the following year, Randolph informed Madison that two Virginia colonial acts had been "confirmed by the king" after they were "sent over [to the Privy Council] for the royal inspection."²⁴⁰ There is no doubt that this exchange penetrated Madison's consciousness as he later wrote Randolph that his solution to the problem that plagued the states was to grant a federal body "a negative in all cases whatsoever on the Legislative Acts of the States as the K. of G. B. heretofore had."²⁴¹ The year after Madison first began formulating his constitutional solution, Richard Henry Lee, a future Senator from Virginia, wrote to Madison summarizing a "petition" drafted by "[m]erchants" who sent a report to the "Committee of the privy Council" complaining about the "commercial restraints upon [their] trade" in part because "Virginia had not repealed her laws that impede the recovery of British debts."²⁴² Although there is no way to confirm which Act the letter referenced, it is certainly possible that a variation of the Stay Act of 1749 was the letter's focus. If anything, this pre-convention correspondence demonstrates Madison's rich understanding of "the Privy Council's practice of reviewing statutes *ex ante*" in colonial Virginia.²⁴³

Moreover, in his notes from 1786, Madison referred to what appears to be the Bankruptcy Relief Act of 1762 and its progeny. He explicitly jotted down that "in Va." the "exchange rose to 60 per Ct." after Virginia's assembly passed the law.²⁴⁴ Madison recognized that the fluctuations resulting from the passage of relief laws created an "unfavorable balance of trade" and "destroy[ed] that confidence between man & man, by which

²³⁹ Letter from James Madison to Edmund Randolph (Apr. 9, 1782), in 4 *The Papers of James Madison* 143, 143 (William T. Hutchinson & William M.E. Rachal eds., 1965).

²⁴⁰ Letter from Edmund Randolph to James Madison (Feb. 15, 1783), in 6 *The Papers of James Madison* 244, 245 (William T. Hutchinson & William M.E. Rachal eds., 1969).

²⁴¹ Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 *The Papers of James Madison* 368, 369–70 (Robert A. Rutland & William M.E. Rachal eds., 1975).

²⁴² Letter from Richard Henry Lee to James Madison (Nov. 20, 1784), in 8 *The Papers of James Madison* 144, 144–46 (Robert A. Rutland & William M.E. Rachal eds., 1973).

²⁴³ LaCroix, *supra* note 5, at 473–74.

²⁴⁴ James Madison, Notes for Speech Opposing Paper Money (Nov. 1, 1786), in 9 *The Papers of James Madison* 158, 159 (Robert A. Rutland & William M.E. Rachal eds., 1975).

resources of one may be commanded by another.”²⁴⁵ He also cited Benjamin Franklin’s earlier work “Remarks and Facts concerning American Paper Money,” which discussed the Board of Trade’s repugnancy assessment of similar laws.²⁴⁶ It is thus no surprise that in the final sentence of his notes, he acknowledged that the law would not “succeed in Great Britain &c.”²⁴⁷ It bears reemphasizing that Madison took the time to study imperial supervision of colonial law because, from the very beginning of his legislative career in colonial Virginia, he “championed the interests of property.”²⁴⁸ Thus, as “state legislatures passed laws similar to those he had fought in Virginia,” it “filled Madison with disgust” and led him to seek political instruments by which he could curb unrestrained democratic will.²⁴⁹ With that in mind, Madison’s knowledge of colonial Virginia’s interaction with British imperial supervision formed the foundation of his plan to incorporate the Privy Council’s legislative review mechanism into his proposed constitutional framework.²⁵⁰

For Madison, only through the replication of the legislative review the Privy Council exercised throughout the colonies, and particularly in colonial Virginia, could the states be constrained. His clear aim was “to protect rights by correcting unjust, improvident, overly changeable legislation in the states.”²⁵¹ In a letter sent to General George Washington the month before the Constitutional Convention kicked off, Madison “outline[d]” his vision for the “new system” of government.²⁵² First, Madison was convinced that the federal “Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade.”²⁵³ Madison’s explicit

²⁴⁵ *Id.* at 158–59.

²⁴⁶ *Id.* at 159, 160 n.6.

²⁴⁷ *Id.* at 159.

²⁴⁸ William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L.J.* 694, 709 (1985).

²⁴⁹ *Id.*

²⁵⁰ LaCroix, *supra* note 5, at 473–74.

²⁵¹ Zuckert, *supra* note 13, at 63; see also Diarmuid F. O’Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 *Va. L. Rev. Online* 31, 37 (2015) (“While we do not have time to discuss all the finer points of Madison’s design, it is sufficient to say that the Framers both knew of and feared excessive legislative power, and therefore implemented precautions against domination by transient majorities.”).

²⁵² Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 *The Papers of James Madison* 382, 382–87 (Robert A. Rutland & William M.E. Rachal eds., 1975).

²⁵³ *Id.* at 383.

mention of the regulation of trade aligns with the principal function of the Board and the Privy Council; that being the regulation of trade to advance England's economic prosperity and safeguard contractual rights.²⁵⁴ Madison next contended that, "[o]ver and above" the national government's "positive power," there existed a critical necessity of "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative."²⁵⁵ Madison envisioned a federal negative comparable to the prerogative power exercised by the Privy Council,²⁵⁶ one that "could reach down into the distinctly internal affairs of the States."²⁵⁷ Indeed, the purpose of his proposal was "to protect private rights from factious state legislatures" by utilizing the supervisory powers of the national government.²⁵⁸ Clearly, then, his theory of vesting authority in the federal government to veto acts of a subordinate legislature had roots in the British imperial system as shaped by his understanding of colonial Virginia's place in that system.²⁵⁹

Madison continued in that same letter to explain that without a federal "defensive power," the state legislatures would continue to enact "spiteful measures dictated by mistaken views of interest."²⁶⁰ In Madison's view, the ability to negative state legislation would control "the internal vicissitudes of State policy; and the aggressions of interested majorities on the rights of minorities and of individuals."²⁶¹ Therefore, the federal government should, much like the Privy Council, function as the "umpire in disputes between different passions & interests in the State."²⁶² To put it bluntly, Madison posited that an umpire was of critical need because "there was nothing to restrain a majority faction from seizing control of the government and imposing its designs on the minority."²⁶³

²⁵⁴ See Edwin J. Perkins, *The Economy of Colonial America* 17 (1980) ("[T]he British expected their colonies to serve the mother country and to pursue economic activities that on balance contributed to the power of England . . ."); Johansen, *supra* note 12, at 7 ("The Board's primary responsibility was to promote England's trade . . .").

²⁵⁵ Letter from James Madison to George Washington, *supra* note 252, at 383.

²⁵⁶ Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 *Wm. & Mary Q.* 215, 219 (1979).

²⁵⁷ George W. Carey, *James Madison on Federalism: The Search for Abiding Principles*, 3 *Benchmark* 27, 28 (1987).

²⁵⁸ Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611, 649 (1999).

²⁵⁹ LaCroix, *supra* note 5, at 463–64.

²⁶⁰ Letter from James Madison to George Washington, *supra* note 252, at 383–84.

²⁶¹ *Id.* at 384.

²⁶² *Id.*

²⁶³ Hobson, *supra* note 256, at 222.

In a letter sent to Jefferson around the same time, Madison theorized that to “restrain the States . . . from oppressing the minority” with “unrighteous measures which favor the interest of the majority,” the “emanation” of the “negative prerogative” should “be vested in some set of men.”²⁶⁴ Madison suggested that “[p]erhaps the negative on the State laws may be most conveniently lodged in” a “Council of Revision.”²⁶⁵ Madison’s proposed council would have vested a quasi-legislative body within the Federal Congress with “the power to overturn congressional legislation as well as congressional vetoes of state legislation.”²⁶⁶ Madison thus embraced the similarity between legislative review by the Privy Council and his own proposed council’s review of democratically enacted legislation. As Professor LaCroix has observed, “Madison envisioned the federal negative functioning in the same manner as the Privy Council’s practice of reviewing statutes *ex ante*.”²⁶⁷ He wanted “to use one of the preeminent tools of British imperial practice to create a unique system of American federal government.”²⁶⁸

Madison appears to also have contemplated the judiciary as an option to check state legislation. In a letter to Washington, Madison posited that the “national supremacy” should be “extended” to the “[j]udiciary departments.”²⁶⁹ Judicial supervision combined with the “supremacy of the national authority,” would “not exclude the local authorities wherever they can be subordinately useful.”²⁷⁰ Instead, when state legislatures

²⁶⁴ Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in 11 *The Papers of Thomas Jefferson* 219, 219–20 (Julian P. Boyd ed., 1955).

²⁶⁵ Letter from James Madison to Edmund Randolph, *supra* note 241, at 370.

²⁶⁶ Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 *J.L. & Pol.* 459, 485 (2012); see also C. Perry Patterson, *James Madison and Judicial Review*, 28 *Calif. L. Rev.* 22, 24 (1939) [hereinafter Patterson, *James Madison and Judicial Review*] (noting that Madison “suggested repeatedly a veto to be exercised by the President associated with a convenient number of the national judiciary called a Council of Revision”); *id.* at 25 (“The Council of Revision . . . would have been exclusively legislative in character and tantamount to a third house. Its veto was to be absolute and this is why it was thought necessary to have the judges associated with the President to prevent the giving of such a power to one man.”); C. Perry Patterson, *Judicial Review as a Safeguard to Democracy*, 29 *Geo. L.J.* 829, 837–38 (1941) [hereinafter Patterson, *Judicial Review as a Safeguard*] (“The Council of Revision would have been a legislative body and would have been a third house for both the nation and the states.”).

²⁶⁷ LaCroix, *supra* note 5, at 473.

²⁶⁸ *Id.* at 489. See generally Morgan, *The Birth of the Republic*, *supra* note 87, at 89 (“The problem was to design a government containing all the virtues of the British constitution but with added safeguards to prevent the kind of deterioration they had just witnessed.”).

²⁶⁹ Letter from James Madison to George Washington, *supra* note 252, at 384.

²⁷⁰ *Id.* at 383–84.

overstepped their bounds, the courts could theoretically provide a necessary check disallowing popular legislation contrary to the interests of creditors both public and private.²⁷¹ Madison, however, viewed the judiciary with great skepticism. As historian Robert Jones has argued, Madison “viewed the Council of Revision as a replacement for, rather than a supplement to, the judicial review of constitutional questions.”²⁷² Madison simply could not envision the judiciary exercising the power of legislative review in an effective and efficient manner.²⁷³ He instead thought that courts lacked the institutional capacity to “harmonize diverse, autonomous, and conflicting lawmaking authorities through adjudication.”²⁷⁴ Madison thus remained committed to the revival of a system modeled after the Privy Council, designed to exercise the power of legislative review over state legislation.²⁷⁵ But make no mistake—Madison’s principal goal was to create a system to bring both “stability and unity within the constitutional order” to discourage the populace’s “frequent recurrence to popular upheavals.”²⁷⁶

In Madison’s view, the lessons from the reign of the British empire, and its oversight of colonial Virginia in particular, “could be applied to the problem of authority in the American republic.”²⁷⁷ Sure enough, the “mutability of the laws of the States,” according to Madison, “contributed more to that uneasiness which produced the Convention” than anything else.²⁷⁸ Madison thus threw his support behind a system of government

²⁷¹ See *id.* at 382–87.

²⁷² Jones, *supra* note 266, at 491.

²⁷³ *Id.* at 493 (“Madison advocated for the Council precisely because it was so difficult for him to imagine that the people would accept even a *qualified* veto of their favored branch at the hands of a body that was so removed from their political control. . . . Integrating members of the judiciary in the legislative process itself, therefore, gave the judicial members a political legitimacy that transcended judicial review.”).

²⁷⁴ Onuf, *supra* note 231, at 516–17.

²⁷⁵ *Id.* at 517.

²⁷⁶ Cash, *supra* note 20, at 384; see also Irving Brant, James Madison as Founder of the Constitution, 27 N.Y.U. L. Rev. 248, 249 (1952) (“Madison’s objective was a supreme national government, able to maintain the country’s position among the nations of the world, and constitutionally authorized to restrain the ambition, disorder and licentiousness which were all too visible in the individual states.”).

²⁷⁷ LaCroix, *supra* note 5, at 473.

²⁷⁸ Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 The Papers of Thomas Jefferson 270, 276 (Julian P. Boyd ed., 1955). Alexander Hamilton accentuated this point by protesting, a little over a month before the start of the convention, that one of “the ill effects of the legislature interfering in private contracts” was “that it would destroy all credit.” Alexander Hamilton, Speech to New York Assembly (Apr. 12, 1787), in 4 The Papers of Alexander Hamilton 145, 145 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

designed to have a similar power over state laws as the Privy Council had over the laws of colonial Virginia.²⁷⁹ As such, Madison set forth from Montpelier to the Constitutional Convention with a proposed framework—one intellectually rooted in the colonial past and informed by the workings of the Privy Council on the laws of his colonial commonwealth.²⁸⁰

B. The Council of Revision in the Form of Judicial Review

Early at the Constitutional Convention, Madison claimed that “the practice in Royal Colonies before the Revolution . . . would not have been inconvenient; if the supreme power of negating had been faithful to the American interest.”²⁸¹ Many delegates, however, considered the incorporation of a pillar of British imperial rule into the structure of the new Federal Constitution a bridge too far.²⁸² Some delegates, like Roger Sherman, sought a more qualified federal negative power, one in which the Constitution defined the “cases in which the negative ought to be exercised.”²⁸³ Madison initially scoffed at Sherman’s proposal. For Madison, placing any limitations upon the negative would only disrupt the “harmony of the system.”²⁸⁴ Without an unqualified negative, Madison feared that “[e]vasions might and would be devised by the ingenuity of the Legislatures.”²⁸⁵ He also believed that the unqualified negative’s “utility is sufficiently displayed in the British System.”²⁸⁶ As he put it, the historical use of the “prerogative by which the Crown, stifles in the birth every Act of every part tending to discord or encroachment,” served to maintain “the harmony & subordination of the various parts of the empire.”²⁸⁷ Sure enough, Madison’s proposal “anticipated the creation of a national court system and the establishment of a council of revision”

²⁷⁹ O’Connor & Bilder, *supra* note 3, at 85.

²⁸⁰ Gailmard, *supra* note 18, at 788 (noting that even before the Convention began, “James Madison was already convinced of the utility of Privy Council review as a model for bounding state legislation”).

²⁸¹ 1 *The Records of the Federal Convention of 1787*, at 168 (Max Farrand ed., 1911) [hereinafter *Farrand’s Records*] (Madison’s Notes, June 8, 1787) (statement of James Madison).

²⁸² Zuckert, *supra* note 13, at 64.

²⁸³ 1 *Farrand’s Records*, *supra* note 281, at 166 (Madison’s Notes, June 8, 1787) (statement of Roger Sherman).

²⁸⁴ 2 *id.* at 28 (Madison’s Notes, July 17, 1787) (statement of James Madison).

²⁸⁵ *Id.* at 440 (Madison’s Notes, Aug. 28, 1787) (statement of James Madison).

²⁸⁶ *Id.* at 28 (Madison’s Notes, July 17, 1787) (statement of James Madison).

²⁸⁷ *Id.*

that could disallow “acts of Congress before they took effect.”²⁸⁸ Madison thus borrowed the Privy Council’s power to review colonial statutes, and Virginia’s laws in particular, to propose at the Constitutional Convention a system designed to police previously unrestrained state legislatures.²⁸⁹

Indeed, by the middle of the Convention, Madison’s position was clear: the constitutional negative should be lodged in a council that would provide the ultimate “check on unjust majoritarian legislation.”²⁹⁰ That check, in the form of a “broad national negative” vested in a council comparable to the Board or the Privy Council, would stymie unjust state legislation.²⁹¹ Madison’s broad federal negative, however, failed to galvanize the necessary support and was rejected at the Convention.²⁹² His fellow delegates, nevertheless, shared his concern for establishing some measure of central control over the internal affairs of the states, and thus turned their attention to the judiciary as a possible option. As Professor LaCroix aptly put it, once the delegates rejected Madison’s proposed council, they elected instead to opt for “a judicialized approach to the problem of multilayered authority.”²⁹³ In essence, the delegates empowered the judiciary to carry out the functions Madison had envisioned for his council.²⁹⁴ The Convention thus premised its “rejection of the Council upon the condition that the Courts would have the power of judicial review.”²⁹⁵ Madison, to be sure, remained committed to his

²⁸⁸ Broadwater, *supra* note 174, at 46.

²⁸⁹ LaCroix, *supra* note 5, at 464 (“Madison proposed grafting onto the founding charter a provision requiring the same type of *ex ante* review of state legislative acts that the British monarch, through the mechanism of the Privy Council, had formerly wielded over the acts of the colonial assemblies.”).

²⁹⁰ Mary Sarah Bilder, *Madison’s Hand: Revising the Constitutional Convention* 71–72 (2015); see also Gailmard, *supra* note 18, at 789 (“Madison and his allies were also concerned about the dangers of federal legislative power; thus, they had proposed a device to control federal legislation: a Council of Revision. . . . [The Council] would review federal laws for consistency with the Constitution and the public good, vetoing legislation as necessary.”).

²⁹¹ Bilder, *supra* note 290, at 77; see also Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 *Va. L. Rev.* 933, 954 (2018) (“Unlike judicial review, the Council of Revision’s decisions would be final unless overridden by the legislature, and the disapproved legislation would become ‘void,’ i.e., without *any* legal effect.”).

²⁹² Bilder, *supra* note 290, at 84. Madison’s initial plan, inspired by prejudicial “debtor relief laws” and the general danger of unrestricted state legislation, to create a council vested with a broad negative power “fell on ears that were unreceptive and uncomprehending.” Kramer, *supra* note 258, at 648.

²⁹³ LaCroix, *supra* note 5, at 458.

²⁹⁴ Zuckert, *supra* note 13, at 64.

²⁹⁵ James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 *U. Chi. L. Rev.* 235, 260 (1989); see also Jones, *supra* note 266, at 507 (“Probably the single most

proposed federal negative in the form of a council. Despite his frustrations over the defeat of proposal, however, he “persisted and adapted, winning his share of victories and remaining, more often than not, open to compromise.”²⁹⁶

Within weeks of rejecting Madison’s council, the delegates adopted both the judiciary provisions of Article III and the Supremacy Clause of Article VI as replacements.²⁹⁷ Indeed, it was Madison’s move to amend a provision of the Constitution that would “become the Supremacy Clause of article 6.”²⁹⁸ It follows that the delegates’ decision to opt for judicial review flowed directly from the decision to reject Madison’s council and its power to disallow repugnant state legislation.²⁹⁹ This trade-off is instructive. It shows that the Convention “began the process of making the judiciary, acting under the Supremacy Clause, the institution responsible for weighing the legislative acts of the states against the dictates of the Constitution” once Madison’s proposal was swept aside.³⁰⁰

important reason the Council of Revision was rejected derived from the Convention’s commitment to judicial review as an integral part of the constitutional structure.”).

²⁹⁶ Broadwater, *supra* note 174, at 50; see also Onuf, *supra* note 231, at 521 (“Madison . . . took a leading role under the new regime in exploiting the language of the Constitution to interpret it in the federal terms that best served the emerging opposition’s partisan interests.”).

²⁹⁷ LaCroix, *supra* note 5, at 490, 493–94 (“[T]he delegates intended the supremacy clause to do what Madison had intended the negative to do.”); see also Gailmard, *supra* note 18, at 788 (arguing that the “debates on these [Privy Council inspired] mechanisms were among the only times that judicial review was discussed in the Convention, and concretely resulted in the Supremacy Clause of the Constitution”).

²⁹⁸ Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 *Duke L.J.* 1421, 1464 (1989); see also Onuf, *supra* note 231, at 520 (noting that the alternative to Madison’s federal negative was the supremacy clause). The Supremacy Clause addressed one of Madison’s main goals: “to prevent instability and injustice in the legislation of the States.” LaCroix, *supra* note 227, at 354 (internal quotation marks omitted).

²⁹⁹ Jones, *supra* note 266, at 509; see also Mitchell, *supra* note 291, at 954 (“[M]any who had favored the Council of Revision, including Madison and Wilson, wound up describing judicial review as a Council-of-Revision-like power to render laws ‘void,’ and early courts followed their example by pronouncing statutes ‘void’ when they found them unconstitutional.”).

³⁰⁰ See Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 *Wm. & Mary L. Rev.* 1513, 1523 (2002). Michael Zuckert has also observed that the delegates turned from Madison’s proposal, yet embraced his overall logic, to empower the judiciary with comparable authority. Zuckert, *supra* note 13, at 57; see also Gorsuch, *supra* note 238, at 50–51 (discussing the defeat of Madison’s proposed council of revision, and noting that the Founders adopted the “view that judges should expound the law only as it comes before them, free from the bias of having participated in its creation and from the burden of having to decide ‘the policy of public measures’”); Zuckert, *supra* note 13, at 68 (“In place of Madison’s

Hence, Madison's failed council was "folded into the courts' powers."³⁰¹ Rather than grant Madison his wish and give the council a negative over state laws, the delegates shaped the Constitution to provide "for a Supreme Court with the power to review state laws for compatibility with the Constitution."³⁰²

It is important to understand that Madison eventually came around to the theory of judicial review. Professors Saikrishna Prakash and John Yoo have documented Madison's support for the judiciary's authority to review both state and federal legislation.³⁰³ Soon after his proposed council's defeat, Madison switched gears and contemplated judges declaring legislation repugnant to the Constitution, much like the Privy Council had declared Virginia's colonial law repugnant to the laws of England.³⁰⁴ Once it was clear his council was not to be, it was Madison, after all, who asked at the Convention: "Is not that already done by . . . Judges [who will] declare such interferences null & void?"³⁰⁵ Madison was thus able to mold his proposed council, rooted in imperial supervision of the colonial assemblies and colonial Virginia in particular, into judicial form. He expected that the judiciary would perform "the essential function he had hoped the Council of Revision would perform

proposal to use Congress to police the federal system, the convention adopted the supremacy clause, a declaration that the Constitution, laws, and treaties of the United States are supreme over state constitutions and laws.").

³⁰¹ Cash, *supra* note 20, at 383.

³⁰² Alison LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 *Ind. L. Rev.* 41, 45 (2011).

³⁰³ Saikrishna B. Prakash & John C. Yoo, *Questions for the Critics of Judicial Review*, 72 *Geo. Wash. L. Rev.* 354, 366 (2003); see also Banning, *supra* note 209, at 447 n.74 (noting that Madison "accepted judicial review of federal as well as state legislation").

³⁰⁴ Patterson, *James Madison and Judicial Review*, *supra* note 266, at 26–27. To be sure, Madison—much like the Board and the Privy Council had done in his colonial backyard—"insisted that the council was still necessary in order to give the judiciary the ability to invalidate laws on policy" and constitutional grounds. Prakash & Yoo, *supra* note 303, at 373–74; see also Holt, *supra* note 298, at 1463 ("When the provisions requiring inferior tribunals were voted down, Madison and Wilson proposed, and the Convention accepted, that Congress be allowed to institute inferior tribunals if it desired.").

³⁰⁵ 2 *Farrand's Records*, *supra* note 281, at 440 (Madison's Notes, Aug. 28, 1787) (statement of James Madison); see also Patterson, *James Madison and Judicial Review*, *supra* note 266, at 27 (noting that when Madison was asked on September 12th what the remedy would be for state law in conflict with the prohibition against export duties, he "replied: 'There will be the same authority as in other cases. The jurisdiction of the supreme court must be the source of redress'").

under his preferred constitutional structure.”³⁰⁶ In the end, then, Madison “got his federal veto over state laws after all in the form of vertical federal judicial review.”³⁰⁷ From this perspective, judicial review is best understood as an effort by Madison to reclaim some of the ground he had lost at the Convention when his council was rejected.

CONCLUSION

Despite the labels chosen at the Convention, both judicial review and imperial legislative review require a body to interpret the supreme law of the land and make a binding decision on the matter before the tribunal.³⁰⁸ This similarity is too striking to be a mere coincidence.³⁰⁹ Professor Steven Calabresi is thus right to conclude that “Madison’s request for federal power to veto state laws was thus much less radical than many might otherwise have supposed given that the King-in-Council had

³⁰⁶ Jones, *supra* note 266, at 540; see also Barry, *supra* note 295, at 252 (noting that the political realities meant that “some accommodations to practicality had to be made”).

³⁰⁷ Calabresi, *supra* note 18, at 1451.

³⁰⁸ Patterson, *Judicial Review as a Safeguard*, *supra* note 266, at 831; see also Frank, *supra* note 228, at 6 (“[T]he Privy Council system is a real antecedent of the modern Supreme Court and the modern system of judicial review.”). In the present day, the repugnancy principle is enforced “by the courts in exercise of the power vested in them by Articles VI and III of the Constitution.” McGovney, *supra* note 1, at 79; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[A] law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”).

³⁰⁹ Some scholars have suggested that viewing “the origins of judicial review in English and colonial practice resurrects an earlier idea about limited legislative authority and thus enriches contemporary discussions of American constitutionalism.” Bilder, *supra* note 33, at 18; see also Cash, *supra* note 20, at 385 (“[T]he final arbiter concept derived from Anglo-American legal history and the traditional role of the Privy Council . . .”); David, *supra* note 3, at 46 (noting that judicial review “has no other judicial antecedent than those inhering to the Privy Council as a revisory body and court of appeal”); Gailmard, *supra* note 18, at 790 (“Experience with the Privy Council inspired the first proposals for this review under the Constitution. These proposals in turn led to the clearest statements about judicial review offered in the Convention. The institutional raw materials left in the detritus of empire thus formed the building blocks of constitutionalism in the new state.”); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 *Chi.-Kent L. Rev.* 825, 826 (2006) (“Precedents existed for the practice of courts, and especially conciliar bodies of superior jurisdictions, reviewing the legislative outputs of inferior ones in the Anglo-American world.”); Thayer, *supra* note 211, at 6 (“It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution.”). Yet underappreciated, until now, is the influence that Privy Council disallowance of his own commonwealth’s legislation had on Madison’s frame of mind and his approach to subordinating the will of state and national electorates to the supreme law of the land.

exercised such a veto power for 169 years”³¹⁰ Yet Madison’s proposed council, and eventually judicial review itself, sprang not only from Privy Council review of colonial law writ large, but especially from colonial Virginia’s particular experience with imperial oversight. In other words, to suggest that Madison derived his ideas merely from the abstract concept of imperial supervision is to underestimate the import Privy Council review of colonial Virginia’s law had on the mechanics of Madison’s proposed council. Ironic as it might be, given the colonies’ fight to cast off British control, it was precisely that system of control to which Madison turned, as his letters and notes show, when it came time to erect his new country’s national government. So deeply did the historical practice of imperial review in his native Virginia impress Madison, that colonial Virginia rightly may be regarded as an intellectual incubator of judicial review.

³¹⁰ Calabresi, *supra* note 18, at 1451.