THE BRITISH PRIVY COUNCIL'S POWER TO RESTRAIN
THE LEGISLATURES OF COLONIAL AMERICA:
POWER TO DISALLOW STATUTES:
POWER TO VETO*

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While the Atlantic seaboard of what is now the United States of America was a part of the British Empire the colonists, the British subjects in America, lived under a federal system, or a dual system of governments, as their descendants do today. Each colony had its local government and over all was the central government of the Empire. The colonists contended that the constitution of the Empire, like the Constitution of the United States today, limited the powers of the central legislature, and assigned to each colony a sphere of local autonomy which Parliament was forbidden to invade. The home government denied this constitutional theory. But whether constitutionally secured or not, federalism in practice existed.

Autonomy in local legislation was granted to each colony and until near the end of the colonial period Parliament, in practice, with very slight exceptions, respected it and left the field of regulation of internal affairs almost wholly to the local legislature.

To the proper working of every federal system, some effective device is needed to prevent encroachment of the local legislatures upon the field of legislation assigned to the nation-wide legislature. This is true even when the spheres of the two governments are defined in a written constitution. The device adopted in our Constitution is to vest in courts the power and duty to hold void any state statute which the Constitution forbids a state to enact, including any one that is in conflict with any law enacted by Congress in pursuance of a power granted to it. As early as 1696, Parliament made a declaration of the supremacy of its enactments over local colonial statutes, that any statute of any American colony "anywise repugnant" to the Navigation Acts "or to any other law hereafter" made by Parliament applicable to the colony should be "illegal, null and void." * Parliament

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a. 7 & 8 Wm. III, c. 22, § 9 (1696).
did not expressly provide that power to enforce this provision should be lodged in courts. In another portion of my book, already published in this Review, I have shown that the Privy Council, in 1727, as the highest court of appeal in the British colonial system assumed power to hold an unconstitutional colonial statute void. In that instance the statute was found to be in conflict with a limitation on the legislature's powers expressed in the colony's constitution. The precedent might readily have been extended to enforce the supremacy of Acts of Parliament over local laws, but this extension by British courts did not come until after American independence.

For the enforcement of the supremacy of imperial statutes over colonial laws the British government throughout the American colonial period relied upon the exercise by the Privy Council of its broad power to disallow or repeal colonial statutes, the chief topic to be dealt with in this chapter. But it was not solely or even chiefly to enforce that supremacy that the disallowance power was created. Even within the scope of autonomy in legislation granted the British subjects in America they were not to have a free hand in making what laws they pleased. From the seventeenth and eighteenth century British point of view the semi-popular legislatures in America must be prevented from enacting laws prejudicial to the economic and social interests of the ruling classes at home and in the colonies as well.

Popular legislative bodies were distrusted. At home the House of Commons, theoretically regarded as a popular assembly, was checked by the House of Lords and by the Crown's veto, which still existed in theory. So also every colonial legislature had a so-called popular branch. To prevent its being too popular, its membership and its electorate were limited to property owners, as was true of the House of Commons. A further check was provided by the still more conservative upper chamber of the legislature. In all but three of the colonies the upper chambers were composed of Crown or proprietor-appointed men, chosen with an eye to conserving ruling class interests; while in two of the three colonies in which the upper chambers were elective local devices attained the same result. Moreover, in all but two of the American colonies the colonial governor had an absolute veto on all proposed laws. All these devices, just enumerated, were integral parts of the local governments themselves. The eighteenth century ruling class in America regarded them as essential, as did the


c. The three exceptional colonies were Connecticut, Rhode Island, and Massachusetts. At the end of the colonial period, in 1774, Parliament reduced this group to two by making the upper chamber in Massachusetts appointive by the Crown. 14 Geo. III, c. 45 (1774).
ruling class in Great Britain—essential to prevent legislation offensive to their interests. The British government, however, did not regard these local controls as sufficient. It supplemented them by vesting in the Privy Council power to disallow or repeal any colonial statute whatever, not solely one repugnant to an imperial law but one that appeared to the Privy Council to be objectionable for any reason.

The Privy Council was given or acquired three kinds of power to defeat or annul laws made in the colonies:

1. disallowance or repeal of colonial statutes;
2. veto of such statutes;
3. judicial annulment of such statutes, commonly called judicial review of legislation.

These three control devices differed distinctly from each other. The relative frequency of their use in the eighteenth century is in the order above given. The first had its origin soon after 1660 and was actively employed to the end of the colonial period. The second did not apply to all colonial statutes. Suffice it to say at this point that it existed most frequently where a colonial governor acting under instructions from the home government succeeded in getting the colonial legislature to insert in a statute a clause suspending the statute’s going into effect until it received the “king’s approbation,” which in fact meant the approval of the Privy Council. A refusal of approbation was an absolute veto. It prevented the proposed statute from becoming a law. It did not repeal or annul an enacted law but prevented enactment. The one characteristic it had in common with the other two devices was that it defeated legislation.

The other two devices operated upon statutes even where no veto was reserved to the Privy Council. They operated upon statutes that had been fully enacted. Disallowance and judicial annulment differed from each other in three respects: (1) the reasons for which they might be exercised, (2) their effect upon the statute, and (3) the nature of the proceedings in which they could be exercised. Briefly put, disallowance by the Privy Council (1) might be for any reason it saw fit; (2) it constituted a repeal, rendering the statute void for the future and not retrospectively void—not disturbing acts done in reliance upon it while it had been in force; and (3) in disallowance the Privy Council acted in an administrative capacity or, on a sharper analysis, as a super-legislature, with power limited to repeal. A single colonial statute, or the entire body of statutes enacted at a session of a colonial legislature, was submitted to it. In acting upon each statute it might (1) do nothing, (2) confirm it, or (3) repeal it. It could repeal the
whole of a statute but not any item, clause or part, less than the whole. The procedure of the Council and its advisory body, the Board of Trade, in disallowance much resembles the procedure of a legislative committee in investigating a bill referred to it. A difference, of course, is that a legislative committee considers a bill or proposal of a law while the Privy Council reconsidered enacted statutes.

On the other hand, judicial annulment of a statute had these characteristics: (1) the sole reason for its exercise was that the legislature lacked authority to enact it—because the enactment of such a law was forbidden by some constitutional limitation on the legislature's power—the function, familiar today, of courts in passing upon the constitutionality of legislation; (2) the decision of annulment was retrospective, declaring the statute void ab initio, that is, as of the moment of its enactment, declaring that it never had been a law; and (3) the power was exercised solely in a lawsuit brought in a colonial court and carried by appeal to the Privy Council sitting in its capacity as the highest appellate court in the colonial system. This power of judicial annulment of statutes, by which the Privy Council nullified only one statute during our colonial period, deserves elaboration not for its importance then, but because of its predominance in present day America over all other devices to control legislatures.

The distinctions between these three devices will become clearer to the reader when their uses and procedures are described in detail. But before taking them up in order, it might be noted that the Privy Council exercised an admixture of powers in disregard of the doctrine of "separation of powers." (1) Disallowance was a legislative function, for though not a power to enact statutes it was a power to repeal them. (2) The veto power also was legislative because no statute to which it applied could be enacted without the assent of the Privy Council. (3) The Council also had full legislative power to enact laws by Orders in Council for colonies in which no local legislature was established, although because of this limitation this power did not extend to the thirteen American colonies. (4) In its capacity as the highest court of appeal over colonial courts it obviously exercised a judicial function. (5) It exercised an executive function in appointing and removing at pleasure numerous colonial officials, including colonial governors and judges.

Montesquieu, who saw in the British government a nice distribution into separate hands of the three types of functions, executive in the king and his ministers, legislative in Parliament, judicial in the judges, overlooked the exercise by the Privy Council of every one of the three types of power.
When the first English colonies were established in America, early in the seventeenth century, the Privy Council was the chief administrative and executive organ of English government in foreign and domestic affairs, as well as colonial. By the eighteenth century it had been displaced by the cabinet in foreign and domestic affairs, but it was still the chief and almost exclusive organ of colonial administration. Its loss of power in other fields had not diminished its authority over the colonies.¹

Englishmen spoke of administration of the colonies as belonging to the "prerogative of the Crown," or to "the King in Council." Orders in Council announcing the decrees of the Privy Council read: "His Majesty is pleased with the advice of his Privy Council" and orders as follows. Early in the eighteenth century this language had become as much of an obsolete fiction as the ceremonial expression that the laws of England were made by the king with the advice and consent of his Parliament. The truth is that the real decisions of colonial questions coming before the Privy Council were made by "the Committee" of the Council which was not attended by the king. The decision of the committee was reported to a formal meeting of the Privy Council, the king usually but not always present, and there automatically ratified. By fictitious verbiage an Order in Council purported to be an order of His Majesty. The king was the symbol of executive administration of the colonies. The real administrator was the Privy Council. It is true that the choice of persons to be Privy Councillors lay solely with the king, and they were dismissable at his pleasure. The logical deduction would be that the Privy Councillors were subservient to the king in fact as well as in theory, but the conventions of the British Constitution often belie logic. The number of Councillors also was determined by the king. The number varied almost every year, ranging from 52 in 1700 to 75 in 1760, about 65 being the average for this period. In 1711 the membership was 71, consisting of 14 dukes, 23 earls, the Archbishops of Canterbury and York, the Bishop of London, 13 executive and judicial officers of high rank, some other nobles and a few untitled persons. The 63 members in 1727 consisted of many noblemen, several politicians, the two archbishops, and several of the higher officials, including the five judges of highest rank, and the speaker of the House of Commons.²

The reader may draw his own conclusions as to the social and economic outlook of the Privy Council. This should be borne in mind when we come to consider the grounds upon which the Council repealed acts of colonial legislatures and, acting as the highest court of appeal, reviewed decisions of colonial courts.

It must not be supposed that all Privy Councillors attended even the formal meetings of the Privy Council, much less participated in the actual work done in committee. The quorum for a formal meeting was only six. Attendance varied much. There were very exceptional meetings of as high as 41, 48, 50, but more often 6, 7, 8, 10, and upward into the twenties. "In 1753, of a council that was composed of sixty-three members, there were more meetings of four, six, seven, or eight, than of twenty or twenty-four." 3 When attendance was large it was "doubtless out of compliment to his Majesty, and as a convenient method of seeing friends and of hearing the latest news." 4 For some Englishmen one could imagine no greater pleasure than sitting in a ceremonial meeting presided over by the king.

But "the Committee" that really made and formulated the decisions of the Council, how was it composed? Instead of special committees of designated persons, as formerly had been the usage, "the Committee" in the middle quarters of the eighteenth century was a committee of the whole, all the members of the Council, in the sense that any who chose to do so might attend. The committee was normally presided over by the Lord President of the Council, though his presence was not necessary. The rule was that any three or more Councillors attending constituted "the Committee." Many Councillors never participated in the committee. In 1718 when the Council numbered 70 only 19 different members attended one or more of the 22 committee meetings, and 12 of these came only three times or less. In 1731, only one-fourth of the forty meetings were attended by as many as eleven. "During 1728 the average attendance was about six, while meetings varied from three or four to nine, ten, or eleven." 5 While some important members of the Council were often present at committee meetings, including at times Councillors who were also Cabinet ministers, usually the latter did not attend. 6

Ordinarily, then, three to eleven Councillors exercised the important function of repealing colonial statutes and reviewing the decisions of colonial courts.

5. 2 TURNER, THE PRIVY COUNCIL, 1603-1784 (1928) 411.
6. 2 id. at 412-3.
But the committee did not act upon its own judgment alone. It had an important adviser in the Board of Trade. To complete the picture of the Privy Council as an imperial mechanism for setting at naught colonial legislation what the Board of Trade was and its part in the performance must be considered.

The "Lords of Trade and Plantations," more commonly called the Board of Trade, was commissioned by the Crown in 1696. For the next 86 years, with varying influence and varying activity it was the chief adviser of the Council in matters relating to trade and the colonies. Its creation was inspired by English merchants who wanted a special board of experts in both commercial and colonial affairs. It was given no executive, judicial, or legislative power or power itself to decide anything. It was an information gathering and advisory body, and the extreme limit of its authority was to make recommendations. Its chief concern was to be British trade, at home, with foreign countries, and with the colonies. Secondly, its commission directed it to consider means of "setting on work and employing the poor of our said kingdom, and making them useful to the public, and thereby easing our subjects of that burden." As if the poor were not also subjects! This second field for endeavor was completely ignored.

Thirdly, it was to gather information and formulate advice upon all problems of government in the colonies and their economic condition, chiefly to enable the central organs of control to protect imperial interests and make the colonies profitable to the mother country. The dominant purpose was economic planning in the interest of the people at home. Its advisory function with respect to the local governments in the colonies included drafting instructions to colonial governors, to be issued by the Privy Council; passing upon colonial governor's nominees to the executive and legislative colonial councils or upper chambers of colonial legislatures; passing upon the fitness of persons to be appointed chief justices and attorneys-general in the colonies; and, after 1752, recapturing from the Secretary of State power to nominate colonial governors in most of the colonies; thus advising upon all appointments in the colonies that were made by the Privy Council.

By correspondence with colonial governors, receiving their reports and the reports of secretaries in the colonies, hearing petitions

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7. The fullest studies of the Board of Trade are: DICKERSON, AMERICAN COLONIAL GOVERNMENT, 1606-1765 (1912); BASYE, THE LORDS COMMISSIONERS OF TRADE AND PLANTATIONS, 1748-1782 (1925); RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL (1915).
9. Id. at 20.
of merchants and any others complaining of any maladministration in the colonies, with power to examine witnesses under oath, the files of the Board became a storehouse of information on trade and the colonies. Parliament called on it for numerous reports and for the drafting of bills for laws affecting the colonies. Instructions to envoys sent abroad to negotiate commercial treaties were drafted by the Board. Even this enumeration of its various activities omits many. Moreover, it must not be supposed that it was always diligent and efficient. It passed through three cycles. Its personnel and activity were both high from 1696 to 1714, both low from 1714 to 1748, and both high again from 1748 to 1761 under the presidency of George Dunk, Earl of Halifax.

I have not yet mentioned a function of the Board which chiefly concerns us in our study of the control of colonial legislation. The Board’s commission directed it “to examine into and weigh such Acts of the [colonial] Assemblies . . . as shall from time to time be transmitted;” and to report on “the Usefulness or mischief thereof to our Crown, and to our Kingdom of England, or to the Plantations themselves” (note the order of importance) and “also to consider what matters may be recommended as fitt to be passed in the Assemblies there.”

The relative burden of this task of passing upon colonial statutes may be seen from the fact that in 1717 the Board set aside Mondays for reading “letters, petitions, memorials, and other papers;” Tuesdays and Wednesdays “for plantation business;” Thursdays “for trade” and Fridays “for the laws of the plantations.”

What was the personnel of the Board that had these important advisory functions? The incumbents of eight of the great offices of state were members by virtue of their offices, but by the terms of the Board’s commission they were not required to attend constantly. In the earlier years they sometimes attended but after 1748 practically never. There were eight other members. These received salaries and were regarded as the Board. While not of the highest rank politically, they usually were members of the House of Lords or the House of Commons, and some were Privy Councillors. It is interesting that John Locke, the philosopher, political scientist, and economist, was a member from 1696 to 1700; Matthew Prior, poet and playwright, 1700-1704; Joseph Addison, the essayist, 1715-1717;

and Edward Gibbon, the historian, held from 1779 to 1782 what he called "the convenient and respectable place of a Lord of Trade." Who did the heavy work of the Board? As usual the answer is the Secretary and the clerks. Not only all the laborious quill-pen transcribing of reports, of minutes, and copying of drafts, but no doubt a lot of the thinking. Especially is the latter true of the Secretary, who arranged the matters to be considered at every meeting, "who knew what was going on, who was familiar with the precedents and conducted the whole work of the office under the direction of the Board." Five men in succession filled the position of Secretary from 1696 to 1761, the first four averaging fifteen years of service. Even the clerks in practice, though not by law, had permanent tenure and served from youth to old age. Long-time consistency of various policies of the Board cannot be otherwise accounted for than by assuming much influence on the part of the nonpolitical permanent personnel.

The earlier practice of the Board was to refer all questions of law to the Attorney General or to the Solicitor General. Overburden of those officers resulting in delays led in 1718 to a lawyer, or King's Counsel, being assigned to the Board as its legal adviser. Thereafter, although questions of unusual importance were still referred to the Attorney General or to the Solicitor General, the burden of advising the Board on the fitness of colonial statutes "in point of law" was borne by their King's Counsel. Here again was an element of permanency, only three appointments in fifty years, Richard West, 1718-1725, Francis Fane, 1725-1746, and Sir Matthew Lamb, 1746-1768.

"Law reports, whether submitted by the attorney and solicitor general or by the king’s counsel, often consisted of the simple statement that certain acts, having been examined, appeared unobjectionable 'in point of law.' Or the law officer began by stating that certain acts were temporary and had expired, and that others were liable to no objection. The remainder he listed separately, with comments following the title of each. After a short discussion of an act there followed, as a rule, a definite recommendation that it be confirmed, or, in spite of objectionable features, allowed to lie by, or that it be disallowed. Criticisms were based primarily upon grounds of legality, although general considerations of policy and expediency were discussed as well. In the latter case, however, the law officer was more restrained in making definite recommendations as to the course which, in his judgment, should be pursued.”

14. DICKERSON, AMERICAN COLONIAL GOVERNMENT, 1696-1765 (1912) 76.
15. Id. at 77 n. 144.
Whether a statute was good "in point of law" usually meant was it enacted in violation of the limitations imposed upon colonial legislatures either by charter or governor's commission? A sample opinion of this character is given in the footnote.18

In short, the question often was the constitutionality of the statute as we use that expression today. By 1750 the Board was using our terminology when it asked whether a statute was "proper consistently . . . with the Constitution of said Province." 19 The common constitutional limitation, that colonial statutes be not repugnant to the laws of England, was quite vague, as we shall see, and gave room for adverse opinions based really upon social and economic predilections of the King's Counsel, or upon his sense of justice and propriety. The Privy Council, however, had power to disallow a colonial statute upon any ground whatever; it could rest its disallowance upon unconstitutionality, but it could disallow a clearly constitutional statute if it disapproved it on grounds of policy or expediency. So the recommendations of the Board of Trade could be based upon any objections it saw fit to make. The King's Counsel had the narrower task of reporting on the legality of the statute, its fitness "in point of law" but the point I am making is that this supposedly narrow task was not so narrow after all, because the vagueness of the constitutional limitation made constitutionality often turn really upon social and economic points of view.

"Points of law" were not confined to questions of constitutional power to enact the statute. Thus, the Attorney General and the Solicitor General advised against four acts of Jamaica on the ground that they belonged to a class which the governor was instructed not to

18. "To the Right Honorable the Lords Commissioners for Trade and Plantations.
"May it please your Lordships;

"In pursuance of your Lordships' desire, signified to us by Mr. Hill, in his letter of the 2d of April last, representing that your Lordships having under your consideration a memorial of several British merchants, praying the repeal of an act passed in the province of North Carolina in the year 1715, by the proprietors of the said province, entitled 'an act concerning attornies from foreign parts, and for giving priority to country debts,' and transmitting the annexed copy of the said act, and desiring our opinion with respect to the validity thereof, and whether the same is or is not repealable by the Crown, it having been continued in use and submitted to in the said province from the time of the passing thereof: we have considered the annexed law, and are of opinion that such part of it as postpones the execution on judgments for foreign debts, in the manner therein provided, is contrary to reason, inconsistent with the laws, and greatly prejudicial to the interests of this kingdom; and, therefore, unwarranted by the charter, and, consequently, void, and we are of opinion, that His Majesty may declare the same to be so, and his royal disallowance thereof.

"D. Ryder
"W. Murray.

"June 3, 1747."

Quoted from CHALMERS' OPINIONS (Am. ed. 1858) 402. The signers were respectively Attorney General and Solicitor General.

assent to, though the fact that a governor’s assent was given in violation of the Privy Council’s instructions was not regarded as making the statute constitutionally invalid.

Also, bad draftsmanship was regarded as a “point of law.” Thus, a statute of the Barbados Assembly made punishable a person who carried off or caused to be carried off any white servant. Attorney General Northey objected that “A man may innocently do” that, and advised that the act was “not fit to be approved” because it omitted the limitation “knowing such person to be a servant.” So Sir Matthew Lamb reported a 1747 statute of South Carolina “not fit” to be approved because “drawn and worded in so loose and incorrect a manner” though he did not object to its substance.

In no instance, it is said, did the Board’s recommendation of confirmation or disallowance of a statute run counter to the advice given it by the Attorney General or the Solicitor General, and advice given it by the King’s Counsel was rarely disregarded. “The influence of the Board’s legal advisers upon its policy in legislative review can scarcely be over-emphasized.” One must find a lack of sophistication, however, in this writer’s further statement that they “were veritable watch-dogs of legality. Their practised eyes were quick alike to note undue encroachments upon the domain of individual liberty, unwarranted violations of the security of private property and unseemly infringements upon the prerogatives of the crown.”

Whether these “undue encroachments,” “unwarrantable violations,” and “unseemly infringements” really were such would depend upon something more than the opinions of English government lawyers of the eighteenth century. Their education and social class gave them a conservative and traditional point of view.

Sometimes particular colonial statutes were brought to the attention of the Board of Trade by complaint of English merchants or by colonists whose interests were adversely affected by the statute. Connecticut and Rhode Island charters did not require those colonies to transmit their laws to the home government, though they intermittently yielded to insistence and did so, yet unremitting laws of those colonies were sometimes brought to the attention of the Board by private complaint and acted upon. Massachusetts and Pennsylvania, because of peculiarities in their charters, remitted their laws, as a rule, to the

20. CHALMERS’ OPINIONS (Am. ed. 1858) 431, 432.
21. Id. at 384-5.
22. Id. at 425.
23. RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL (1915) 68.
24. Id. at 69.
25. Id. at 103.
Privy Council, which referred them to the Board of Trade. The governors in other colonies were instructed to remit all laws direct to the Board of Trade. All acts passed during a session of the legislature were usually transmitted together. Thus, a great batch of laws might be dealt with in a single report of the Board, recommending the approval of some and the disallowance of others, and all disposed of in a single order of the Privy Council. Thus by Order in Council, October 31, 1751, eighty-nine acts of Virginia were acted upon, fifty-seven confirmed, ten disallowed, and the remainder left open for future consideration.26

At this point it will be well to sum up the procedure of the home government in disallowance of colonial statutes.

These statutes came either direct to the Board of Trade or were referred to it by the Privy Council. The first step by the Board was to refer them to one of its legal advisers for an opinion of their “fitness in point of law.” The legal adviser did not always give a mere closet opinion. Sometimes, at least, he heard arguments for and against the statute by legal counsel and others.27

Upon receipt of the legal adviser’s opinion, the laws were read aloud at the Board. If difficult or important questions were raised, consideration might be postponed and a day set for hearing interested and supposedly informed persons. Sometimes witnesses were summoned and examined under oath. Usually the agent for the colony appeared in support of the law. Sometimes opponents and supporters of the statute were represented by lawyers.28 Sometimes the Board sought the advice of other officers of government, as the treasury and commissioners of customs on laws affecting trade, or the Bishop of London on laws concerning morality or religion.

Consideration by the Board terminated in a “representation” or recommendation to the Committee of the Privy Council. Usually the committee accepted the recommendation of the Board without question and without deviation. Sometimes, however, in doubt or disagreement it referred the statutes back to the Board for further consideration. Sometimes it applied to the treasury or to the Attorney General for report. Sometimes the opponents and proponents of the statute filed written briefs with the committee and legal counsel were heard in oral argument. In some cases it rejected the recommendations of the Board and rendered a contrary decision. The power of decision rested alone with it. Finally the committee’s decision was read at a

26. Id. at 95; 4 Acts of Privy Council, Colonial Series, 1745-1766 (1911) 131.
27. See opinions in CHALMERS’ OPINIONS (Am. ed. 1858) 393, 458, 461.
formal meeting of the Privy Council, usually with the King presiding, and automatically adopted as an Order in Council.

Not only were many colonial statutes disallowed by this procedure, but some were confirmed. Indeed, the Board of Trade made three kinds of recommendations, either (1) that a statute be confirmed, or (2) disallowed, or (3) be permitted to "lie by probationary" until experience disclosed its merits or demerits, until, as the Board once said, "the Utility or Inutility" of the statutes might be "shewn by the Practice and Exercise of them." Where no supposedly clear ground for disallowance appeared, and no clear showing of harmlessness warranting confirmation, it was deemed better to let a statute lie by probationary, rather than confirm it because of two serious consequences of confirmation.

(1) It was accepted legal opinion that a colonial statute once confirmed by the Privy Council could not later be disallowed by it.29

(2) Confirmation by the Privy Council also imposed an obstacle to the ordinary process of repeal of the statute by the colonial legislature. Instructions to royal governors required them to refuse assent to any statute which repealed a confirmed law, unless the repealing statute contained a clause suspending its going into effect until the king, that is, the Privy Council, approved the repeal. The Board of Trade and the Committee of the Privy Council thought "no Circumstances or Necessity can justify" a departure from this instruction and acts repealing once confirmed statutes, without a suspending clause, were often disallowed.30 Consequently, the colonists sometimes complained not only of disallowances but also of confirmations.31

The most extensive investigator of this subject says, "Of 8,563 acts submitted by the continental colonies, 469 or 5.5 per cent. were disallowed by orders in council." Of this total of disallowed laws he found that New Hampshire had enacted 7.2 per cent of them; Massachusetts, 2.8 per cent; New York, 3.4 per cent; New Jersey, 4.5 per cent; Pennsylvania, 15.5 per cent; Virginia, 4.3 per cent; North Carolina, 8.8 per cent; South Carolina, 4.9 per cent; and Georgia, 9.4 per cent.32 Data for accurate computation does not exist, and the author claims only approximate correctness. At least thirty-one laws of Maryland while she was a royal province were disallowed,

29. Id. at 56, citing an opinion of Attorney General Northey in 1703, and an Order in Council in 1754 which assumes the correctness of this doctrine.
30. See, for example, 4 Acts of Privy Council, Colonial Series, 1745-1766 (1911) 133 et seq., 511; 5 id. 164.
32. Id. at 221.
33. Id. at 98.
and one each of Rhode Island, and Connecticut, none of which seems to be included in the above summary. It is safe to say that the number of American colonial statutes disallowed by the Privy Council exceeded 500.

Sometimes disallowance of its statutes resulted in serious consequences to a colony. The Board of Trade sent a long representation to the Privy Council

"in March, 1754, reviewing the history of elections in the colony of North Carolina, advising the repeal of a number of the colonial acts, and proposing certain instructions for Arthur Dobbs, who had already been appointed governor. About a month later, the King in Council acted upon this advice by repealing twenty-six of the most important laws of the colony. This remarkable action was taken in order to clear away the legal basis upon which the representative system had rested since the proprietary period and found it solely upon the royal instructions to the governor. Among the repealed acts were five laws relating principally to land matters passed forty years earlier, in 1715; twelve passed between 1722 and 1749, erecting counties or towns and conferring the right of representation upon them; still others were the elaborate election law of 1743, the vestry act of 1741, the reapportionment act of 1746, the seat of government act of the same year, and others of less importance. It is safe to say that no colony in the eighteenth century suffered such a complete demolition of the legal basis of its representative system, election customs, church organization and land laws as was here accomplished in North Carolina. For six years after this wholesale repeal there was no general election law..."

As in some of the instances just quoted, statutes were sometimes disallowed long after their enactment. Thus, a South Carolina statute to "encourage the settlement of South Carolina" enacted in 1696 was disallowed thirty-eight years later. In other instances laws that had been in force for a generation were disallowed. Based upon examination of the disallowance of 437 laws, an investigator has computed the approximate average time elapsed between enactment and disallowance as three years and five months, to which should be added one to three months for the Order in Council to reach the colony, at which time the disallowance became operative. In the meantime these

34. Id. at 103.
35. Ibid.
38. Id. at 223.
39. Id. at 222.
laws had been in effect, and acts done or rights accrued under them were unaffected by the repeal. The effect was the same as is produced today when a legislature repeals one of its former validly enacted statutes.

As we have seen there was no time limit within which the Privy Council must exercise its power of disallowance. Exceptions to this statement must be made with respect to laws of Massachusetts and Pennsylvania. It was expressly provided in the Massachusetts charter of 1691 that unless a statute of that colony was disallowed within three years of its receipt by the Privy Council, it should continue in full force to the date fixed in it for its expiration, if any, or until repealed by the colonial legislature. This charter required Massachusetts laws to be sent home "by the first opportunity after the making thereof." On the other hand, the Pennsylvania charter, fixed five years after the making of a statute as the time within which it must be transmitted to the Privy Council and allowed the latter only six months after receipt to disallow it, and if not disallowed within the six months, the statute was to "stand in full force, according to the true intent and meaning thereof." 41

The charter of Pennsylvania, though it was a proprietary colony, expressly reserved to the Crown a power to disallow the colony's laws. So there was express reservation of this power with respect to the eight royal colonies, Massachusetts by its charter and the others by the Governor's Commissions. 42 The Board of Trade in 1734 reported to the House of Lords that Maryland, Connecticut, and Rhode Island were not "under any Obligation by their respective Constitutions, to return authentic copies of their Laws to the Crown 43 for Approbation or Disallowance," and added: "there is also this singularity in the Governments of Connecticut and Rhode Island that their Laws are not repealable by the Crown . . . ." 44 This view seems supported by an opinion of Attorney General Northey in 1714. 45 In 1760, however, the Board asserted that the power of disallowance or "the king's final negative" rested in prerogative and was "necessarily implied, though it should not be actually expressed, in every charter by which

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40. I. POORE'S CHARTERS (1877) 952.
41. 2 id. at 1512.
42. See, for example, paragraph 9 of the Commission to Francis Bernard as Governor of New Jersey, 1758, in GREENE, THE PROVINCIAL GOVERNOR (1898) 225, 228.
43. The fact that both Rhode Island and Connecticut were urged to, and intermittently did, remit their laws (see RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL (1915) 103 n. 1) may have been wholly due to the need of them in judicial appeals from the courts of those colonies. See 4 Acts of Privy Council, Colonial Series, 1745-1766 (1918) 153.
44. 5 Connecticut Historical Society Collection (1896) 447.
45. CHALMERS' OPINIONS (Am. ed. 1858) 340.
the King gives permission to his subjects to make laws in America;"  

and that on this ground laws of Connecticut had been disallowed. In 1767 Lord Mansfield asserted that disallowance was "a prerogative of the Crown, which the King could not grant away or divest himself of, even by the most express words." Whatever was the correct theory, in fact the Privy Council did disallow at least one law of Connecticut, one of Rhode Island, and two of Carolina during the proprietary period, without any express reservation of power in their charters. There seems to be no instance of disallowance of a Maryland law enacted under her charter, though at least thirty-one of her laws enacted while she was a royal province, 1690-1715, were disallowed. Connecticut at least, never conceded the existence of the power. When notified that their law entitled "Hereticks" had been disallowed on a petition of English Quakers, the General Assembly proceeded itself to repeal it "so farre as it respects Quakers," but left it in force in other respects, thus impliedly denying the validity of the Privy Council's repeal.

The effect of an Order in Council disallowing a statute of a colony was to repeal it, and the repeal did not take effect until notice of the Order in Council was received by the colonial governor. To the question whether disallowance made a law "void ab initio," the Attorney General answered, "the acts of assembly are good till repealed, and, consequently, void only from notification of the repeal." The usual expression of an Order in Council was that the law is "hereby repealed and declared void and of none effect" or "hereby disallowed, declared void and of none effect," which must be understood as void in the future, that is, after notification of the repeal. The Massachusetts charter made this very clear, that "incase all or any" laws "presented to us . . . in Our . . . Privy Councill be disallowed . . . and soe signified by us . . . unto the Governor for the time being then such and soe many of them as shall be soe disallowed . . . shall thenceforth cease and determine and become utterly void and of none

46. 5 Statutes at Large of Pennsylvania 700-1 (1760).
47. Letter of Wm. Sam'l Johnson to William Pitkin, April 11, 1767. 9 Massachusetts Historical Society Collection (5th series, 1885) 222, 226.
48. 2 Acts of Privy Council, Colonial Series, 1680-1720 (1910) 832 (the law entitled "Hereticks").
49. 2 id. at 457.
50. 2 id. at 506-7.
51. For the disallowances, see 2 id. at 837-840. For records of inclusive action of "the Committee" during the charter period, see 3 id. at 252-3, 5 id. at 116.
52. 4 Col. Rec. of Conn. (1868) 546.
53. CHALMERS' OPINIONS (Am. ed. 1858) 276, 282.
THE BRITISH PRIVY COUNCIL'S POWER

The purposes which the British government attempted to effectuate by its control over colonial legislation were: (1) "to further the economic interests of the Empire as a whole," (2) "to enforce a rather close conformity both to the spirit and the letter of English law," (3) to preserve the supremacy of the central government, and (4) "to protect the colonists from the consequences of their own legislative indiscretions." The author I have quoted states these purposes a bit charitably and from the eighteenth century British point of view. Moreover, supposing that these purposes were all good, many specific instances of disallowance were not truly in furtherance of them. Particularly this is true with respect to the fourth purpose. Clearly, a small handful of British politicians, or even statesmen, with very imperfect channels of communication could hardly act wisely with respect to the internal economic and social conditions of colonies three thousand miles away. "The economic interests of the Empire as a whole" necessarily meant the interest of England first. He is a rare Englishman who in our time attempts to defend either the policies or the administration motivated by them.

The various grounds assigned by the Privy Council in disallowing about five hundred American colonial statutes have been stated in detail by able writers, and a complete survey or even a comprehensive summary will not be attempted here. A few miscellaneous examples will first be given. In 1700, the Pennsylvania legislature enacted a statute entitled, "An act for the Names of Days and Months" which, being short, may be quoted in full:

"Be it enacted by the Proprietary and Governor, by and with the advice and consent of the freemen of this Province and Territories in General Assembly met, and by the authority of the same, That it shall and may be lawful to call and write the months of the year and days of the week, as in scripture they are called, viz., the First, Second and Third, &c., months of the year, and

55. Poore's Charters (1877) 952.
56. See paragraph 10 of the Commission to General Bernard, cited in note 42 supra; Commission to Governor Slaughter of New York, 1689, in 3 Documents Relative to the Colonial History of the State of New York (1853) 624.
58. Keith, Constitutional History of the First British Empire (1930) 298.
the First, Second and Third days of the week, beginning with the
day called Sunday, and the month called March, according to the
English account." 60

By Order in Council this law was repealed. All that was said as
an objection to it was: "Every man may call the days and months as
he pleases. This act is insignificant and not fit to remain in force." 61
This instance presents disallowance at its worst. That the act was
"insignificant" would have been a good reason for tolerating the whim
of the legislature.

One of several instances of disallowance resulting from ignorance
of colonial conditions is that of a Pennsylvania election law of 1700.
It directed notices of an election to be posted upon trees or houses
along principal roads, upon the court houses "and public fixed meeting
houses for religious worship." The reason given for disallowance was
that "it ought to have been churches, chapels and public meeting
houses." 62 William Penn vainly argued, "A word no reason to lay
by . . . so material a law . . .; nor have we yet church places
[enough?] to authorize it." 63

Another statute of the same colony making it a penal offense for
anyone to "assault or menace his or her parent" or to "assault or
menace a magistrate" was disallowed because, consulting a dictionary,
it was found that "menace" was "too general and uncertain, and liable
to be construed according to the humor of the courts." 64 A lawyer
today would say that many statutes and constitutional provisions are
open to the same objection, but Penn said, "Let the simplicity of the
times in that wilderness excuse inexpertness." 65 Elsewhere I have
given examples of disallowance because of poor draftsmanship.66 The
statutes above seem to have had no significance to the empire beyond
the colony, and disallowance of them was step-mothering interference
with local discretion and local responsibility. A half century later the
Board of Trade tended more frequently to recommend confirmation
of laws "which appear to Us to relate only to the Private Oeconomy
of the province and to have been enacted for their particular Con-
veniency. . . ." 67 This later policy of hands off purely internal
affairs was not consistently pursued, however. Thus a Massachusetts

60. 2 Statutes at Large of Pennsylvania 19-20 (1700).
61. 2 id. at 449, 454, 455, 480.
62. 2 id. at 24, 26, 480.
63. 2 id. at 468.
64. 2 id. at 13, 479.
65. 2 id. at 467.
66. See p. 69 supra, and RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLA-
TION BY THE KING IN COUNCIL (1915) 142.
67. 4 Acts of Privy Council, Colonial Series, 1745-1766 (1911) 97-8. See other
examples in volumes 4 and 5.
law to limit by licensing the number of auctioneers was disallowed in 1774 solely because the power to grant licenses was lodged by it in the town selectmen, "when it is more fit that such power should be in-
trusted to" the royal Governor. 68

Sometimes laws which would have no effect outside the colony
were disallowed because deemed oppressive to the colonists. Thus, a
law of New Hampshire of 1758 to establish closed seasons for the
killing of wild deer, though admitted to have a good purpose, was
disallowed because the procedure prescribed for its enforcement vio-
lated British standards of justice in that (1) it put a burden of estab-
lishing innocence upon one who was accused merely upon suspicion,
(2) it permitted trial without jury, (3) it authorized search by game
wardens, without a magistrate's warrant, of "all places" in which con-
cealment of meat and skins of deer was suspected. 69

Sometimes laws were disallowed because deemed inadequate for
their purpose. Thus, a militia law of Pennsylvania of 1755 was dis-
allowed because (1) only voluntary enlistment was provided for, (2)
its members were to provide their own subsistence, (3) no person
under twenty-one could be enlisted, thus excluding "many able Bodied
Men fit for the service of their Country," (4) officers were to be
elected by ballot, and (5) the men were not to be compelled to go
more than three days march beyond the inhabited portions of the
province. Moreover, said the Privy Council, if the law were "never
so good and proper" it should be disallowed because its preamble
declared that the majority of the assembly are "principled against
bearing Arms" and that "to compell persons thereto would be to vi-
late a fundamental of the Constitution, and be a direct breach of the
Privileges of the People." 70 These Quaker tenets of themselves were
enough to cause the Privy Council to disallow the statute. The con-
scientious objector has no constitutional support in our own times. 71

Colonial laws affecting trade, shipping, and finance often did affect
the empire as a whole or home country interests in particular and the
disallowance of many of them is more understandable. A few ex-
amples will suffice. The Privy Council disallowed a Georgia law
which levied a duty on the exportation of raw hides because it would
enhance the price paid by English buyers and encourage "manufac-
tures" (processing the hides) in the colony. 72 The general commer-

68. 5 id. at 303.
69. 4 id. at 377.
70. 4 id. at 332.
71. See opinion of Mr. Justice Cardozo in Hamilton v. Regents of the University
of California, 293 U. S. 245, 265, 55 Sup. Ct. 197, 205, 79 L. Ed. 343, 354 (1934).
72. RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN
cial policy of England was to encourage the shipment of raw materials to England and the purchase of English manufactures by the colonists. Colonial statutes imposing high duties on the importation of slaves were disallowed on the ground that lessening this supply of cheap labor would increase the cost of production and the price of commodities wanted in England, and a decrease in production of such a commodity as tobacco would diminish the power of the colony to purchase English manufactures. A South Carolina law was commended because it offered a bounty to encourage the raising of flax but disallowed because it also offered a bounty to encourage the making of linen in the colony "which being a Manufacture of this Kingdom . . . the Establishment of it in the Colonies ought . . . to be discouraged." Two Virginia laws which forbade bringing tobacco from North Carolina into Virginia were disallowed because they would hamper the export to England of North Carolina tobacco through Virginia ports, northern North Carolina being portless, "with very bad Consequences to the Trade of this Kingdom from whence the Inhabitants of North Carolina have hitherto taken considerable Quantities of British Manufactures which they have been enabled to pay for by their Tobacco." A state law in the United States today of this character is forbidden by the Constitution of the United States as interpreted by the Supreme Court, a forbidden state interference with interstate commerce.

"Almost all the debtor and bankruptcy laws of the colonies—Massachusetts, Virginia, North Carolina, and others—were considered injurious to the British merchants." In disallowing a Massachusetts bankruptcy law, it was said that "in a colony where not above one tenth of the Creditors are resident" the law put absentee creditors to disadvantage, and in particular "English merchants." The injustice of local and diverse bankruptcy laws in the local units of a larger economic aggregate, led the colonists just emerged into independence to put into the Constitution of the United States a grant of power to Congress, "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The Supreme Court has construed this as permitting each state to have a bankruptcy law so

73. Russell, The Review of Colonial American Legislation by the King in Council (1915) 113.
74. Id. at 119; 5 Acts of Privy Council, Colonial Series, 1766-1783 (1912) 320.
76. United States Const. Art. I, § 8, cl. 3.
long, and only so long, as there is no national bankruptcy law in force but that in no case can a state bankruptcy law discharge the claims of nonresident creditors arising out of contracts made before the state bankruptcy law was enacted. While the Privy Council was always assiduous in protecting British creditors, creditors who resided in the home country, it also looked out for British debtors, home folks who were in debt to colonists. Laws were “almost universal in the American colonies” allowing a local creditor to attach the property of an absentee debtor, attachment laws of the kind now in force in probably every state in the United States. The Privy Council disallowed such laws unless limited to debtors who absconded or kept out of the colony to escape payment.\textsuperscript{79} They later weakened a bit, and confined their objection to the attachment of property of a debtor who had never resided in the colony,\textsuperscript{80} an illogical exception not made in modern attachment laws. Against these excepted debtors colonial creditors were put to the expense of bringing suits in England or wherever the debtors resided.

We pass to a ground for disallowance of great interest, disallowance of a statute for the reason that the legislature in enacting it exceeded the limit of its powers as fixed by the constitution of the colony—disallowance of statutes because unconstitutional, in the present day American sense of unconstitutional. In the constitution of every American colony, whether established by charter or by governor’s commission, was the limitation that colonial statutes should not be repugnant to the laws of England. There was also the similar but narrower restriction imposed by the Act of Parliament of 1696\textsuperscript{81} which declared void any colonial statute anywise repugnant to any Act of Parliament which was applicable to the colony. The principle of that statute seems absolutely essential to any federal system.

In the present day federal system in the United States as it exists in the relation of Congress to the state legislatures, the repugnancy of statutes of the latter to the constitutional statutes of the former is determined exclusively by the courts in exercise of the power vested in them by Articles VI and III of the Constitution. State laws in conflict with acts enacted by Congress in pursuance of its granted powers are held by the courts to be void. In our other federal system, that existing between Congress and the territories and other dependencies of the United States, the courts exercise this same power to adjudicate the invalidity of any statute enacted by the local units that is in conflict with any act of Congress applicable to that local unit.

\textsuperscript{80.} id. at 321.
\textsuperscript{81.} 7 & 8 Wm. III, c. 22, §9 (1696).
In this latter federal system there is an additional device, one addi-
tional to annulment by the courts, namely, the power of Congress to
disallow or repeal any statute of any subordinate legislature in our
imperial system. This device of disallowance, we shall see, was early
adopted by Congress with respect to territorial legislation. Just as
the Privy Council might repeal a colonial statute for any reason, so
may Congress for any reason repeal a statute enacted by the legis-
lature of any territory or other dependency of the United States. It
is not necessary for Congress to resort to this device, however, to
repeal local statutes on the ground of repugnancy to its own statutes
because the device of judicial annulment has proved thorough and
effective for this purpose in the United States. In the British colonial
federal system the device of disallowance was so fully developed and
so constantly employed for this purpose that it no doubt retarded the
development of the device of judicial annulment. The latter came
late, though, as we shall see, its superiority for some purposes to the
device of disallowance was perceived by the British before the Amer-
ican Revolution.

What Acts of Parliament enacted before the settlement of a colony
were regarded as carried there by the settlers and in force there was
always very obscure; 82 but as to Acts of Parliament enacted after the
settlement, those were in force there which “particularly mentioned” 83
the colonies or which by “express words” declared themselves ap-
licable to colonies in general, or to the colony in particular. 84 Square
conflict with the latter class of acts brought disallowance upon several
colonial statutes. Thus a Massachusetts statute was disallowed in
1719, because in conflict with the Navigation Act of 1660. 85 So an
Act of Jamaica was disallowed in 1762 because open to the construc-
tion that it forbade enemy goods captured as prize and brought into
Jamaica to be shipped to any other colony, “which is Undoubtedly
expressly contrary to the Laws of the Mother country,” 86 referring
to Acts of Parliament regulating colonial trade. Such square conflict
with an Act of Parliament was not necessary to justify disallowance
which could be exercised for any reason. Thus, it is not surprising to
find a Virginia law disallowed because it “may be said to Counteract
the Spirit of the Act of Parliament for the Transportation of Con-
victs” 87 to the colonies.

82. Sioussat, The Theory of the Extension of English Statutes to the Plantations,
1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 416.
83. Opinion of King’s Counsel West in 1720. CHALMERS’ OPINIONS (Am. ed.
1858) 206.
84. Opinion of Att’y Gen’l Yorke, 1729. Id. at 208.
86. 4 id. at 513.
87. 5 id. at 104. (Italics supplied.)
The prohibition of the charters and governors’ commissions not only forbade colonial laws “repugnant” to the statutes of Great Britain, but also to the “laws” of Great Britain which sometimes was construed as including the Common Law of England. The common law then constituted even more than today the bulk of the law of England. Nearly all the law governing ordinary social and business relations was found in the common law, the nonstatutory law stated only in the decisions of the courts and semi-authoritative private law books. It included nearly all of the law of contracts, of civil wrongs, of crimes, of domestic relations, and of property. Must the social life in the frontier colonies be governed by the same rules of law that governed the old and long settled society at home? No, it seems never to have been intended that colonial laws should conform fully to the common law of England. For this reason the limitation usually had the relaxing clause, “as near as may be agreeable to” or “so far as conveniently may be agreeable to” the laws of Great Britain. In fact, in their earlier periods nearly every one of the American colonies enacted extensive codes of law that departed materially from the rules of the common law, and in the main these codes went unquestioned.

Nevertheless, there were sporadic disallowances of statutes because of their variance from the common law. Thus, a South Carolina statute which gave settlers exemption for five years from suit for any debt contracted before arrival was disallowed because “in its own Nature repugnant to the Common Law of England.” Usually in such disallowances the law officers used the more general term “repugnant to the law of England.” So colonial statutes departing from the rule of primogeniture in the inheritance of real property were sometimes but not always disallowed. So statutes giving married women control and power to dispose of their separate property were disallowed. It was a bit too progressive “to alter the Law in so Settled and known a point.” So it was objected against a divorce law of Nova Scotia that it allowed divorce not only for the “usual causes” of impotence or adultery, “but also in the Case of Wilfull Desertion and withholding necessary maintenance for three Years together.”

Repugnancy to the common law was a vague and impractical concept. Consistently to enforce it would have involved imposing upon colonial legislation the extremely conservative standards of eighteenth

88. Reinsch, The English Common Law in the Early American Colonies, 1 Select Essays in Anglo-American Legal History (1907) 367.
89. 3 Acts of Privy Council, Colonial Series, 1720-1745 (1910) 396.
91. 4 Acts of Privy Council, Colonial Series, 1745-1766 (1911) 4; and see 4 id. at xvii.
92. 4 id. at 558.
century England. Not till a century later, however, did Great Britain wholly give up this requirement with respect to colonial laws. In 1865, Parliament enacted the Colonial Laws Validity Act \(^{93}\) which declared that no colonial statute should be regarded as repugnant to the law of England unless repugnant to an Act of Parliament or some order or regulation authorized by an Act of Parliament.

All instances of 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. That is, they had been enacted in violation of the limitation imposed upon the legislature by the colony’s constitution. In several disallowances this concept was expressed. So two laws of Carolina were disallowed in 1706 because “not warranted by the Charters of 1663 and 1665;” \(^{94}\) specifically, that they violated the limitations in those charters that the laws should “be consonant to reason, and as near as may be conveniently, agreeable to the laws and customs” of England. In another instance, in 1718, the Solicitor General recommended disallowance because the colonial legislature “exceeded” its power. \(^{95}\) In 1747 the Attorney General and Solicitor General advised that a North Carolina statute was inconsistent with the laws of England, “and therefore unwarranted by the charter, and, consequently, void” and that “his Majesty may declare . . . his royal disallowance thereof.” \(^{96}\)

In 1705 a Connecticut law entitled “Hereticks” which contained a provision that “All who shall entertain any Quakers, Ranters, Adamites and other Hereticks are made liable to the Penalty of Five Pounds” was disallowed for the reason that it was “contrary to the Liberty of Conscience, Indulged to Dissenters by the Laws of England, as likewise to the Charter granted to that Colony.” \(^{97}\)

To this class belongs the disallowance of a Massachusetts statute which empowered a town to regulate fishing in the coves within the town. It was disallowed because of a special limitation in the charter that nothing therein should be taken to abridge the rights of any British subject to fish in the coastal waters of the colony. \(^{98}\)

This disallowance of laws “not warranted” by the colonial constitutions has led some writers to find a closer analogy between disallowance and judicial annulment than exists. The procedures clearly differed. Examples have been pointed to, however, in which the language

\(^{93}\) 28 & 29 Vict., c. 63 (1865).
\(^{95}\) 2 id. at 740.
\(^{96}\) Opinion quoted in note 18 supra.
\(^{97}\) 2 Acts of Privy Council, Colonial Series, 1680-1720 (1910) 832.
\(^{98}\) 5 id. at 395; see 1 Poore’s CHARTERS (1877) 954.
used in a disallowance Order in Council purports not merely to repeal the statute for the future but to declare it void as of the date of its enactment. In the following discussion it will appear, however, that these exceptional expressions were definitely repudiated by the Privy Council as erroneous. Many disallowed laws had full or partial effect before the Privy Council could act upon them and notice of the action reach the colony. Fretting over this, and the circumvention of disallowance by the frequent colonial practice of enacting statutes to last for a year only and re-enacting them annually, the Council was groping at times toward the concept that a statute in violation of a constitutional limitation was void \textit{ab initio}, void of itself, without disallowance. So long as this remained an abstraction it was of no significance. A statute might be theoretically a nullity from its enactment but if it was acted upon, if it was enforced by colonial administrative officers and courts, and no organ of government could authoritatively decide that it never had been a valid law, and enforce its decision, the supposed nullity would be a pure abstraction. In 1727, as we shall see, the Privy Council acting in its judicial capacity as the highest appellate court over colonial courts, held that as a court it could decide, in a private law suit, that an unconstitutional statute was no law at all, or void \textit{ab initio}, and refuse to give it any effect as between the parties to the suit. This appellate decision of 1727 carried the logical implication, as we shall see, that the colonial courts of first instance might also exercise this power. But this mode of determining retrospectively that a statute was still-born could operate only if the parties to a law suit raised the issue. If British lawyers of the eighteenth century had had the fertility of American lawyers of the nineteenth, they might have discovered the device of applying to a court for an injunction to restrain administrative officers from enforcing an alleged unconstitutional law. Armed with this weapon, the colonial attorneys general, representative of the Crown in each colony, appearing before his Majesty's courts in the colonies could have put these unconstitutional statutes to immediate and retrospective death.

But the Privy Council in its administrative capacity, armed only with the power of disallowance, could only mutter about unconstitutional laws being void \textit{ab initio}, and do nothing but repeal them. In a very interesting instance this was clearly recognized by the Council in 1767.

Massachusetts the year before had passed a statute to compensate the officers and others for the losses inflicted upon their property by mobs in the Stamp Act riots. This was commended. Indeed, it had

been suggested by a resolution of the House of Commons. But the colonial legislature had included in the statute a free and general pardon of all the rioters, including some that had been tried and convicted in Hampshire County. This legislative pardon clearly violated a charter provision which vested the power to pardon in the governor or in cases of wilful murder and treason in the Crown. The statute had been passed in December. What could the Privy Council do the following May? The money they thought might already have been paid out, to that they did not object, but what of the pardon? Prosecutions had been suspended, and no doubt the convicted felons had been discharged. The Committee of the Council “looking upon the matter of declaring the Act Null and Void Ab initio to be of great importance” had search made of the precedents, and consulted the Attorney and Solicitor General. They found indeed a few apparent precedents. Thus in 1699 an Order in Council had declared a law of Pennsylvania “null and void from the time of making the said act.” The Committee definitely decided that these sporadic precedents had used erroneous language. All the precedents adduced had clearly been instances where the action actually taken was ordinary disallowance, 10o repeal as to the future. The Committee “after a diligent inquiry into precedents, recommended that the act be disallowed,” with express reservation “of any question touching the Nullity of the Act . . . , ab initio, whenever the same may judicially come into question.” 101 They may have glimpsed the idea that in subsequent prosecutions of the rioters, the courts might hold the pardon statute void ab initio, and the supposed pardon no defense. But it seems that no subsequent prosecutions ever took place. 102 So the Privy Council showed itself well aware of the distinctions between disallowance and judicial annulment. Not only did the Council’s procedure in the exercise of the two powers differ, and the effects of their exercise differ, but there was a third difference. Courts, even today, profess to have power to declare a statute null only when it is enacted in violation of a constitutional limitation. They profess to have nothing to say about the policy, wisdom, or expediency of the statute, but to be confined solely to the question of constitutionality. On the other hand, in the instances in which the Privy Council gave unconstitutionality as

100. One alleged precedent produced was an Order in Council declaring a Jamaica law of 1750 “ipso facto null and void.” When we look to the original record we find that the Committee of the Privy Council found the law to be repugnant to a British statute and “therefore” by the Act of 1696 the “Law is ipso facto null and void and ought to be so declared by Your Majestys Order in Council.” But they did not end there; they proceeded to recommend “your Majesty to rescind this Law.” 4 Acts of Privy Council, Colonial Series, 1745-1766 (1911) 518. Cf. Keith, Constitutional History of the First British Empire (1930) 249-251.
102. A full account of this episode is given in 3 Hutchinson, The History of the Province of Massachusetts Bay (1828) 151-160.
a ground for disallowance, their power to disallow the statutes did not depend upon that reason. The statutes might have been disallowed for any other reason they saw fit to assign. Had the Council disallowed the statutes "upon a mere consideration of their general inexpediency," it would have been acting within its power. In the quaint and fictitious language of 1760, "His Majesty has an undoubted right to examine into the merits of . . . every . . . provincial law" and to disallow it "upon any good reasons which may be suggested to him by the wisdom of his privy council." 104

Such was the remarkable device of disallowance, a device by which a handful of conservative and reactionary men were able to substitute their judgment for that of the legislatures in the colonies. Voting their social and economic predilections and umpiring the federal system in the interests of the governing classes at home, they set aside more than five hundred American colonial statutes.

Their record may be compared with that of American courts in the nineteenth and twentieth centuries, exercising the kindred device of judicial annulment. In one narrow field alone, that of legislation intended specifically to benefit the working classes, American courts, down to 1922, had annulled more than three hundred statutes. 105 Though purporting to find in each instance that the statute declared void was in conflict with some provision of a constitution, state or national, the result was arrived at, not in every case but in many instances, by strained or perverted interpretations which judges uninfluenced by their social and economic predilections would not have read into the constitutions. Abusing the power given them to hold unconstitutional statutes void, these courts composed of a handful of conservative and even reactionary men converted the power of judicial annulment of unconstitutional laws into the broad power legally given the Privy Council to nullify any law that to them seemed objectionable. Although the two devices, disallowance and judicial annulment, differ in procedure and differ in their effects, the one repealing a statute, the other declaring original nullity of it, yet it is obvious that the newer device, when operated by willing men, may be an equally powerful restraint upon law-making.

Privy Council's Veto Power

We shall now consider how the Privy Council sought and sometimes attained an additional power to restrain colonial legislatures—a

103. Report of the Board of Trade, June 24, 1760. 5 Statutes at Large of Pennsylvania 697, 699 (1760).
104. 5 id. at 701.
veto power. In each of the eight American colonies that were royal provinces, the Crown-appointed governor had an absolute veto over the enactments of the colonial legislature. This resulted from the provision of the governor's commission, the constitution of a royal province, that laws could be enacted only with the assent of the governor, who was thus made a third branch of the legislature. This veto power was thus vested in an official of the local government and not in the Privy Council.

In the seventeenth century when most of the American legislatures were created it must have been thought that the governor's veto and Privy Council disallowance would be adequate controls. Early in the eighteenth century, however, the home authorities came to consider these controls insufficient. A law objectionable to the home government might be in force for years before it was brought to the attention of the Privy Council; and disallowance stopped only its future operation. Moreover, legislatures not infrequently evaded disallowance by enacting laws of short duration, keeping them alive by reenactment. Governors residing in the colonies, more aware of local needs and subject to local influences, were often induced to sign bills in violation of instructions, either by political coercion or out of conviction that the law was needed.

How could the home government acquire a veto, a veto in addition to that of the colonial governor, one to be lodged in and exercised by home officials? Parliament later solved this problem in the Quebec Act of 1774,106 which was the organic act or constitution for the Province of Quebec. It clearly grasped the distinction between disallowance and veto. By Article XIV it reserved to the Privy Council a power to disallow any ordinance whatever of the Quebec legislative council, and by Article XV a power to veto ordinances on particular subjects. Article XIV required every ordinance enacted by the council with the governor's consent to be "laid before his Majesty for his royal approbation; and if his Majesty shall think fit to disallow thereof, the same shall cease and be void from the time that his Majesty's order in council thereupon shall be promulgated at Quebec." On the other hand, Article XV reserved a veto by providing, "That no ordinance touching religion, or by which any punishment may be inflicted greater than fine or imprisonment for three months, shall be of any force or effect, until the same shall have received his Majesty's approbation." In the latter case an express veto by the Privy Council or a silent one by inaction prevented the bill from becoming a law; while its inaction in the former case, its failure to disallow, left the statute in full force.

106. 14 Geo. III, c. 83 (1774).
This device of reserving to the Privy Council, by the constituent instrument, a veto over colonial laws of specified subject-matters continued to be used in the British colonial system after the American Revolution, as, for example, with respect to several colonies in Australia until past the middle of the nineteenth century. But in none of the charters or governor's commissions in force in the thirteen American colonies in the eighteenth century had such a reservation been made, except in a single insignificant instance. This exception was in the Massachusetts charter of 1691, reserving a veto to the Crown over legislative grants of public lands lying within certain stated bounds.

Instead of resorting to Parliament to remodel the American constitutions, the Privy Council undertook to acquire by its own action a veto over particular types of American colonial laws. This it sought to do by instructions to royal governors of two kinds, (1) that they should refuse assent to laws on specified subjects until the consent of the Privy Council was first obtained, and (2) that they were not to sign bills on particular subjects unless they contained in themselves clauses suspending their becoming operative as laws until the Privy Council's consent was obtained. Device (1) became familiar in the British colonial system after the American Revolution as the power of a colonial governor "to reserve bills." I refer to the discretionary power given, for example, to the Governor General of Canada, by the British North American Act of 1867, with respect to bills passed by the Canadian Parliament.

"55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, . . . either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure."

"57. A Bill reserved . . . shall not have any Force unless and until, within Two Years . . . the Governor General signifies . . . that it has received the Assent of the Queen in Council."

107. See Jenkyns, British Rule and Jurisdiction Beyond the Seas (1902) Appendix viii. The device above referred to is distinguishable from the discretionary power frequently given colonial governors in the nineteenth century, either to approve, veto, or reserve bills for home government approval. In the instances referred to above, reservation was mandatory, with respect to bills on particular subjects. Where reservation is discretionary, the governor may approve, making the law effective until disallowed. Where reservation is mandatory no law comes into force until and unless the Privy Council assents.

108. The Massachusetts Charter granted a general power to the Governor and legislature "to make or passe" grants of public lands with an exception, that grants "made or past" of lands within specified bounds are to be of no "force validity or Effect until Wee . . . shall have Signified Our . . . Approbacon of the same." I Foore's Charters (1877) 952-3.

109. See note 107 supra.

110. 30 & 31 Vic t. c. 3 (1867).
Device (1) was thus included in the constituent act for Canada. For the American colonies it was found only in instructions to governors. Although so included it seems to have been rarely complied with by American colonial governors and very little insisted upon by the home government. It was on device (2), the suspending clause, that the Privy Council pinned its hopes.

A very important instruction in a typical form attempting to establish these two devices may now be quoted. The reader will note the dissatisfaction expressed in the first clause over one of the defects of disallowance and, secondly, the broad terms used in describing the kinds of laws to which the two new devices were to be applied.

"And whereas great mischiefs may arise by passing bills of an unusual and extraordinary nature and importance in the plantations, which bills remain in force there from the time of enacting until our pleasure be signified to the contrary; we do hereby will and require you not to pass or give your consent hereafter to any bill or bills in the assembly of our said province of unusual and extraordinary nature and importance wherein our prerogative or property of our subjects may be prejudiced, without having either [device (1)] first transmitted unto us the draft of such a bill or bills and our having signified our royal pleasure thereupon, or [device (2)] that you take care in the passing of any act of an unusual and extraordinary nature that there be a clause inserted therein suspending and deferring the execution thereof until our pleasure be known concerning the said act, to the end our prerogative may not suffer and that our subjects may not have reason to complain of hardships put upon them on the like occasions." 111

This instruction seems to have been first sent in 1706. The following sent to all royal governors in America in the seventeen twenties was also very sweeping in intention.

"And whereas laws have formerly been enacted in several of our plantations in America for so short a time that the royal assent or refusal thereof could not be had thereupon before the time for which such laws were enacted did expire, you shall not therefore give your assent to any law that shall be enacted for a less time than two years, except in the cases mentioned in the foregoing article; 112 and you are not to reenact any law to which the assent of us or our royal predecessors has been once refused without express leave for that purpose first obtained from us upon a full representation by you to be made to our Commissioners

111. I. Labaree, Royal Instructions to British Colonial Governors (1935) 141-2. This quotation and the next following are published here with the courteous consent of the author and of the publisher, D. Appleton-Century Company.

112. This article permitted laws taxing "wines or other strong liquors" to be of one year's duration.
for Trade and Plantations of the reason and necessity for passing such law, nor give your assent to any law for repealing any other law passed in your government whether the same has or has not received our royal approbation unless you take care that there be a clause inserted therein suspending and deferring the execution thereof until our pleasure shall be known concerning the same.”

Other instructions than those above quoted commanded the governors to resort to one or the other of the two devices with respect to bills for the issuance of paper money, bills affecting the trade or shipping of Great Britain, and all private acts.

If the governors had reserved all bills required by these instructions to be reserved, and under threat of governors’ vetoes the legislatures had inserted suspending clauses in all statutes of the character mentioned, the Privy Council would have secured a veto on almost all important legislation. The broad terms of the first instruction included a wide range of laws, and the second was far more inclusive than a casual reading discloses. Of the last quoted instruction it has been said:

"On its face the latter part of this rule applied only to bills which actually repealed former laws. But in practice the Board of Trade interpreted the word 'repeal' to include partial as well as entire repeal, so that the instruction really prohibited revision or amendment, as well as entire repeal, of any act once passed unless the new bill should be suspended until the king gave his consent." 115

By the middle of the eighteenth century the natural process of legislation had provided all the provinces with laws on nearly every important subject. As time went on it became increasingly difficult to pass any new act without in some way altering a previous law on the same subject. So the suspending clause became more and more frequently necessary, even for what might be called ordinary legislation. The assembly found it harder each year to take effective and prompt action on matters of local concern.”

The enforcement of the suspending clause requirement presented a difficulty. Legislatures were reluctant to insert such clauses, partly on principle, and rightfully asserting that they were not bound by instructions to the governor, but chiefly because of the long delays before home action would be taken and reported. “During a large part of the eighteenth century the Board of Trade was notorious for its delays and

114. See the authoritative and full discussion of this subject in Labaree, Royal Government in America (1930) ch. 6, and the same author's two volumes on Royal Instructions to British Colonial Governors (1935).
115. Labaree, Royal Government in America (1930) 252.
116. Id. at 256-7. This quotation is published here with the courteous consent of the author and of the publisher, Yale University Press.
procrastination."\textsuperscript{117} The procedure for acting upon a bill reserved or one with a suspending clause was the involved procedure used in disallowance, described earlier in this chapter.\textsuperscript{118}

Governors frequently were induced to sign bills without suspending clauses, in violation of instructions. Then the only remedy was disallowance. The governor's assent defeated the Privy Council's attempt to acquire a veto power.

In some instances the Privy Council disallowed laws of the kinds included in the suspending clause instructions solely because they lacked the clause, but usually when this ground was assigned there was added one or more other reasons. This alone shows that governors frequently disregarded the instruction. Often governors were reprimanded and even threatened with recall for doing so. In several instances laws impressed the Privy Council as so sound and needed that they confirmed them in spite of the lack of suspending clauses.\textsuperscript{119}

This attempt by means of instructions to governors to secure to the Privy Council a veto met with only partial and sporadic success. It is said that Massachusetts never yielded compliance with the suspending clause instructions.\textsuperscript{120} Her governor was appointed by the Crown after 1691 and subject to these instructions and undoubtedly numerous of her laws fell within the categories embraced by them, yet only three of her statutes were disallowed for lack of suspending clauses.\textsuperscript{121} On the other hand Virginia often, but not always, submitted to the requirement.\textsuperscript{122} How it went in other royal colonies I have not inquired, but it is said that no royal colony escaped disallowance of at least one of its laws for lack of a suspending clause.\textsuperscript{123}

The proprietary governors of Pennsylvania, Delaware, and Maryland were not subject to royal instructions and they could have no force in Connecticut or Rhode Island whose elective governors had no veto power.

While Massachusetts resisted the suspending clause instructions, her governor several times complied with the instruction requiring certain kinds of bills to be reserved for home government consent before he signed them.\textsuperscript{124} Governor William Shirley "reduced the proceeding

\begin{thebibliography}{99}
\bibitem{117} Id. at 256.
\bibitem{118} See 4 Acts of Privy Council, Colonial Series, 1745-1766 (1911) 28; 5 id. at 505.
\bibitem{119} See, for examples, 4 id. at 88, 95-6, 133; 5 id. at 503-5.
\bibitem{120} \textit{Russell, The Review of American Colonial Legislation by the King in Council} (1915) 214.
\bibitem{121} Dorland, \textit{The Royal Disallowance in Massachusetts} (1917) 22 Queen's University Bulletin 17, 32.
\bibitem{122} Labaree, \textit{Royal Government in America} (1930) 256 n. 77.
\bibitem{123} Id. at 253.
\bibitem{124} Except while Maryland was a royal province, 1690-1715.
\bibitem{125} \textit{Russell, The Review of American Colonial Legislation by the King in Council} (1915) 214 n. 1.
\end{thebibliography}
almost to a farce" by asking home government consent before signing a bill which repealed a former law that had granted a bounty for the killing of crows and blackbirds. "The Board of Trade solemnly commended his action but expressed a wish that he had followed the more usual method of including a suspending clause." 126 The suspending clause instructions, though originating long before the reign of George III, and though they were the instruments of the Privy Council rather than of the King, were charged in the Declaration of Independence as one of the King's "usurpations" tending to establish "an absolute Tyranny."

"He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them."

While in post-independence America the suspending clause device seems never to have been used to get a central government veto on the legislatures of Territories or colonies of the United States, the companion device of reserving bills for the same purpose has been imitated. The Act of Congress of April 30, 1900, the Organic Act for the Territory of Hawaii, granted broad legislative powers to the legislature of Hawaii, subject to many limitations, and reserved to Congress a veto of bills for legislation on particular subjects, by the provision: "but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress." 127 Many "acts" enacted by the Hawaiian legislature with the approval of the Governor of Hawaii have been submitted to Congress in compliance with this requirement. 128 Many have been "ratified, approved and confirmed" by Congress by means of a statute enacted in the manner all other acts of Congress are enacted. A refusal of Congress to take any action would be a silent veto. While the Hawaiian legislature and governor may go through all the forms required to enact statutes, acts of the character here involved are not really statutes, and have no effect as such until the approval of Congress is obtained. Congress, being armed not only with this veto power, but also with the supreme legislative power over Hawaii in all cases whatsoever, in confirming these Hawaiian reserved acts sometimes confirms them with amendments made by itself. 129 Hawaii has

126. LABAREE, ROYAL GOVERNMENT IN AMERICA (1930) 254.
128. See examples in 34 Stat. 309, c. 3441; 36 Stat. 845, c. 419; 39 Stat. 38, c. 53; id. 39, c. 54; id. 57, c. 95; id. 229, c. 155.
129. See examples in 33 Stat. 227, c. 1405; id. 231, c. 1406.
no choice with respect to such amendments and must accept them as made by Congress.

Moreover, by the Hawaiian Organic Act a veto is reserved to the President of the United States over legislative acts authorizing the incurrence of public debt and the issuance of public bonds, in certain cases: "Nor shall any such bond or indebtedness be issued or incurred until approved by the President of the United States." 130

So by the Act of Congress, known as the Jones Act, which was the constitution of the Philippine Islands from August 29, 1916, to November 14, 1935, an absolute veto was reserved to the President of the United States over acts of the Philippine Legislature respecting customs duties, immigration, currency, and coinage. The President had six months in which to veto. At the end of that time the proposed statute became a law if the President failed to act.131 A like veto is still preserved to the President, since the establishment of the Commonwealth of the Philippine Islands, over "Acts affecting currency, coinage, imports, exports, and immigration" 132 and over every amendment made by the Philippines to the Commonwealth Constitution.133

By the earlier Jones Act, over all other Philippine statutes than those listed above the President had a veto in some circumstances. The Organic Act gave a qualified veto to the Governor General. If the Philippine Legislature repassed the act over the Governor's veto by a two-thirds vote of both houses, and the Governor did not persist in his disapproval, the Act became a law without being submitted to the President, but if the Governor persisted in his disapproval it was submitted to the President, who then might veto it or approve it.134 If the Governor's objection twice made was concurred in by the President, this triple veto was final. In this legislation there was an apparent reluctance to let one man silence the popular voice, except with respect to currency, coinage, immigration, and customs duties. The vetoes just described were strictly such, preventing the enactment of laws. Moreover, these vetoes, like those sought by the Privy Council, were in addition to a power of disallowance, for Congress reserved, by the Jones Act, a power to annul or repeal, that is, to disallow, any Philippine statute whatsoever.135 We shall have more to say later136 of other

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130. 31 STAT. 151 (1900), 48 U. S. C. § 562 (1940).
133. 48 STAT. 460 (1934), 48 U. S. C. § 1237 (1940). See also 48 STAT. 461 (1934), 48 U. S. C. § 1237 (1940), for a power in the President "to suspend the taking effect of or the operation of any law . . . which in his judgment" will have certain bad effects.
135. Ibid.
136. The reference is to a chapter not yet published.
uses of the disallowance device by the United States in control of its "colonial empire. It is interesting to note that imperialism as practiced by twentieth century Americans supplemented the disallowance power by a veto in some instances for the same reasons, no doubt, that led the Privy Council to attempt to do so in the eighteenth century.

At the opening of this paper it was stated that the Privy Council was vested with still a third device with which to defeat colonial legislation—its power in its capacity as the highest appellate court in the colonial system to hold unconstitutional colonial statutes null and void. A chapter on the history of the origin and use of this device has already been published in this Review.137