Emulation and Designed Divergence: Ordering the British Empire with Commercial Law

In October 1771, the Jamaican plantation manager William Smalling wrote to his employer, Joseph Foster Barham in London, regarding the legal status and management of estates that had belonged to Barham's deceased brother Thomas. Exasperated by the slow pace of affairs and the ignorance of the London lawyers handling the estate, Smalling complained that, "Your Lawyers know little of our Constitution which differs from Gr Brittains."[1] We should not be surprised to read of colonists making references to the difference between their constitutions and England's in this period. Except that in this instance the points in dispute had nothing to do with the liberties of subjects, the rights to representation, or the extent of parliamentary sovereignty—all familiar elements of the imperial crisis of the 1770s. Instead, according to Smalling the differences lay in the legal rules surrounding inheritance, property, and other matters of private law. This letter speaks to the invisible and yet very real legal borders that crossed the British Empire.

The Empire was managed centrally from London, but it comprised individual units with their own laws and even legal systems. Scholars often refer to this phenomenon of overlapping and competing laws and legal systems "legal pluralism."[2] The strongest and most rigid of these divisions separated England and Scotland, with the latter retaining its own legal order even after the Union of 1707. The Empire was subject to a fragmented legal system. English law applied

[1] William Smalling to Joseph Foster Barham, October 19, 1771, Bodleian Library, Barham Papers, MS Clar. Dep. c. 357/2, folder 2.

[2] We can take legal pluralism to be "the idea that in any one geographical space defined by the conventional boundaries of the nation state, there is more than one 'law' or legal system." Margaret Davies, "Legal Pluralism," in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert M. Kritzer (Oxford, 2010), 806. This definition is convenient for its simplicity, though scholars of legal pluralism accept that it can exist in spaces not defined by nation states. Sally Engle Merry writes of legal pluralism as a "situation in which two or more legal system coexist in the same social field." In the context of the British Empire, it is useful to keep the different borders of both the nation state and the social field in mind as sovereignty was frequently questioned and individuals mobile. Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (January 1988): 870.

DRAFT

in the colonies, though each colony developed its own modifications, and there was no unified or harmonized imperial law throughout the Empire. The only truly imperial legal bodies were Parliament, which could legislate, and the Privy Council, which served as the Empire's ultimate court of appeal and had the power to disallow colonial laws, often with the advice of the Board of Trade.

As Smalling's letter demonstrates, private law matters – those dealing with property, inheritance, contract, and other relations between individuals – had profound implications for the ways imperial actors went about their business. While the imperial crisis of the 1760s and 1770s provoked an outpouring of proposals for reforming the constitutional and political relationships between metropole and colony, then and since, private law, especially commercial law, had a fundamental, and underappreciated, role in structuring the Empire. Narrowing the scope of analysis to commercial law uncovers elements of the nature, management, and ordering of the Empire otherwise obscured by attention to the more famous issues of the colonies' constitutional relationship to the monarch and parliament. Here we are focused on issues of commerce and trade, not on matters of sovereignty, the rights and liberties of subjects, and other aspects of the relationship between the state and the individual.

While often not explicitly connected to debates about sovereignty or political rights, the powers to regulate commercial life, including property and trade, were widely accepted as part of Parliament's purview.[3] Indeed, Smalling's letter demonstrates that private law could be framed using the language of constitutionalism. Yet rather than concentrating on the theoretical and constitutional underpinnings of those rights, investigating their operation through commercial law reveals fundamental patterns and structures in the operation and management

[3] Julian Hoppit, *Britain's Political Economies: Parliament and Economic Life, 1660-1800* (Cambridge, 2017), 15-28; Perry Gauci, ed. *Regulating the British Economy, 1660-1850* (London, 2011).

of the Empire. With goods, capital, and people moving around and through the British Empire in dizzying webs of complexity, influential merchants and imperial administrators sought to direct those flows. It is well-known how powerful groups in the metropole attempted to shape state policy through the Navigation Acts, the chartering of monopoly companies, currency policies, and other measures of political economy.[4] Private commercial law offered another arena for imperial and commercial management.

Commercial law enabled the Empire to be ordered – stratified into unequal regions with defined roles in the empire's economic and political system – in ways that complemented public law measures. The differences in law around the Empire created opportunities for such ordering. Most imperial jurisdictions followed some form of English law, a dynamic termed "legal latitude" below. Legal latitude prevailed between colony and metropole and between colonies. Merchants and lawyers, in the center and on the periphery, improvised, innovated, and found solutions to manage imperial legal difference and in the process created the legal infrastructure trade required to flourish. Parliamentary legislation in the eighteenth century serves as the epitome of these efforts. The legal infrastructure Parliament constructed served as the Empire's ligaments, connecting disparate and distant colonies to each other and to the metropole, in the process providing a means of ordering and organizing the Empire. Key to that ordering was the development of laws that created and exploited legal differences between

[4] See, for example, Charles M. Andrews, *The Colonial Period of American History*, vol. 4: *England's Commercial and Colonial Policy* (New Haven, 1964); Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (New York, 2011); William A. Pettigrew, *Freedom's Debt: The Royal African Company and the Politics of the Atlantic Slave Trade, 1672-1752* (Chapel Hill, 2013); Abigail L. Swingen, *Competing Visions of Empire: Labor, Slavery, and the Origins of the British Atlantic Empire* (New Haven, 2015); Joseph A. Ernst, *Money and Politics in America, 1755-1775: A Study in the Currency Act of 1764 and the Political Economy of Revolution* (Chapel Hill, 1973); Steve Pincus. "Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries." *The William and Mary Quarterly* 69, no. 1 (2012): 3–34; Steve Pincus, *The Heart of the Declaration: The Founders' Case for an Activist Government* (New Haven, 2016). Andrew O'Shaunessy notes that in the 1760s British policy measures, including the Sugar Act, Currency Act, and Townshend Acts, "increasingly discriminated against the North American colonies in favor of the British West Indies." Andrew Jackson O'Shaunessy, *An Empire Divided: The American Revolution and the British Caribbean* (Philadelphia, 2000), 106.

DRAFT

colony and metropole. These laws eased the movement of capital from center to periphery, bolstering the wider imperial economy. Trade, and the laws governing it, impelled the empire not just to expansion but also to connection and integration through this exploitation of legal difference.

In the context of the eighteenth-century British Empire, a spectrum existed for imperial legal policy, with complete uniformity and total disarray at either end. The two most prevalent policy ranges lay somewhat inwards from the two endpoints: they were policies of emulation (closer alignment) and designed divergence (enhancing variance) with English law. Imperial policymakers recognized that conditions were not identical around the Empire, and there was widespread acceptance that some divergence was permissible, and perhaps even desirable.[5] The level of divergence, of course, depended on any colony's particular conditions.

How much divergence to permit or create depended on an individual's politics and the given situation. British policy regarding these issues was more reactive than proactive. Instead of a hard and fast set of ideological and political positions, most policymakers had certain sets of ideas and impulses that functioned as templates for action when conjunctures arose. Those conjunctures could be challenges or opportunities. In both cases, the policy response was mediated through pre-existing templates of thought for how the empire could and should be ordered. Seeking to find consistency in their responses is unrealistic, but we can discern some coherence in the ways policymakers approached situations. Economic hardship, for example, caused by persistently low sugar prices in the 1720s and a financial crisis in the early 1770s

[5] Edmund Burke famously pointed out the absurdity that "the natives of *Hindostan* and those of *Virginia* could be ordered in the same manner; or that the *Cutchery* court and grand jury of *Salem* could be regulated on a similar plan." Letter to the Sheriffs of Bristol, quoted in P. J. Marshall, *The Making and Unmaking of Empires: Britain, India, and America c. 1750-1783* (Oxford, 2007), 204. See also, Thomas Pownall, *The Right, Interest, and Duty, of Government, as concerned in the Affair of the East Indies*, 2nd rev. ed. (London, 1781), 36-37; Harry Verelst, *A View of the Rise, Progress, and Present State of the English Government in Bengal* (London, 1772), 134; John Campbell, *A Political Survey of Britain: being a Series of Reflections on the Situation, Lands, Inhabitants, Revenues, Colonies, and Commerce of this Island* (London, 1774), 2:615.

resulted in laws that heightened the difference between law in England and law in the colonies with the aim of making metropolitan creditors more secure at the expense of colonial debtors.

Through attention to the development of commercial law, we gain new perspectives on imperial policymaking. British merchants reformed law in Britain and across the Atlantic by improving debt enforcement procedures to foster a freer flow of credit from the metropole to the provinces. The dynamic between emulation of metropolitan law and the purposeful creation of divergences from it made the Empire a more unified economic space over the eighteenth century. Commercial law thus served as a critical means of imperial ordering and management. Paradoxically, it allowed for the shaping of a coherent and ordered empire by means of heightening distinctions between law in the metropole and in the provinces, or a set of policies that were effectively dirigisme by difference. Ultimately, such dirigisme depended on treating the wider empire as a set of distinctive regions, each with its own appropriate set of policies and laws. Attention to commercial law further suggests an alternate view of the legal and political challenges of the 1770s. Imperial policies in the wake of the Seven Years' War that attempted to impose uniformity on the colonies contradicted the spirit of commercial policies that had allowed difference – and thus imperial trade – to flourish.

DRAFT

The history of legal difference in the British Empire is already a crowded field. Scholars have tended to look at legal differences between Britain and its various colonies and possessions in one of two registers. Many historians of British American law write in terms of constitutions, putting historical legal dynamics into conceptual categories that both fit how contemporaries

thought and are analytically rigorous today.[6] Yet analyzing legal development in terms of constitutions can lead us to overemphasize questions of sovereignty and liberty at the expense of understanding legal developments on the ground.

Others scholars have examined legal pluralism in the British Empire from the perspective of competing and overlapping jurisdictions.[7] However, because pluralism was so endemic in early modern polities, and crops up nearly everywhere we look for it, it is not always the most appropriate term or concept for understanding the legal world of the Empire and we can be more specific in describing the legal dynamics of empire.[8] Christian Burset recently introduced the useful concept of "strategic legal pluralism," to describe imperial policymakers' choices in deploying non-English legal systems in the Empire.[9] Yet a major legal problem of empire in the British case was not so much that different legal systems competed

[6] Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA,, 2004); Daniel J. Hulsebosch, "Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750-1777 Forum: Constitutions on Edge: Empire, State, and Legal Culture in Eighteenth-Century New York," *Law and History Review* 16, no. 2 (Summer 1998): 319–80; Daniel J. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21, no. 3 (Autumn 2003): 439–82; Daniel J. Hulsebosch, *Constituting Empire New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill, 2005); Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World*, 1st ed. (New York, 2011); Aaron Graham, "Jamaican Legislation and the Transatlantic Constitution, 1664-1839," *The Historical Journal* 61, no. 2 (June 2018): 327–55. See also

[7] Lauren Benton and Richard J. Ross, "Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World," in *Legal Pluralism and Empires, 1500-1800*, ed. Lauren Benton and Richard J. Ross (New York, 2013), 5–6; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, 2002); Lauren A. Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, MA, 2017); Lauren Benton, "Empires and Jurisdictional Politics: Legal Pluralism and the Search for Global Order," in *The Oxford Handbook of Global Legal Pluralism*, ed. Paul Schiff Berman (Oxford, 2020) , Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *The William and Mary Quarterly* 60, no. 3 (July 2003): 471–510; Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America* (Chapel Hill, 2001); Christoper L. Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century." *Law & social inquiry* 26, no. 2 (2001): 315–372; Esther Sahle, "Legal Pluralism, Arbitration, and State Formation: The Rise and Fall of Philadelphia's Quaker Court, 1682–1772." *Law and History Review* 41, no. 4 (2023): 653–681.

[8] From its origins in describing the interaction of European and indigenous laws in colonial legal systems, pluralism has become an overly capacious term. Its very ubiquity often renders it meaningless. John Griffiths writes that legal pluralism is "the omnipresent, normal situation in human society." Brian Tamanaha similarly describes the "historical normalcy" of legal pluralism. John Griffiths, "What Is Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 39; Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (New York, 2021), 19.

[9] Christian R. Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (New Haven, 2023), 7.

DRAFT

with each other, but rather that different variations of English law co-existed in an uneasy and undefined relationship with one another. Whether those various jurisdictions and rules worked in agreement or conflict had to be worked out on a case-by-case basis, as there was no overarching schema for managing the multiplicity of laws and jurisdictions.[10] We can distinguish between this specific problem – the variations in English law across the Empire – and other forms and variants of legal pluralism (such as the operation of English and non-English legal systems) by casting legal differentiation within the English legal system across the British Empire in terms of legal "latitude."

Framing the issue of legal difference in terms of "legal latitude" builds on the insights of the constitutional and legal pluralism literatures but carries two further benefits. First, it draws our attention to the laws on the ground and their operation, rather than to the constitutional system that underpinned them. The constitutional system set the "rules of the game" and articulated the ideas under which contemporaries worked. Looking at the more quotidian workings of imperial law fills in the detail below the level of the imperial constitution. Indeed, assertions of English rights were often tied to basic, procedural elements of law, and those elements reward greater study. Second, latitude focuses attention on the fact that most legal difference in the British Empire, particularly in the Atlantic world, was created by variations and divergences from metropolitan English law, not completely separate legal systems. Men and women in London, Dublin, New York, Kingston, and Calcutta, lived under English law. Yet that English law was by no means the same. Pursuing legal latitude helps us appreciate the sometimes-subtle variations, riffs, and fugues that composed law in the Empire. Since laws

[10] According to Hulsebosch, there was no imperial conflict of laws treatise until the nineteenth century. Daniel J. Hulsebosch, "Nothing but Liberty: Somerset's Case and the British Empire," *Law and History Review* 24, no. 3 (2006): 650.

played a constitutive role in the practices of empire, we can only truly understand imperial management with the fine-grained analysis legal latitude enables.

The choice of the term "latitude" is not accidental. Contemporaries often wrote on these and other issues using this language.[11] In the eighteenth century, "latitude" could mean the wide range through which something might vary or the freedom from narrow construction. It also carried connotations of liberality and permissiveness.[12] In legal contexts, writers used the word to emphasize freedom of action. For example, the judge Sir Michael Foster argued that a narrow construction of the Habeas Corpus Act would give "latitude…to domestic tyrannies of all sorts," while the translator of a Muslim legal text wrote that a commission of agency was "a *latitude*, or *endowment with power of action*."[13]

Latitude is not an anachronistic term; nor does it impose modern or theoretical models of legal organization upon the eighteenth-century world. In fact, contemporaries thought about another realm of life also plagued by competing desires for uniformity and diversity – religion – in these terms.[14] Indeed, "Latitude-Man" was an early variant of "latitudinarian."[15] The shared meanings behind legal latitude and latitudinarianism can help us identify some of the challenges

---

[11] Anon., *Thoughts on Improving the Government of the British Territorial Possessions in the East Indies* (London, 1780), 63-67; Eliga H. Gould, *The Persistence of Empire: British Political Culture in the Age of the American Revolution* (Chapel Hill, 2000), 210; Arthur Mitchell Fraas, "'They Have Travailed Into a Wrong Latitude:' The Laws of England, Indian Settlements, and the British Imperial Constitution 1726–1773" (Ph.D. diss., Duke University, 2011), 247–48, 368–69.

[12] See definitions I.2.a, I.3.a, and I.3.b in "latitude, n.". OED Online. June 2020. Oxford University Press. https://www-oed-com.proxy.lib.umich.edu/view/Entry/106162? (accessed August 19, 2020).

[13] Anon., *Account of Some Proceedings on the Writ of Habeas Corpus* ([London], 1781), 13; Charles Hamilton, *The Hedàya, or Guide; A Commentary on the Mussulman Laws: Translated by Order of the Governor-General and Council of Bengal* (London, 1791), 3:59. Another writer lamented the wide "latitude of interpretation" the Regulating Act of 1773 left to the Supreme Court of Bengal. Anon., *A Review of the Principles and Conduct of the Judges of His Majesty's Supreme Court of Judicature in Bengal: Or, An Enquiry into the Causes that have obstructed or defeated the salutary Ends proposed by the Legislature in establishing this Court* ([London], 1782), 11, 47, 55.

[14] See, "latitudinarian, adj. and n.". OED Online. June 2020. Oxford University Press. https://www-oed-com.proxy.lib.umich.edu/view/Entry/106165 (accessed August 19, 2020).

[15] In the eighteenth-century, "latitudinarian" developed a general meaning of "a person of lukewarmness or laxness of any sort." Martin I.J. Griffin, *Latitudinarianism in the seventeenth-century Church of England* (Brill, 1992), 5, 10.

of imperial administration more widely. The tensions created by the conflict between laws in a given colony with those in another or the metropole, and the question of when that conflict became problematic for the administration of justice and order, parallel related questions on the tensions between religious establishment and dissent.

In the debates surrounding imperial law, English law as practiced in England, with all its technicalities, terms of art, and complications, was the normative version and colonial law diverged from this metropolitan standard. We can understand those divergences in terms of the "latitude," or the level of deviation, between metropolitan and colonial laws. Legal latitude proliferated throughout Britain's colonies. Differences in geographic latitude (and longitude) often led to legal latitude, and the two were inextricably linked. Under different geographic conditions, colonists created societies with various social structures, economies, and governments than existed in Britain. The colonies relied on legal forms that did not always closely follow those at home, and created a body of practice that hardened into customs. The idea of custom had special resonance in the English legal world and became the grounds and justification for divergences. Especially in the early years of the English Empire, imperial officials tolerated and accepted this latitude. However, with the growth and elaboration of empire, more and more policymakers in the capital sought to restrict latitude in the colonies and exert central control. The Board of Trade often attempted to assert central control over the colonies, but rarely succeeded in its ambitions.[16] Especially following territorial gains in the

[16] In 1700 the Board put forward a bill that would have brought all colonial charters under regulation, and from the early-1720s to mid-1730s it attempted to reform the empire's loose and unwieldy political structure, both without much success. Its instructions to governors and queries on the administration of the colonies were similar expressions of the effort to more tightly manage the colonies. P.J. Marshall, "Parliament and Property Rights in the Late Eighteenth-Century British Empire," in *Early Modern Conceptions of Property*, eds. John Brewer and Susan Staves (London, 1995), 534; Craig Yirush, *Settlers, Liberty, and Empire: The Roots of Early American Political Theory, 1675-1775* (New York, 2011), 183–93; Asheesh Kapur Siddique, "Governance through Documents: The Board of Trade, Its Archive, and the Imperial Constitution of the Eighteenth-Century British Atlantic World," *Journal of British Studies* 59, no. 2 (April 2020): 264–90; Andrew D. M. Beaumont, *Colonial America and the Earl of Halifax, 1748–1761* (Oxford, 2014). For the Board's early history, see Ian K. Steele, *Politics of Colonial Policy: The Board of Trade in Colonial Administration 1696-1720* (Oxford, 1968); O. M. Dickerson, *American Colonial*

DRAFT

Seven Years' War, some imperial officials in London and the colonies were committed to minimizing the latitude allowed to individual colonies, while others sought strategically to deploy legal pluralism in newly-acquired territories.[17] Nevertheless, even for matters entirely within Britain, parliament passed little legislation that sought to integrate the component parts of Great Britain for most of the eighteenth century.[18] Legal development throughout the British Empire during the century therefore proceeded in a complicated double movement. Some impulses encouraged greater uniformity and convergence on metropolitan law, while others incentivized and demanded divergence.

Emulative policies minimized latitude in other legal orders along English models and patterns, but took into account the diversity of both English laws and colonial conditions. Emulation was not transplantation, imitation, or direct copying. It was a more complex process by which some colonial legal orders became more like those in England through their own dynamics and with adaptation to their local needs. Thinking of these impulses and policies under the rubric of emulation is helpful because it aligns with ideas and practices in other areas of economic and political life. Scholars of political economy, such as Sophus Reinert and John Shovlin, have excavated the important role emulation played in eighteenth century political economic thinking across Europe. [19] Emulative policies and ideas encouraged improvement as

Government, 1696-1765 a Study of the British Board of Trade in Its Relation to the American Colonies, Political, Industrial, Administrative (Cleveland, 1912).

[17] See, for example, Thomas Pownall, *The Administration of the Colonies*, 3rd rev. ed. (London, 1766), 83-85; Burset, *Empire of Laws*, and below at n38.

[18] Joanna Innes, "Legislating for Three Kingdoms: How the Westminster Parliament Legislated for England, Scotland and Ireland, 1707–1830," in *Parliaments, Nations and Identities in Britain and Ireland, 1660-1850*, ed. Julian Hoppit (Manchester, 2013), 20–21.

[19] John Shovlin, "Emulation in Eighteenth-Century French Economic Thought," *Eighteenth-Century Studies* 36, no. 2 (2003): 224; Sophus A. Reinert, *Translating Empire: Emulation and the Origins of Political Economy* (Cambridge, MA, 2011), 2, 29–33, 39–46. For examples of British attempts to emulate European states' policies, see Matthew Wyman-McCarthy, "Perceptions of French and Spanish Slave Law in Late Eighteenth-Century Britain," *Journal of British Studies* 57, no. 1 (2018): 29–52; R. Grant Kleiser, "An Empire of Free Ports: British Commercial Imperialism in the 1766 Free Port Act," *Journal of British Studies* 60, no. 2 (April 2021): 334–61.

DRAFT

the acceptable, desirable cousin to "jealousy of trade."[20] In terms of economic production, emulative strategies helped British industries make their own version of imported goods, combining an imitation of foreign manufactures with innovative production techniques.[21] Similarly, work on the "consumer revolution" in early modern Europe and colonial America has drawn on concepts of emulation.[22] Casting legal changes in terms of emulation thus allows us to view those developments as part of a wider movement in thought and activity. Legal emulation minimized latitude and helped the periphery develop economically along English lines.[23]

The processes of emulation are much like the "Anglicization" that other scholars have noted in colonial American legal history.[24] However, approaching the issue from the perspective of emulation allows us to connect the processes of legal transformation to other developments in British and colonial life, whether political economy or consumer taste. Anglicization was a particular form of emulation, which had the greatest purchase in the American colonies. For the most part, British imperialists were not attempting to "Anglicize" the legal systems of Native Americans or South Asians. The large exception to this pattern was the Anglicizing policies

[20] In Adam Smith's moral philosophy, emulation's origin is in man's desire "[t]o be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation." Emulation is the "anxious desire that we ourselves should excel," arising from our "admiration of the excellence of others." Adam Smith, *Adam Smith: The Theory of Moral Sentiments*, ed. Knud Haakonssen (Cambridge, 2002), 6, 132–33. On the "jealousy of trade," see especially Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, MA, 2005).

[21] Maxine Berg, *Luxury and Pleasure in Eighteenth-Century Britain* (Oxford, 2007), 100; Maxine Berg, "From Imitation to Invention: Creating Commodities in Eighteenth-Century Britain," *The Economic History Review* 55, no. 1 (February 2002): 1–30; Maxine Berg, "In Pursuit of Luxury: Global History and British Consumer Goods in the Eighteenth Century," *Past & Present*, no. 182 (2004): 85–142.

[22] Michael Kwass, *The Consumer Revolution, 1650-1800* (Cambridge, 2022), 5–9, 99–104; T. H. Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence* (New York, 2004), 167–68; Neil McKendrick, John Brewer, and J. H. Plumb, *The Birth of a Consumer Society: The Commercialization of Eighteenth-Century England* (London, 1982); Jonathan Eacott, *Selling Empire: India in the Making of Britain and America, 1600-1830* (Chapel Hill, 2016).

[23] As Burset argues, the close connection between economic development and the common law historically may have less to do with the substantial features of the common law and more with the fact that it was *common* to many jurisdictions. Burset, *Empire of Laws*, 166–67.

[24] For the concept of "Anglicization," see John M. Murrin, "Anglicizing an American Colony: The Transformation of Provincial Massachusetts" (Ph.D. diss., Yale University, 1966); Richard Ross, Jane Ohlmeyer, and Philip Stern, "Anglicization of and through Law: British North America, Ireland, and India Compared, 1540-1800," paper presented at the Omohundro Institute 2021 Annual Conference.

DRAFT

enacted in Ireland.[25] Anglicization applies better to the settler colonial societies in the Americas than it does to the wider British Empire. Legal developments beyond straightforward convergence on English standards were a common element of the imperial experience, and emulation enables us to encompass them within a single heuristic.

In its early stages, emulation entailed colonial legal communities becoming more like their London counterparts. Many British colonies began their lives with laws and legal system that bore little resemblance to the law as practiced in England, especially to the central courts in Westminster. Over the course of the seventeenth and early eighteenth centuries, these differences were lessened as colonists adhered more closely to metropolitan norms and instructions from the center sought to minimize latitude. The Board of Trade and Privy Council's work in scrutinizing colonial legislation and appellate jurisdiction stand as forces minimizing latitude and encouraging emulation from the center.[26] This goal of total uniformity might have been chimerical, but they enacted policies that aimed to minimize the distinctions between different parts of the Empire. The reform and reorganization of colonial court systems along increasingly English lines is an important expression of this impulse. The New York Judicature Acts of 1691 and 1692, as well as the Regulating Act of 1773's provisions for the administration of justice in British Bengal, provide illustrations of this impulse in practice. [27]

DRAFT

[25] Pawlisch, *Sir John Davies and the Conquest of Ireland*; Nicholas Canny, *Making Ireland British, 1580-1650*, 1st ed. (Oxford, 2001).

[26] Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York, 1915); Dickerson, *American Colonial Government*, 227–28, 234–40, 243–44; Charles M. Andrews, *The Colonial Period of American History*, vol. 4: *England's Commercial and Colonial Policy* (New Haven, 1964), 290–96; Bilder, *The Transatlantic Constitution*.

[27] Charles Z. Lincoln, William H. Johnson, and A. Judd Northrup, eds., *The Colonial Laws of New York From the Year 1664 to the Revolution, Including the Charters to the Duke of York, the Commissions and Instructions to Colonial Governors, the Duke's Laws, the Laws of the Dongan and Leisler Assemblies, the Charters of Albany and the Acts of Colonial Legislatures from 1691 to 1775 Inclusive* (Albany, 1894), 1: 226-31, 303-08; An Act for establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe, 1773, 13 Geo. 3, c. 63.

We can see another form of emulation in the creation of new, substantive laws in non-English jurisdictions along the models of earlier English legislation, but with appropriate modifications made for local distinctions. Emulative legislation attempted to minimize the legal latitude at work in the Empire. These laws took English rules and adapted them to particular places and legal regimes. This dynamic extended beyond the American colonies and into the other polities that composed the British state. As Colin Kidd argued, emulation and imitation of English ways characterized the Scottish response to the Union.[28] What I call emulative legislation is much like Joanna Innes's "parallel legislation:" laws for one kingdom that echoed those of another.[29] Bankruptcy laws in the North American colonies and Scotland show how simple transplantation or imitation of English laws was impossible and they needed to be emulated instead.

Against these convergent, emulative impulses, divergent forces, particularly economic and political ones, weighed in on the side of difference, whereby each colony might have the laws best suited to its particular situation. In fact, a degree of latitude was necessary for the Empire to function effectively and most officials, writers, and policymakers accepted that fact. The simple reason for this is that the contexts in which law operated diverged too greatly for any one set of laws to be able to bridge the distances. The Privy Council in its role as imperial legal arbiter recognized this dynamic when it applied the "repugnancy principle."[30] According to the repugnancy principle, the Privy Council could disallow colonial laws that were "repugnant" or "contrary" to the laws of England. Although clear in theory, this was a nebulous and ever-

[28] Colin Kidd, "Eighteenth-Century Scotland and the Three Unions," in *Anglo-Scottish Relations from 1603 to 1900*, ed. T C Smout (Oxford, 2005), 186.

[29] Innes, "Legislating for Three Kingdoms," 35, 37.

[30] Mary Sarah Bilder, "The Corporate Origins of Judicial Review," *The Yale Law Journal* 116, no. 3 (2006): 513–15, 534–39; Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York, 1950); Bilder, *The Transatlantic Constitution*.

shifting standard that often stood in for rules that damaged metropolitan interests.[31] In many instances, the Privy Council upheld colonial laws that violated the repugnancy principle, and English jurists from the seventeenth and eighteenth centuries helped build an imperial legal order where colonial laws conflicted with metropolitan ones.[32]

The Privy Council had such significance because the Westminster Parliament infrequently legislated for the colonies and legislative assemblies in the American colonies were left to direct their own affairs, particularly in commercial matters. According to one count, Parliament passed only sixty-eight statutes with "direct reference" to the colonies between 1660 and 1760, out of a total of 5,865 acts.[33] The colonies' need for self-regulation in economic affairs was particularly pronounced because Parliament rarely legislated on trade, and, when it did, its concerns were parochial. Just under one-quarter of all acts passed by Parliament in the period 1660-1800 dealt with the economy, and, of those, approximately 70% were enclosure acts.[34] Elites in Britain, especially English landowners, drove Parliament's legislative agenda, which reflected their concerns and interests. Moreover, up to the 1760s, Parliament rarely intervened in internal colonial affairs. Colonists in America, therefore, found themselves in an environment in

[31] The Privy Council disallowed all legislation designed to favor colonists over metropolitan merchants and creditors. Colonial assemblies used a variety of tactics to frustrate metropolitan creditors: they passed laws that required creditors to accept commodities of undetermined value or depreciated currencies as payment, that privileged local creditors over "foreign" or metropolitan ones, and that imposed time-limits to the validity of certain debts. Dickerson, *American Colonial Government*, 238–39; Russell, *The Review of American Colonial Legislation by the King in Council*, 128–31.

[32] Hulsebosch, "Nothing But Liberty," 655.

[33] Gipson takes this to be a sign of the "active interest of Parliament in the affairs of the colonies," but, at an average of just over one statute per year, this hardly proves deep involvement. Laurence H. Gipson, *The British Empire before the American Revolution*, vol. 13: *The Triumphant Empire* (New York, 1967), 180. The total number of acts comes from Julian Hoppit, "Patterns of Parliamentary Legislation, 1660–1800," *The Historical Journal* 39, no. 1 (March 1996): 117.

[34] Julian Hoppit, "Patterns of Parliamentary Legislation, 1660–1800," *The Historical Journal* 39, no. 1 (March 1996): 121. According to Hoppit's data, the number of acts dealing with the economy was lower in the period 1660-1760 than in the 1760-1800 period, see Table 3. Using his data in Tables 1 and 3, it is possible to assign 11.7% of all legislation in the period 1660-1760 to the economic category. Widening the scope to include successful and failed legislation, Hoppit finds that 51% of the bills Parliament considered were economic in nature over the period 1660-1800, yet this was unevenly spread, with the period after 1760 seeing far more economic legislation than the period before 1714. Julian Hoppit, *Britain's Political Economies: Parliament and Economic Life, 1660-1800* (Cambridge, 2017), 69-70.

which Parliament had made few rules beyond the Navigation Acts and they had the ability exercise a great degree of control over their commercial law. From the middle of the century, colonial assemblies increasingly used their legislative powers to regulate economic and commercial affairs.[35] When promulgating laws that might run afoul of the repugnancy principle or metropolitan interests, colonial assemblies justified their interventions through reference to their unique situations.

In the second half of the eighteenth century, particularly following the Seven Years' War, the tensions between latitude and desire for uniformity became more acute. Some imperial officials in the metropole sought to close down the latitude permitted in the colonies and enforce a more uniform and dirigiste empire.[36] Other administrators and politicians, labeled "authoritarian reformers" or "paternalists" by historians, not only accepted divergences but sometimes even promoted them.[37] They sought to enact policies restricting the common law in the colonies, giving imperial administrators a freer hand in their management of colonial populations.[38] Legal difference could thus serve as tool of empire building. London-based policy makers promoted laws for the colonies that contravened the repugnancy principle when

[35] A study of colonial legislation in the British Atlantic has uncovered a profound shift in colonial legislative patterns from the 1740s. Before that decade, colonial legislation increased only gradually. Output then "exploded" to meet the demands of imperial warfare, and colonial elites maintained wartime levels of legislative activity in peacetime. Aaron Graham, "Legislatures, Legislation and Legislating in the British Atlantic, 1692–1800," *Parliamentary History* 37, no. 3 (October 2018): esp. 387.

[36] Yirush, *Settlers, Liberty, and Empire*, 199–200; Sarah Kinkel, "The King's Pirates? Naval Enforcement of Imperial Authority, 1740–76," *The William and Mary Quarterly* 71, no. 1 (January 2014): 9; Sarah Kinkel, "Disorder, Discipline, and Naval Reform in Mid-Eighteenth-Century Britain," *The English Historical Review* 128, no. 535 (December 2013): 1451–82. For responses to the new imperial challenges and ideas about the nature of the post-1763 empire, see P. J. Marshall, "Empire and Authority in the Later Eighteenth Century," *The Journal of Imperial and Commonwealth History* 15, no. 2 (1987): 105–22; H.V. Bowen, "British Conceptions of Global Empire, 1756–83," *The Journal of Imperial and Commonwealth History* 26, no. 3 (September 1998): 1–27; Marshall, *The Making and Unmaking of Empires*, chap. 6; S. Max Edelson, *The New Map of Empire: How Britain Imagined America before Independence* (Cambridge, MA 2017); Patrick Griffin, *The Townshend Moment: The Making of Empire and Revolution in the Eighteenth Century* (New Haven, 2018).

[37] Justin Du Rivage, *Revolution against Empire: Taxes, Politics, and the Origins of American Independence* (New Haven, 2018), 7–12; Burset, *Empire of Laws*, 10-11.

[38] Christian R. Burset, "Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire," *Law and History Review* 34, no. 3 (August 2016): 21–24; Fraas, "They Have Travailed Into a Wrong Latitude," 14; Burset, *Empire of Laws*.

enhancing latitude between the metropole and the colonies either served metropolitan interests, brought the metropole and colonies into a closer economic relationship, or was unavoidably necessary for the functioning of colonial societies.

While historians have long recognized the divergence between law in England and in the colonies, scholars have not yet appreciated how widening those differences could be a tool of empire. Such policies of "designed divergence" moved law in the colonies further away from the metropolitan standard in order to create a colonial political economy best suited to imperial demands. In some instances, small legal modifications tied disparate parts of the Empire together. Commercial interest groups favored divergent policies and used their influence in Parliament and Whitehall to advance them when they felt the need or saw an opportunity. Particularly significant were changes in colonial laws designed to augment the flow of capital from Europe to the Americas. Legislation such as the Colonial Debts Act (1732) and the West India Mortgages Acts (1773 and 1774) increased the divergence between law in the colonies and in Britain, expanding legal latitude in those colonies, and yet they made the Empire a tighter and more unified economic space.

Laws relating to insolvency and bankruptcy illustrate the processes of emulation as well as the challenges of enacting laws based on English rules in other imperial jurisdictions. In the early eighteenth century, English legislators created a functional, permanent law of insolvency and bankruptcy.[39] However, these laws did not apply to jurisdictions outside of England.[40]

[39] Julian Hoppit, *Risk and Failure in English Business, 1700-1800* (Cambridge: Cambridge University Press, 1987), chap. 3; Louis Edward Levinthal, "The Early History of English Bankruptcy," *University of Pennsylvania Law Review and American Law Register* 67, no. 1 (January, 1919): 1–20.

[40] In the Privy Council case of *Cleeve v. Mills* (1764), the Council found that the bankruptcy statutes did not apply to any of the king's dominions outside of England. *Cleeve* v. *Mills* (P.C., 1764), BL, Add MS 36226/351. For

DRAFT

Colonies operating under English law and Scotland both attempted to import the provisions of England's bankruptcy statutes but were forced to emulate rather than copy England's bankruptcy rules.

Even in jurisdictions with a relatively small amount of legal latitude, the obstacles to outright transplantation were too high. Without a stable bankruptcy law in the American colonies, colonial legislatures relied on a series of acts, often of limited duration, for the relief of insolvent debtors. While these acts helped imprisoned debtors, they hardly amounted to a serious bankruptcy law. They failed to implement a system that forced creditors and debtors into an orderly arrangement and offered the debtor a discharge.[41] A discharge performed the important economic function of allowing the bankrupt to start up again without their old debts hanging over them. It also incentivized the debtor to deal honestly and provide a full accounting of their affairs to their creditors. Colonial assemblies were well aware of these defects and attempted to remedy them through legislation.

Yet the Privy Council rejected two of the more ambitious and permanent colonial statutes, passed by Massachusetts in 1758 and Virginia in 1763. Rather than take issue with the statutes' goals or find any repugnancy, the Privy Council rejected them because the Board of Trade found that the laws disadvantaged creditors in England. The laws imposed a strict schedule for creditors to submit their claims for a share in the bankrupt's estate, with the consequence that creditors in Britain who did not put in their claims before the deadline might

---

other case documents, see http://amesfoundation.law.harvard.edu/ColonialAppeals/index_new.php?report_no=13_1763_01. See also, Smith, *Appeals to the Privy Council from the American Plantations*, 492. For an earlier case on the same issue, which seems to have been unnoticed in *Cleeve* v. *Mills*, see Wyndham Beawes and Thomas Mortimer, *Lex Mercatoria Rediviva, or, The Merchant's Directory Being a Complete Guide to All Men in Business*, 4th ed. (London, 1783), 542–43. The Board of Trade and Privy Council were well aware of the limitations of the English bankruptcy statutes, see *Acts of the Privy Council of England: Colonial Series*, eds. W.L. Grant and James Munro, 6 vols. (London, 1908-23), 5: 336.

[41] For a fuller account of insolvency and bankruptcy laws in the colonies, see Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge, MA, 2002), 47–67.

lose out to local creditors entirely. In support of this argument, the Board claimed that nine-tenths of all creditors for both colonies lived in England. The empirically dubious claim aside, a more fundamental fear underlay the Board's recommendation. Fraudulent transactions by a debtor in concert with certain creditors remained a major problem, even in England. Distance between colony and metropole, creating an unavoidable time lag in communication, magnified the opportunities for fraud to unacceptable levels. An unscrupulous debtor might reach an agreement with equally unscrupulous creditors and have the remaining estate divided before creditors in Britain had a chance to file their claims. In the face of such potential injustices, the Board recommended the Privy Council reject the laws.[42] The assemblies' attempt at transplanting English bankruptcy rules into the Empire simply didn't work. The imperial context meant those laws' *effects* needed to emulated rather than their provisions and processes imported (though it is questionable how any colonial statute could have assuaged the imperial authorities' fears in this case).

Closer to the imperial center, Scotland too suffered for most of the eighteenth century without an effective bankruptcy regime. Despite greater proximity to the halls of power and their ability procure parliamentary acts, Scots faced additional hurdles to legal reform along English lines than did legislators in Virginia or Massachusetts. Their legal system operated according to different processes and procedures than England's. The problem was not so much one of latitude, as in the American colonies, as different systems altogether. Scots reformers' experience of attempting to improve that kingdom's bankruptcy laws underscores the need to see the process of reform along English lines as one of emulation and not transplantation or importation. English rules applied directly simply would not work in that country; their effects needed to be emulated.

[42] *Acts of the Privy Council of England; Colonial Series*, 4: 388-89, 563. See also, *Journals of the Commissioners for Trade and Plantations*, 14 vols. (London, 1920-1938), 10: 48-11; 11: 358-59, 365, 369-70.

The desire to import English bankruptcy laws in Scotland expressed itself soon after the Union of 1707. Proposals for the integration of English law into Scots law often came from Scotland itself, with authorities in the metropole taking a *laissez faire* attitude towards the integration the two kingdoms' private laws. These proposals, nevertheless, were highly controversial within the Scots legal community. A strident memorial from 1716, preserved only in manuscript, in opposition to one early proposal for extending England's bankruptcy laws to Scotland makes clear that simply copying English laws – as the author accused the proposal of advocating – would be impossible in practice. In his words,

> The introducing by Lump of the Law of a different Nation in any considerable Measure is as hard as the rooting out of their Genius of our People and the planting that of another. There is one kind of Spirit that runs uniformly through the Law of our Country…that cannot agree with the Law of another Country when it is introduced in gross or in any great measure at once.

The memorial continued: how could the Scots legal system deal with the new rules when their very terms were "unknown" to its officers? Since the processes of ranking creditors on a debtor's estate touched multiple areas of law, would the Scots law of "persons, things, and actions" need comprehensive reform as well? The law of Scotland could not "in bulk agree to other parts of the Law of Engl[an]d nor can that Law be made of a piece with [Scots law], and therefore each… ought to wish the continuation of what we have and to think of amendments slowly."[43] We do not have the proposal so vehemently opposed by the memorial's author, but that author captured the Scots legal establishment's opposition to largescale borrowing from England.

When attempts at reform came in the last third of the century, they were part of larger movements of legal reform and improvement, though Scots merchants and bankers instead of lawyers led the charge with respect to bankruptcy legislation.[44] Commercial men living in and

[43] Anon., "Memorial concerning the alterations proposed of the Law of Bankruptcy and ranking of Creditors in Scotland," 1716, University of London, Senate House Library, Special Collections MS96.

[44] On the attempt to reform Scottish entails, see John W. Cairns, "Historical Introduction," in *A History of Private Law in Scotland*, ed. Kenneth Reid and Reinhard Zimmerman, vol. 1: Introduction and Property (Oxford,

around Edinburgh and Glasgow with interests in and connections to overseas trade led the reformers. They attempted to emulate England's system and adapt it to the unique aspects of Scots Law—especially the complications created by feudal land law. Scots reformers sought to ameliorate the law along several lines. In a situation unique to Scotland, creditors there had greater incentivizes to file suit at the slightest rumor of insolvency than their English peers were. Further, Scots bankruptcy law provided no discharge to insolvent debtors and creditors had to go through onerous and expensive legal processes to seize lands. As the law then stood, it was only possible to proceed at law against a debtor's real estate through costly and time-consuming common law actions like adjudication, sale, and ranking. Scotland lacked the more streamlined statutory processes that English bankruptcy law had put in place.

Scots law's problem, according to this line of thinking, was that it made it too difficult to separate the insolvent owner of an estate from that land. And the ultimate cause of those difficulties lay in the feudal nature of landowning in the kingdom. Land law there remained feudal, unlike England where feudal tenures had been abolished in 1660, and feudal superiors needed to participate in any transfer of ownership. If the seller was as a vassal, the superior would grant a disposition—a deed transferring property—to the purchaser, which had to be accompanied by a charter or writ of confirmation from the superior. Critically, the new vassal had to be infeft, or formally received through an investiture, by the superior. Transferring land at common law in eighteenth century Scotland required five distinct documents to be effected. The most important step was the delivery and registration of sasine. Sasine was the traditional ceremony of a superior transferring lands to a vassal by giving appropriate symbols, such earth

---

2000), 160; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 2002), 156–75; David Lieberman, "The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames," in *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, ed. Istvan Hont and Michael. Ignatieff (Cambridge, 1983), 214–18; N.T. Phillipson, "Lawyers, Landowners, and the Civil Leadership of Post-Union Scotland," *Juridical Review* 21 (1976): 97–120.

and stone for lands. In this sense it was roughly equivalent to the English process of being seised of land by turf and twig. The distinction between the Scots sasine and English seisin was that in England seisin signified possession, whereas in Scotland sasine was the feudal investiture. Feudal rights only vested in the new owner after sasine had been made.[45]

These feudal rules complicated the process of recovering debts through lands. The process of foreclosing on and adjudicating landed estates could be a complex one, as any transfer of land required adherence to all the formal necessities of feudal conveyance. The creditor's remedies in case of default were also limited by the distinction Scots law drew between different rights. Although the disposition in security, the closest Scots equivalent to the English mortgage, gave the creditor a power of sale, this was only a right in security and not an absolute or feudal right, making the power of sale really a commission requiring the debtor's consent. The creditor had no feudal right which could authorise him or her to sell the land directly.[46] Other options remained open. The creditor could proceed through adjudication, or the judicial seizure of lands for the benefit of creditors, but this was notoriously time-consuming and costly.

The reformers' efforts culminated in new bankruptcy laws in 1772, 1783, and 1793.[47] The 1772 Act made several important changes to the ways the courts treated suits for debts against a bankrupt person. This was a problem particular to Scots law with no analogue in England, but its effects included reducing the incentives for creditors to rush to file a suit and lessening the possibilities for a bankrupt to commit fraud.[48] The Act further introduced sequestration for the

DRAFT

[45] D.L. Carey Miller, "Transfer of Ownership," in *A History of Private Law in Scotland*, vol. 1: *Introduction and Property*, eds. Kenneth Reid and Reinhard Zimmermann (Oxford, 2000), 272-79; C.F. Kolbert and N.A.M. Mackay, *History of Scots and English Land Law* (Berkhamsted, 1977), 247, 358.

[46] Robert Bell, *A Dictionary of the Law of Scotland, intended for the use of the public at large, as well as of the profession*, 2nd ed. (Edinburgh, 1815), 1:107, s.v. "bond."

[47] 12 Geo. 3, c. 74; 23 Geo. 3, c. 18; 33 Geo. 3, c. 74.

[48] Its provisions equalized the preference given to creditors who had raised diligences within a certain period of time before the bankruptcy, thereby decreasing the incentives for creditors to rush to execute diligences and removing possibilities for fraudulent behavior.

bankrupt's moveable property. Sequestration was the process by which the court took possession of the insolvent's property for the benefit of all creditors, and the Act enabled creditors who had previously levied executions (called diligences in Scotland) to apply to the Court of Session for the sequestration of the debtor's estate. The creditors could be paid out of the estate directly or receive the proceeds of its sale. If the bankrupt refused to voluntarily transfer their assets, the court now had the power to imprison them until they did so. While the 1772 Act provided some real benefits to creditors, it left much to be desired. Bankrupt individuals still had no means of securing a discharge and their creditors still faced costly and time-consuming legal processes to seize lands. Scots merchants, keenly aware of the disadvantages, pushed to bring the advantages of England's bankruptcy legislation to Scotland.

At the head of this effort was the Glasgow merchant Patrick Colquhoun. Colquhoun had made his fortune trading tobacco from the Chesapeake before he moved into public life. He became Lord Provost of Glasgow, founded the Glasgow Chamber of Commerce, and then moved to London, where he could lobby more directly for his reforming agenda. The Glasgow Merchants' House added Colquhoun to a committee for considering the bankruptcy law in 1782 and from then on, he seems to have taken the lead in drafting and passing a new law. He utilized his extensive correspondence networks, soliciting mercantile and legal views on the proposed improvements. His major allies in this endeavor included his fellow colonial merchants from the west of Scotland and the Edinburgh banker Sir William Forbes.[49] The London end of the operation relied on the services of Jams Seton, a London solicitor who commonly worked as an

[49] Glasgow Merchants' House Minutes, June 11, 1782, Glasgow City Archives [hereafter GCA], T-MH/1/3, 274. For Colquhoun's correspondence in pushing the bill, see GCA, TD1670/4/4, TD1670/4/5, TD1670/4/6, TD1670/4/7.

agent in the capital, and James Hunter Blair, MP for Edinburgh in these years, and a partner in Forbes's bank.[50]

Colquhoun polled many of the most important colonial in traders in Scotland on their thoughts on the existing bankruptcy laws and the areas in need of reform. Foremost amongst their complaints was the fact that Scots law did not include a discharge for the bankrupt, as English law did.[51] As Colquhoun's correspondents desired, the 1783 Act introduced a discharge for the bankrupt.

The merchants' other major desideratum was that the new act would facilitate seizing land from bankrupts. Colquhoun's correspondents frequently compared the situation in Scotland with that in England. One of his correspondents reported that the "great grievance of our Bankruptcies" was the "shamefull waste of time & expence in converting Heritable subjects [real estate] into money." He computed that 20-30% of the value of those lands ended up being paid to the lawyers. One of the judges of the Court of Session had earlier tried to introduce some remedy taken from the English practice, but at that time, the country "had not then attained sufficient liberal and commercial views, to counter ballance [*sic*] the weight of the Law int[e]rest."[52] An anonymous memorialist claimed the "tediousness and expense of Raising Money from land" frequently prevented Scots from doing so. The memorialist found that "many Estates which are now sunk under a load of debt would perhaps have been in a great measure saved if it had been easier for the Creditors to have divested their debtor of the Management."[53]

---

[50] John Seton to Patrick Colquhoun, February 7, 1782, GCA, TD1670/4/4. Sir William Forbes to Patrick Colquhoun, February 26, 1782, GCA, TD1670/4/4. Seton was a Gray's Inn solicitor who acted as the London solicitor-agent for the Glasgow Chamber of Commerce and had connections with the Edinburgh banking families such as Coutts and Forbes. Robert J. Bennett, *Local Business Voice: The History of Chambers of Commerce in Britain, Ireland, and Revolutionary America, 1760-2011* (Oxford, 2011), 293.

[51] Joseph Crombie to Patrick Colquhoun, December 15, 1781, GCA TD1670/4/3; Archibald Grahame to Patrick Colquhoun, December 16, 1781, GCA, TD1670/4/3.

[52] James Coulter to Patrick Colquhoun, December 16, 1781, GCA, TD1670/4/3.

[53] Memorial & Answers to the Objections of the Lords of Council & Session the proposed Bankrupt Law, 1782, GCA, TD1670/4/4.

Prominent Glasgow merchants prescribed the same remedy, though for different reasons. James Ritchie of Craigton, a fellow Glasgow 'Tobacco Lord,' wrote that the issue of, as he termed it, "Real Mercantile Estates" was an "object of the first magnitude."[54] Ritchie, and others, believed bringing real estate under the purview of Scots bankruptcy was so important because they felt it was the only way to get at the wealth of most merchants. Colonial traders, this argument ran, held most of their moveable assets in the colonies, and their wealth in Scotland was concentrated in their landholdings. With the their bankruptcy laws unable to effect property outside of the kingdom and feeble when dealing with real estate, creating a better way of assigning landed property to the creditors was a significant goal for Scots reformers.

Confronted with such thickets of protections for the holders of land, Scottish merchants in the 1770s and 1780s saw salvation in English law's relatively straightforward procedures for the assignment of assets to trustees for the benefit of all creditors or English courts' abilities to force sales. However, it was not a simple process to import those English rules. The Scots legal establishment feared that bringing real estate under the bankruptcy laws would have destabilizing effects on landed society and would also introduce inconsistencies into property law. In an earlier letter, Ritchie recounted to Colquhoun the challenges the promoters of the 1772 Act faced on the same subject, and that they "genteely [*sic*] gave way" to the Lords of Session's objections to ensure the bill's success.[55]

The proposals for the bill in 1783 included provisions affecting the heritable estate of bankrupts, which again predictably provoked opposition. Seton proposed mollifying the "Men tenacious of Old Systems" as he termed them, by restricting the application of the act to merchants, as the English bankruptcy statutes did.[56] Ritchie had, in fact, proposed the same

[54] James Ritchie to Patrick Colquhoun, February 6, 1782, GCA, TD1670/4/4.
[55] James Ritchie to Patrick Colquhoun, December 17, 1781, GCA, TD1670/4/3.
[56] John Seton to Patrick Colquhoun, February 7, 1782, GCA, TD1670/4/4.

DRAFT

method for including land without subverting the feudal system for the 1772 law but it did not make it into that statute as the legal community's opposition was too strong.[57] This was not the only divergence between the legal and commercial interests in drafting the bill. Henry Dundas, the Lord Advocate (the Crown's chief legal officer in Scotland), wished to promote a bill by which the administration of a bankrupt's property would be vested in the Court of Session. To the commercial interests, this meant the creditors would be subjected to large and unnecessary expenses, as well as being deprived of managing their own affairs. In Sir William Forbes's words, the Lord Advocate's plan was an "unmercantile idea" and "very vexatious." He also reported that the Chief Baron of the Exchequer was still averse to the idea of including landed property in the bill and the propriety of granting a discharge. However, Forbes was hopeful that the Faculty of Advocates could be brought round to the commercial view of the issue.[58]

In its final form, the 1783 act introduced a process of sequestration for heritable property, which made it easier for bankrupts to assign their lands to trustees for the benefit of their creditors and for the courts to take possession of their lands if they declined to make a voluntary assignment. It therefore included detailed and complex provisions that allowed trustees to hold feudal titles to land and forced feudal superiors to give those trustees the titles, if necessary.[59] But, in order to avoid upsetting the traditional legal community's ideas about the role of land in society and to do as little violence as possible to the feudal strictures on the transfer of land, these provisions applied only to merchants and others operating in commerce, a formula itself borrowed from England's bankruptcy laws.[60] The commercial interests were thus successful in

[57] James Ritchie to Patrick Colquhoun, December 17, 1781, GCA, TD1670/4/3.

[58] Draft Circular to the Magistrates of Other Burghs from the Lord Provost of Glasgow, March 4, 1782; Sir William Forbes to Patrick Colquhoun, March 5 1782, GCA, TD1670/4/5.

[59] 23 Geo. 3, c. 18. s. 21

[60] 23 Geo. 3, c. 18, s. 6. English bankruptcy had been restricted to traders since the sixteenth century but this was the first time Scots law made a distinction between an insolvent and a bankrupt. Sally Tolin Hanley, "The Development of the Scottish Laws of Partnership and Bankruptcy: A Study of Assimilation," (Ph.D. dissertation, Lehigh University, 1983), 289.

having the bankrupt's property vested in a trustee elected by a committee of creditors, and in allowing for the court to give the debtor a discharge. The story of the 1783 act demonstrates how English law could be a model for laws in other jurisdictions. English laws could not, though, be directly imported or transplanted. In the case of Scottish bankruptcy and land law, the feudal system and the legal profession presented major obstacles that had to be negotiated. Significant provisions of English bankruptcy law were emulated rather than copied. Scots law replicated the desired effects of English law in a different context without uprooting or destroying that wider context.

The 1793 Act carried on the larger project of improving Scotland's bankruptcy regime. Once again, the Glasgow Chamber of Commerce deeply involved itself in reforming efforts.[61] Now, the issues that occupied them included the ranking of creditors on partnership debts and the private estates of the partners and adjusting the existing law to take into account the numerous Scots who had left the kingdom seeking better opportunities. With Scots increasingly leaving the country to pursue fortunes in England, the Caribbean, or India, the prevalence of complicated bankruptcies – in which debtors, creditors and assets might all be in different locations – increased. The issue of commercial estates continued to be an issue as well, though now concern lay with assets in other jurisdictions. A committee of the Glasgow Chamber of Commerce, in commenting on a draft of the bill in 1793, were particularly concerned that actions under the act be made competent in any court in Great Britain for the recovery of payments or preferences. If not, they feared "most of the Glasgow Bankrupt Estates will be exposed to be tore to pieces as that [estate or assets] of every Merchant lies abroad, and that of every Manufacturer chiefly in London."[62] While this may have been too difficult to effect, the final act included a provision

[61] See the papers in GCA, TD1670/4/75.
[62] *Notes on the Bankrupt Law, by a Committee of the Directors of the Chamber of Commerce and Manufacturers of Glasgow*: 1793, GCA, TD1670/4/75.

DRAFT

applying to Scots outside of Scotland the Scottish parliamentary statutes of the seventeenth century that established notour bankrupts and regulated the sale of their estates. Another provision enabled the bankruptcy trustee to pursue the recovery of a bankrupt's estate abroad as well as at home.[63]

The Scots commercial community thus drove statutory reform to bankruptcy law upon lines they thought most beneficial for the growth of commerce. It is worth noting that this process originated in the periphery and not in the center. London policymakers had little, if any interest, in altering Scotland's bankruptcy laws. Commercially-minded Scots realized the advantages to reforms and sought to enact them. By viewing developments like this as part of a larger process of emulation, we can tie together various elements of legal change and development in the British Empire. Emulative impulses sought to reduce latitude without flattening differences in how legal systems worked throughout the Empire. English law served as the model, but it was emulated according to local needs.

While some reforms to commercial law, such as the efforts to improve bankruptcy laws in Massachusetts, Virginia, and Scotland, proceeded along emulative lines, other instances of major reforms to imperial commercial law drew on strategies of designed divergence. The credit relationships between metropolitan creditors and colonial debtors provided opportunities for imperial legislation to ameliorate the challenges legal latitude and colonial policy-making posed to British interests. British merchants faced a perennial challenge in collecting debts from colonial planters and merchants in the seventeenth and eighteenth centuries. Judges friendly to colonists staffed colonial courts and their colleagues and neighbors sat as jurors. Even if a British

[63] 33 Geo 3, c 74, sections 2 and 32.

DRAFT

creditor managed to win a case against a colonial debtor, he still had the challenge of enforcing it in an unfriendly jurisdiction. Unreliable colonial courts were a major obstacle for British merchants.

Metropolitan policymakers were well aware of the challenges creditors in Britain suffered. When the Board of Trade drafted instructions for Gov. William Cosby of New York in 1732, they enjoined him to encourage all merchants who could bring trade to New York. More specifically, to ensure that the colony "may have a constant and Sufficient supply of Merchantable Negroes at Moderate Rates," he was to take special care that New Yorkers pay slave traders "within a competent time, according to Agreements."[64] While the Board of Trade singled out slave traders here, British merchants in all trades faced the same problems. Colonial courts consistently proved unreliable in helping them collect debts. Colonial legislatures, at the behest of local debtors, created obstructions to the easy recovery of debts. Such was the content of the law passed by the New York assembly in 1731, which limited the amount that creditors could collect on specialties.[65] Colonial assemblies used a variety of other tactics to frustrate metropolitan creditors: they passed laws that required creditors to accept commodities of undetermined value or depreciated currencies as payment, that privileged local creditors over "foreign" or metropolitan ones, and that imposed time-limits to the validity of certain debts. The Privy Council disallowed all this legislation designed to favor colonists over metropolitan merchants and creditors.[66]

---

[64] Draft Instructions to Gov. Cosby, April 28, 1732 [OS], TNA, CO 5/1125 (Part 1), ff. 285-86.

[65] The act was disallowed by the Privy Council as repugnant to the laws of Great Britain. Ferdinando John Paris, "Some Objections… An Act to prevent the taking or Levying on Specialtys of more than the Principal Interest and Cost of Suit," 1731, TNA, CO 5/1055, ff. 185-86. Paris was a barrister at the Inner Temple who frequently handled colonial business. Bilder, *The Transatlantic Constitution*, 89.

[66] Dickerson, *American Colonial Government*, 238–39; Russell, *The Review of American Colonial Legislation by the King in Council*, 128–31.

In the face of such a variety of obstacles, metropolitan merchants required some means of overcoming the multiplicity of colonial impediments. Spearheaded by the London tobacco merchant Micajah Perry, the mercantile communities of London, Bristol, and Liverpool lobbied for legislative intervention in 1731. They complained about the many colonial laws that imposed extra duties on their trade, obstructed their collection of debts, or placed them at a commercial disadvantage.[67] The August 1731 petition of several London merchants made the case that "as the Laws now stand" in some colonies, British creditors were "left without any remedy for the recovery of their just debts" or had only "partiall and precarious" remedies, with the result that they were "greatly discouraged" from trading to America.[68] In October the Board of Trade reported to the Privy Council that colonial laws and duties were indeed frustrating trade, as the merchants complained.[69]

The timing of these petitions was not coincidental. A prolonged depression in sugar and tobacco prices and concomitant rise in defaults made the need for action at that time acute. Colonial debtors were taking advantage of the Empire's patchwork jurisdiction and fleeing from one colony to another to evade their creditors.[70] In the resulting Colonial Debts Act of 1732, also known as the Debts Recovery Act, Parliament altered the laws regarding the collection of debts in all the American colonies. Its full title, "An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America," made clear that it was a concerted attempt to

[67] Jacob M. Price, *Perry of London : A Family and a Firm on the Seaborne Frontier, 1615-1753* (Cambridge, MA, 1992), 81; Russell, *The Review of American Colonial Legislation by the King in Council*, 133–34; Leo Francis Stock, ed., *Proceedings and Debates of the British Parliaments Respecting North America*, vol. 4: 1728-1739 (Washington, D.C, 1937), 128, 130, 145, 150.

[68] "Petition of the Merchants of London trading to the colonies," August 1731, TNA, CO 323/9; *CSPC*, v. 38, August 12, 1731.

[69] "Particular Facts and Instances in Support of the Merchants' Petition," October 1731, TNA, CO323/9, ff. 74-75. Abstracts of some of the pieces of evidence lodged by the merchants can be found in *CSPC*, v. 38, October 8, 1731.

[70] F.W. Pitman, *The Development of the British West Indies: 1700-1763* (New Haven: Yale University Press, 1917), 134–35. For a contemporary account of West India planters fleeing to other colonies, see John Ashley[?], *The Present state of the British sugar colonies consider'd: In a letter from a gentleman in Barbadoes to his friend in London* (London, 1731), 10-11.

shift the balance of power from colonial debtors to metropolitan creditors.[71] Imperial action was necessary because there was no other way to coordinate laws in all of the colonies.

The final Act introduced several innovations and changes in English law in the colonies, making it far friendlier to metropolitan creditors. Most significantly, the statute re-classified enslaved people and real property in America as liable to satisfy unsecured debts. Some of the West Indian colonies had passed acts giving unsecured creditors similar rights, while Jamaica, South Carolina, and Virginia proved to be vocal opponents of the policy.[72] Virginia's agent in London, Isham Randolph, unsuccessfully petitioned Parliament against the bill.[73] Under English law, creditors could only take land and other real property for the satisfaction of debts contracted under bonds or other specialties. The Act removed those protections in the colonies and made real property, and particularly enslaved people, liable for the satisfaction of all debts, including open accounts and book debts.[74] English law had a long-established hierarchy of debts and different classes of assets which were liable to satisfy them. The Act did considerable violence to that system in the colonies. The change benefitted metropolitan creditors because they most commonly extended credit through simple contracts or open accounts, neither of which entitled the creditor to priority on the debtor's real estate. The Act also forced defaulting debtors to sell their lands at auction instead of a local appraising the property.

The modifications in the classification of real estate and enslaved people have attracted the most attention from previous historians. However, the Act had other provisions that reshaped

[71] Colonial Debts Act, 1732, 5 Geo. 2, c. 7. Pickering, ed. *Statutes at Large*, 16:272-74.

[72] William Burge, *Commentaries on Colonial and Foreign Laws Generally, and in their Conflict with Each other and the Law of England* (London, 1838), 2:648-49; William Knox, *The Interests of the Merchants and Manufacturers of Great Britain, in the present Contest with the Colonies, Stated and Considered* (London, 1774), 37. On the lobbying against the bill, see Nicholas George Leah, "The Politics of Imperial Trade: A Study of the Colonial Debts Act" (MPhil Thesis, University of Oxford, 2019), 54–63.

[73] Price, *Perry of London*, 81–82; Stock, *Proceedings and Debates*, 4:153–54.

[74] The Act's revised treatment of real property had long-term implications for the development of American property law. Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120, no. 2 (December 2006): 385–459.

DRAFT

the law of evidence in the colonies and in the process helped knit together the distinct jurisdictions that composed the Empire. The first section of the Act provided vital plumbing that enabled legal business to be transacted across the Atlantic Empire. Instead of being required to send accounts and witnesses across the Atlantic to prove debts in colonial courts, that section gave British merchants an easy legal mechanism to prove their debts. Under its provisions, they simply had to go to the mayor or chief magistrate of the city in which they lived and have a witness – usually their clerk – swear out an affidavit, attesting to the validity of the debt owed in the colonies, which could then be used as evidence in a colonial court.[75] This provision might seem like a minor change, but it was a substantial alteration to the law of evidence. It prevented defendants from cross-examining witnesses, and created an unequal, differentiated law of evidence for litigants depending upon their place of residence in the Empire. The original legal innovation allowing metropolitan creditors to prove their colonial debts actually originated in the colonies, in a Virginia law of 1705. The Crown repealed Virginia's statute in 1730 because it imposed a statute of limitations on bringing suits for debts, but Virginia refused to reenact the authentication provision.[76]

A draft of the bill from 1731 or 1732 proposed giving British merchants legal privileges beyond any other subjects possessed. The proposed bill banned any pleas in bar to actions

---

[75] The Colonial Debts Act specifically authorized the drawing of affidavits for mercantile debts, but the practice extended to having the courts authenticate other important documents. Letters of attorney and deeds sent from Britain to the colonies could similarly be authenticated in municipal courts by a witness. Anthony Stokes, *A View of the Constitution of the British Colonies, in North America and the West Indies, at the time the Civil War broke out on the Continent of America* (London, 1783), 394 James McNayr, *A System of English Conveyancing, adapted to Scotland* (Glasgow, 1789), 262. According to Thomas Emerson, one of the attorneys of the London Mayor's Court, documents commonly authenticated by that Court included, "*Affidavits* verifying the execution of deeds, wills, and other writings affecting lands, &c. in the *West India Islands*, and other his Majesties colonies and plantations in *America*, to the end that they may be registered in such islands or places, and for other purposes; and also *affidavits*, authenticating proofs, the execution of powers of attorney, &c. for the recovery of debts, &c. in the above, and other foreign places." Thomas Emerson, *A Concise Treatise on the Courts of Law of the City of London* (London, 1794), 77.

[76] Priest, "Creating an American Property Law," 421–22; John Clayton to Micajah Perry, July 23, 1730, TNA, CO 323/9, f. 77

metropolitan creditors brought in the colonies with the authenticated affidavits. This would have limited colonial debtors' defenses to only having paid some or all of the balance. The draft was even more generous to metropolitan Britons in other aspects. It would have enabled them to bring appeals to the Privy Council from judgments in any colonial court, no matter the amount. Further, in an attempt to bypass the onerous duties and other taxes colonies imposed on metropolitan merchants, the bill sought to declare all British subjects trading to the plantations as "Residents in such Plantations," giving them the same rights, privileges, and immunities as colonists, and obviating any punitive colonial laws against British merchants.[77] It is unclear what the Board of Trade and Privy Council thought of the draft, but these provisions were dropped from the eventual Act.

Nevertheless, the new evidentiary provisions significantly affected British merchants' operations. Taking the affidavit as evidence meant that merchants or their clerks no longer needed to travel to the colonies to give testimony in court. Instead, they could send the affidavit and copies of the accounts, along with a power of attorney to a trusted correspondent in the same jurisdiction. Their correspondent could then initiate court proceedings on their behalf against the debtor. This provision made the process of proving a debt from across the Atlantic far simpler for British merchants, and, of course, an affidavit and account could not be cross-examined. Jonathan Blenman in a 1742 tract argued that the law not only gave creditors greater security but also gave the creditor unfair advantages over the debtor.[78] However, while the metropolitan creditor's advantage was clear in the black letter of the law, in practice the situation remained murkier. A petition from merchants in London, Bristol, and Liverpool in 1735 made it clear that the Colonial Debts Act did little good when colonial legal officials did not observe it, failed to

[77] TNA, CO 323/9, ff. 87-88.

[78] Jonathan Blenman, *Remarks on several Acts of Parliament relating more especially to the colonies Abroad* (London, 1742), 9-32.

execute processes at law, and even declined to hold courts.[79] Though it is hard to assess quantitatively the Act's effect on the flow of British credit, economic historians have tended to find that it enhanced the amount of credit and contributed to the colonies' economic development.[80] Contemporaries certainly believed the Act had far-reaching consequences.[81]

This rule for authenticating accounts had wide reverberations. It created a uniform law of evidence in commercial debt cases throughout the American colonies. It provided a set of rules for authenticating documents on one side of the Atlantic and using them on the other. In fact, these legal innovations proved to be so effective at stimulating the provision of credit and facilitating the authentication of documents from different jurisdictions that individual colonies enlarged upon them. Antigua, for example, passed its own act to extend the methods of proving debts owed in Britain to creditors in Antigua, Ireland, North America, or any of the other British colonies. Other colonies followed suit and passed acts along similar lines.[82] After the Empire expanded in the nineteenth century, Parliament extended the provisions of the Colonial Debts Act to New South Wales.[83] The changes introduced by the Colonial Debts Act underscore the utility of thinking in terms of legal latitude. The problem for most metropolitan creditors was not navigating multiple, overlapping legal systems, but rather maneuvering within competing

[79] "The Humble Petition and Representation of the Merchants of London, Bristol and Liverpool in behalf of themselves and others his Majesty's Trading Subjects to the British Colonys and Plantations in America," 1735, TNA, CO 323/10, ff. 48-54

[80] Jacob Price, Russell Menard, and S.D. Smith all see the Act as effective, if not perfectly so, in changing lending behavior. Richard Pares is doubtful regarding its enforcement in colonial courts. Claire Priest provides circumstantial evidence for the Act's effect on credit expansion. Jacob M. Price, "Transaction Costs: A Note on Merchant Credit and the Organization of Private Trade," in *The Political Economy of Merchant Empires: State Power and World Trade, 1350-1750*, ed. James D. Tracy (New York, 1981), 276–96; Jacob M. Price, "Credit in the Slave Trade and Plantation Economies," in *Slavery and the Rise of the Atlantic System*, ed. Barbara L. Solow (Cambridge, 1993), 309–11; Russell R. Menard, *Sweet Negotiations: Sugar, Slavery, and Plantation Agriculture in Early Barbados* (Charlottesville, 2006), 114; S. D. Smith, *Slavery, Family, and Gentry Capitalism in the British Atlantic: The World of the Lascelles, 1648-1834* (Cambridge, 2006), 165–66; Richard Pares, *Merchants and Planters*, Economic History Review, Supplement 4 (Cambridge, 1960), 46; Priest, "Creating an American Property Law," 435–36.

[81] William Knox, *Interests of the Merchants and Manufacturers of Great Britain, in the present Contest with the Colonies, Stated and Considered* (London, 1774), 35-36, 38.

[82] Stokes, *A View of the Constitution of the British Colonies*, 392-93.

[83] New South Wales (Debts) Act, 1813, 54 Geo. 3, c. 15.

English legal systems. The Act altered English laws of evidence and procedure in the colonies in order to make debt recovery easier for British creditors.

As the Act's title made clear, its provisions only applied to British colonies in the Americas. It was a targeted intervention in legal procedures in one imperial region that did not apply elsewhere. A comparison with the situation in British India reveals how demanding the process of authenticating and proving documents could be in possessions not covered by the Colonial Debts Act. Not until the 1780s was there a relatively easy, set method for authenticating British documents in the British Indian courts.[84] Moreover, when a parliamentary Act of 1786 laid down procedures for authenticating bonds, deeds and other writings in and from India, the procedures it introduced diverged from the practices for the American colonies. For documents moving between Britain and India, a witness needed to authenticate the handwriting of the witnesses to the document in question.[85] For the American documents, one of the subscribing witnesses had to appear and make an affidavit.[86]

British merchants' lobbying efforts in the period after American independence show just how critical the Act was to the functioning of the British Atlantic economy. Their petitions also reveal the central role an effective court system played in the operation of commerce. With political independence, the Act no longer applied in the newly formed United States, and, in its absence, British merchants sorely missed the protections they had arranged for themselves. The London Committee of American Merchants in 1783 petitioned for the final peace treaty with the United States to include a provision "for the securing and recovering of British Debts upon

[84] *George Hoggan v. David Killican et al.*, Victoria Memorial Hall, Hyde Notebooks, March 8, 1782, Vol. 3.

[85] An Act for the further Regulation of the Trial of Persons accused of certain Offences committed in the East Indies…and for the more easy Proof, in certain Cases, of Deeds and Writings executed in Great Britain or India, 1786, 26 Geo. 3, c. 57, s. 38. Pickering, ed. *Statutes at Large*, 35:602-3.

[86] McNayr, *System of English Conveyancing, adapted to Scotland*, 262.

principles similar to those" of the Colonial Debts Act.[87] Even after the peace was secured, the mercantile community lobbied for a commercial treaty with the United States to ensure they received impartial justice in the American courts.[88]

In another petition to the Foreign Secretary from 1785, the Committee of Merchants trading to North America detailed the legal challenges British merchants now faced in the United States. First on their list of new problems was the uncertainty over proof of debts that the Act's removal had created. They claimed that "Many of the Forms of Proof to ascertain Brit: Debts & to secure British Property" depended upon Acts of Parliament that, obviously, no longer applied. As a result, "the Rules of Evidence which affect Disputes between the Merchant here and his Debtor there" were "so much deranged as to render the Recovery or Security of such Debts and Property very difficult and hazardous." The memorialists went on to specify the difficulties they encountered without the Colonial Debts Act.[89]

As late as 1793, Thomas Emerson, as the Attorney of the London Mayor's Court, wrote to John McKesson, a New York lawyer and the clerk of the state's Supreme Court, regarding these issues.[90] The problems of stitching together a legal community torn apart by independence entailed significant issues that occupied the attention of important lawyers in both Britain and America. Over a decade after the formal end of the American War of Independence, the metropolitan legal and commercial establishment was still coming to grips with how to navigate a commercial world that political strife had stripped of its legal infrastructure. What was so

[87] "Observations of London Merchants on American Trade, 1783," *American Historical Review* 18, no. 4 (Jul., 1913): 779. doi:10.2307/1834770.

[88] "A Few Hints Most Submitted to the Rt. Hon. the Marquis of Carmarthen…by the Committee of the Merchants of London, Bristol, Liverpool, Whitehaven, and Glasgow, Trading to Virginia, Maryland, and North Carolina previous to the Year 1776," December 23, 1785, TNA, FO 4/3, vol. 2, ff. 387-88.

[89] "Reasons Submitted by the Merchants trading to North America to the Marquis of Carmarthen on the expediency of the appointment they have solicited," December 14, 1785, TNA, FO 4/3, vol. 2, f. 383.

[90] Thomas Emerson to John McKesson, April 2, 1793, New-York Historical Society [hereafter NYHS], John McKesson Papers, Box 1, Folder 7.

DRAFT

essential to this legal infrastructure was that the very means of allowing communities on either side of the Atlantic to conduct legal business with each other meant that the empire had to rely on substantive differences in the law of evidence, increasing legal latitude, a policy designed to bring the two locations into a closer economic relationship. Those divergences were also designed to privilege British creditors' claims over colonists' rights in American courts.

DRAFT

The Colonial Debts Act was by no means the only instance of parliamentary intervention relying on the strategy of designed divergence. Another set of statutory additions provided further encouragement for the flow of credit to the West Indian colonies by increasing legal latitude. By the early 1770s, metropolitan merchants and others with excess capital had lent extensively to colonial merchants and planters. So much so that when the credit crisis of 1772-3 hit, many merchants in Britain were overextended. The collapse of the London banker and stock speculator Alexander Fordyce precipitated a financial panic that quickly spread to other banks in London. From London it then expanded to Scotland, the European Continent, and other parts of the British Empire.[91] Even solvent banks temporarily stopped payments and refused to discount bills of exchange, closing off one of the most important sources of commercial credit. The financial crisis in the metropole coincided with a year of heavy hurricanes, with several major storms in 1772 causing devastation throughout the Caribbean.[92] According to the London merchant Alexander Small, "the very numerous Failures we have had, added to the Losses by the Hurricane in the West Indies, had tied up every Man's hands here in Money Matters."[93] Raising

[91] Paul Kosmetatos, *The 1772-73 British Credit Crisis* (New York, 2018); Richard B. Sheridan, "The British Credit Crisis of 1772 and The American Colonies," *Journal of Economic History* 20, no. 2 (June 1960): 172.

[92] Stuart B. Schwartz, *Sea of Storms: A History of Hurricanes in the Greater Caribbean from Columbus to Katrina* (Princeton, 2015), 88.

[93] Alexander Small to William Alexander, January 5, 1773, NYHS, Alexander Papers, Box 6, Fol. 6.

the funds needed to repair the damage was difficult – verging on impossible – with this combination of crises.

The financial situation was even worse in the Ceded Islands: Grenada, Dominica, St Vincent, and Tobago. A new generation of would-be planters sought to establish themselves in those islands following the conclusion of the Seven Years' War. Unlike previous generations, however, they had to buy their estates at market rates – either from the Crown or French planters – and required financing from the metropole to meet their payments.[94] John Blackburn, another London merchant, diagnosed overambitious colonial investments as the ultimate cause of the present crisis: "The Amazing thirst to be Concerned in West India Estates & the Moonshine Advantages Apparent thereupon have Ruined many of Our Eminent Merch^{ts}." Blackburn continued that, "unless the present bill now in Parliament will Induce foreigners to lend their money…I can foresee very Fatal Consequences."[95]

The bill Blackburn mentioned was the West India Mortgages Act of 1773, which enabled foreigners to lend money on mortgages in the West India colonies.[96] With British colonial investment overextended and the domestic financial system blocked from the credit crisis, plantation owners needed a new source of funds to finance their operations. An earlier version of the bill had failed to gain the Commons' approval in April 1772.[97] The changed circumstances of 1773 made the need for statutory intervention more pressing. By mid-1773 planters were evading their debts by fleeing from British islands to French possessions.[98] William Pulteney served as

[94] D. H. Murdoch, "Land Policy in the Eighteenth-Century British Empire: The Sale of Crown Lands in the Ceded Islands, 1763–1783," *The Historical Journal* 27, no. 3 (September 1984): 549–74.

[95] John Blackburn to William Alexander, March 4, 1773, NYHS, Alexander Papers, Box 6, Fol. 6.

[96] An Act to encourage subjects of foreign states to lend money upon the security of freehold or leasehold estates, in any of his Majesty's colonies in the West Indies; and to render the securities granted to such aliens effectual for recovering payment of the money so to be lent, by sale of such freehold or leasehold estates, 13 Geo. 3, c. 14, 1773, Pickering, ed. *Statutes at Large*, 30:22-26.

[97] Julian Hoppit, ed., *Failed Legislation, 1660-1800: Extracted from the Commons and Lords Journals* (London, 1997), 418.

[98] Sheridan, "British Credit Crisis of 1772," 172–73.

the bill's sponsor in Parliament. Born into the Scottish Johnstone family, trained as a lawyer, and now one of the wealthiest men in the kingdom through inheritance, Pulteney was ideally placed as a nexus for European bankers, British colonial merchants, and West India plantation owners to make the case for statutory intervention.[99]

According to its preamble, the West India Mortgages Act aimed to "encourage foreigners, or aliens, to lend money upon the security of such estates."[100] The Act, in fact, was designed to induce Dutch investors to enhance their lending to planters in the British West Indies. To encourage investment, the Act made it legal for foreigners to lend money on the security of West Indies land at 5% interest. Compared to the 3-4% that government securities and mortgages yielded in Britain and the Netherlands, the additional returns were supposed to spur investment into the sugar colonies.

The true heart of the plan was to monetize plantation real estate to induce foreign capitalists to lend money on the security of plantations in the British colonies. The inability of foreigners or aliens to own real property was a longstanding principle of English law. The Act circumvented this prohibition, enabling foreigners to take a mortgage as effective security for a loan, while still maintaining their inability to own the land. It gave foreign lenders the same rights to legal process for suing in law or equity courts "as any British subject now may or can have." Their rights then diverged from those of British subjects, as they were not entitled to "the actual possession of any such mortgaged premises," by any process at common law or to foreclose on the equity of redemption through an equity court.[101] Instead, the Act stipulated local

[99] Even before promoting the bill in Parliament, Pulteney served as a conduit linking Amsterdam bankers with British West Indian plantation owners in need of capital, see William Pulteney to Hope & Co., August 27, 1770, Huntington Library [hereafter HL], MssPU 1908; Hope & Co. to William Pulteney, August 31, 1770, HL, MssPU 376. On the Johnstone family, see Emma Rothschild, *The Inner Life of Empires: An Eighteenth-Century History* (Princeton, 2011).

[100] Pickering, ed. *Statutes at Large*, 30:22.

[101] Pickering, ed. *Statutes at Large*, 30:23.

officials would auction off the property and the proceeds be remitted to the creditors. Foreign mortgage holders also received the right to sue for the recovery of their money in colonial courts, even if their home nation was at war with Britain.

The bill faced opposition from two groups: planters in the previously colonized islands afraid that increased sugar production would lower prices, and West India merchants in England worried that planters taking out loans from foreigners would consign their sugar to the foreign lenders' agents in London.[102] Its opponents in Parliament claimed that it would damage the price of British stocks by encouraging Dutch investors to sell their holdings and buy West India mortgages that offered a higher rate of return.[103] Yet according to the bill's sponsors, British securities already paid higher rates of return than Dutch ones did and so there was no reason to assume those investments would be sold to purchase additional ones. Moreover, the money would be raised through a subscription method, whereby the large financial houses would organize individual concerns, known as "negotiations," that took smaller investments of £100 or even 100 guilders from individual investors, who would not liquidate their British holdings to fund their investment in West India mortgages.[104] The West Indian plantation loan was already a well-known investment vehicle in the Netherlands, whereby merchant bankers arranged loans to planters in the West Indies, taking mortgages as security, and then sold bonds to individual investors.[105] This was the model that Pulteney and English merchants sought to emulate in the

[102] Anon., "A West-India Planter," *Considerations on the state of the Sugar Islands: and on the policy of enabling foreigners to lend money on real securities in those colonies* (London, 1773), 17-18.

[103] Around 1760, Dutch investors held some £20 million in consols, in addition to shares in the Bank of England and East India Company. They also normally made advances to British merchants on the security of mortgages of consols and real estate, the magnitude of which contemporaries believed to be even larger than their holdings of national debt and public stocks. L.H. Jenks, *The Migration of British Capital to 1875* (New York, 1927), 7.

[104] *Cobbett's Parliamentary History*, 17:687-89.

[105] The first *negotatie* or "negotiation" was created by the Amsterdam merchant-banker Willem Gideon Deutz in 1753 to provide credit for planters on Surinam. By 1776, at least 198 West India negotiations had been established, providing at least 62 million guilders in credit to planters. J.P. van der Voort, "Dutch Capital in the West Indies during the Eighteenth Century," *The Low Countries History Yearbook/Acta Historiae Neerlandica* XIV (1981): 88–95; J.P. van der Voort, *De Westindische Plantages van 1720 Tot 1795: Financiën En Handel* (Eindhoven, 1973), 109.

West India Mortgages Act, allowing plantations in the English colonies to serve as the basis for Dutch "negotiations." The recourse to Dutch capital in 1773 was curious – if not ill-advised – as a bubble in Dutch plantation loans had just burst and investors there were wary of lending money in similar ventures.

Beyond the financial objections raised against the bill in the Commons, opponents focused on the fear that foreigners might use it to gain ownership property in the British West Indies.[106] This may have been a smokescreen for MPs with interests in Jamaica and other first generation colonies, who worried that increased sugar supplies from new colonies would lower prices and eat into their profits. Of course, the bill explicitly avoided that outcome by adding special procedures for foreigners suing to recover money they had lent. Its second section made clear that foreign lenders had no right to "have or obtain, directly or indirectly, the actual possession of any such mortgaged premises" either by common law or equity.[107] Foreign mortgage holders could only recover their money through a forced sale; they could never enter into possession of the estate.

A significant point of opposition to the bill was that it intruded on areas that colonial legislatures could handle themselves.[108] Pulteney's response showed how political expediency could be clothed in constitutional garb:

> Let us not be told, that their own assemblies can apply a remedy. Sir, if they passed such a law, it would not be valid, because contrary to the law of this land. The British legislature alone is competent in this case, in which it is proposed to dispense, in some measure, with long received principles of the constitution.[109]

[106] *Cobbett's Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 17: *A.D. 1771-1774* (London, 1813), 482.

[107] 13 Geo. 3, c. 14 s. 2.

[108] *Cobbett's Parliamentary History*, 17:482. This echoed one of Blenman's objections to the Colonial Debts Act: Barbados already had laws that made real estate liable for all debts. Blenman, *Remarks*, 10-11.

[109] *Cobbett's Parliamentary History*, 17:483-4.

He claimed the changes it made to property law in the West Indian colonies were significant and diverged enough from English law that they would be classed as contrary to the laws of England. Colonial assemblies were incompetent to make such laws, and the Privy Council frequently disallowed acts from colonial legislatures on those grounds. Any serious alteration to English law had to come from Westminster. In the context of plantation mortgages, it was in the metropole's interest for colonial law to diverge so sharply from English law, and the plan was sanctioned. Of course, one of the main reasons Parliament had to intervene was its ability change the law in multiple colonies at once. Passing laws in each colony would have been a time-consuming process and liable to being derailed by local politics.

Metropolitan policymakers made a further change to imperial mortgage laws in 1774. Again, Pulteney shepherded the bill through the Commons.[110] The new statute must have been far less controversial, as there were no debates recorded in Cobbett's *Parliamentary History*. It normalized the legal standing of British creditors who had lent on mortgages in Ireland and the West Indies at interest rates above the 5% permitted in Britain. As the law stood, mortgages on colonial plantations that paid more than 5% in annual interest were breaking England's usury laws. Each colony had the right to set its own interest rate ceilings, and they were all above the rate allowed in Britain. Instead of setting a standard rate as the 1773 Act had, this Act enabled lenders legally to charge interest on the mortgages according to where the property was located. Jamaica, for example, allowed 6% on these mortgages.[111] This approach neither enforced convergence on a metropolitan norm nor established a new standard for all of the colonies. It allowed usury limits to appropriately match economic local economic conditions, integrating the Empire financially by means of divergence. Including Ireland with the West Indian colonies

[110] Price, "Credit in the Slave Trade and Plantation Economies," 328.
[111] Price, "Credit in the Slave Trade and Plantation Economies," 328.

DRAFT

marked a twist on the regional policy, but Ireland's high rates of absenteeism might explain why it was included with the Caribbean region.[112]

For individuals wanting to borrow or lend money with plantations as security, it became "markedly easier" to do so following the passage of the acts.[113] Hope & Co., Amsterdam merchant-bankers, finding the path cleared, arranged a number of loans to British planters on Grenada and Tobago.[114] Pulteney helped arrange a loan for a Tobago plantation owner with a banker in Brussels at a reasonable rate "in consequence of the late Act of Parliament."[115] Nevertheless, it is impossible to fully assess the Act's impact in stimulating Dutch lending. The most complete study of Dutch plantation loans found that prior to 1776 British planters received twenty loans, with all going to the Ceded Islands with the exception of one loan to Barbados—though this is an underestimate.[116] We know, for example, that Archibald Stirling took advantage of the Act to take out a mortgage on Frontier plantation in Jamaica and planned to use the money to pay off the remainder of his brother's debts and legacies.[117] Dutch houses lent over 3 million guilders to plantations on the English islands up to 1775.[118] A subsequent analysis estimated that Dutch investors extended loans worth about 44 million guilders to British planters between 1770

DRAFT

[112] B.W. Higman, *Plantation Jamaica, 1750-1850: Capital and Control in a Colonial Economy* (Jamaica: University of the West Indies Press, 2005), 20.

[113] Lowell J. Ragatz, *The Fall of the Planter Class in the British Caribbean, 1763-1833: A Study in Social and Economic History* (New York, 1928), 134.

[114] Marten G. Buist, *At Spes Non Fracta: Hope & Co. 1770-1815: Merchant Bankers and Diplomats at Work* (The Hague, 1974), 20. According to Van der Voort, Hope & Co. contracted for more than a million guilders of loans between 1770-73. Van der Voort, "Dutch Capital," 95.

[115] Copy Letter, William Pulteney to M. Danoot, August 6, 1773, HL, MssPU 1909.

[116] Van de Voort, *De westindische plantages*, 108. See also Christiaan van Bochove, *The Economic Consequences of the Dutch: Economic Integration around the North Sea, 1500-1800*, Close Encounters with the Dutch (Amsterdam, 2008), 149.

[117] Archibald Stirling of Keir to Patrick Stirling, March 13, 1773, and Archibald Stirling of Keir to David Erskine, July 6, 1773, GCA, T-SK 15/11, 75, 80.

[118] J.P. Van Der Voort, "Dutch capital," 88-95

and 1791.[119] The political and ruptures of the mid-1770s, however, checked the full effects of the West India Mortgages Acts.[120]

The West India Mortgage Acts underscore the strategy of "designed divergence" for imperial governance. By allowing deviations in colonial laws that were both "repugnant" to the laws of England (altering the process for recovering money on landed security) and less offensive and seemingly minor (permitting higher rates of interest), the imperial Parliament laid down an effective framework for cross-jurisdictional activity. Without interventions like these, transactions could all too easily become mired in the swamp of multiple jurisdictions and rules that composed the Empire. While it may seem counterintuitive, or even ironic, the Colonial Debts Act and the West India Mortgages Acts show that heightening legal latitude between the mother country and the colonies could lead to tighter integration between the metropole and colonies- not just economic but also legal.

Once again, comparison between acts designed for the American and West Indian colonies on the one hand, and for British India, on the other hand, reveal how commercial law ordered the wider empire. The same year that Parliament took up the task of increasing credit to its West India colonies, it also reformed the East India Company on a grand scale. The 1773 Regulating Act reformed the governance of the East India Company and its administration of law and order in Bengal. The Act also limited the interest British subjects could charge or pay there. Unlike the rates in the Atlantic world, however, those in India were far higher. Parliament established a usury ceiling of 12% for Britons in Bengal, over double what was permissible at home.[121] Interest rates were generally higher in India than in Europe – and highest in Bengal.[122]

---

[119] Bochove, *Economic Consequences of the Dutch*, 260-63.
[120] Ragatz, *Fall of the Planter Class*, 134; Pitman, *Development of the British West Indies*, 136-7.
[121] 13 Geo. 3, c. 63, s. 30.
[122] P. J. Marshall, *East Indian Fortunes: The British in Bengal in the Eighteenth Century* (Oxford, 1976), 41.

East India Company servants commonly lent money at a rate of 2-3% per month, and according to Harry Verelst, lending money at 10% per annum in Bengal was the equivalent of lending at 5% in England.[123] Usury ceilings in one region of the wider Empire were thus palpably inappropriate for another.

Analyzing these acts together each other sharpens the picture of regional convergence and designed divergence from the English standard. The undertaking to make laws throughout the Empire for the benefit of commerce relied on strategies of designed divergence. Too much divergence would heighten the obstacles to doing business across borders. Too much convergence would flatten the very real physical, social, and economic differences between the colonies. Allowing heterogeneity in interest rates throughout the Empire – and especially allowing investors resident in Britain to take advantage of that heterogeneity – helped funnel capital to where it was wanted most. In this way, the right amount of latitude could enhance trade and tie disparate parts of the Empire closer together. Interest rates are one small example of the type of divergence needed for the imperial economy to function. The more fundamental alterations Parliament made to the laws of property, evidence, and foreclosure in the colonies show the need to foster legal difference across the Empire. Legal latitude provided the framework for various laws for distinctive spaces.

Those and other laws pushed capital, goods, people, and behaviors along certain prescribed paths.[124] The efficacy of these policies derived from understanding, accepting, and promoting difference. The legal rights and abilities British subjects possessed in the metropole

[123] Harry Verelst, *A View of the Rise, Progress, and Present State of the English Government in Bengal: including a reply to the misrepresentations of Mr. Bolts, and other writers* (London, 1772), 124-5. On profits to be made in the money market in India, see Marshall, *East Indian Fortunes*, 70–73; Ian Bruce Watson, *Foundation for Empire: English Private Trade in India, 1659-1760* (New Delhi, 1980), 99–101.

[124] The Anonymous Partnerships Act (Ireland) of 1782 is a further example of this strategy of designed divergence, although it is doubtful whether it in enhanced integration between Ireland and other parts of the Empire, see E.A. French, "The Origin of General Limited Liability in the United Kingdom," *Accounting and Business Research* 21, no. 81 (1990): 15–34.

or in one jurisdiction were not mirrored in others, and the Empire's legal geography became increasingly uneven. Although contemporaries never expressed it in these terms, these policies were effectively dirigisme by difference.

For most men and women who faced and fostered imperial legal latitude, the true challenge was how to make doing business across a diverse empire possible, how to manage these different jurisdictions, not how to make that empire uniform. Where possible, peripheral jurisdictions sought to emulate English patterns, whether those were in the structure of the court system or the substance of the law in ways best suited to local conditions. Significant latitude remained that could never be ironed out- indeed the wider system depended on maintaining such latitude. Beyond the Navigation Acts, the imperial parliament rarely intervened to facilitate activities across its expanding dominions. When it did, managing those gulfs in latitude provided opportunities for imperial ordering, for imposing a schema or plan upon a diverse array of colonies and possessions. Just as the Empire's political economy was predicated on difference – colonies were to produce staple commodities and the center was to be the seat of manufacturing – its commercial law increasingly reflected the hierarchical relationship between metropole and colony. Highlighting, and even exacerbating, the divergence between law at home and in the colonies drew the different parts of the Empire closer together.

Whitehall policymakers did not create many laws that crossed the jurisdictional border and facilitated business. For the most part, the problems of legal latitude were left for the colonies to manage themselves, and where the Westminster Parliament did intervene, the impetus came from colonial and metropolitan interest groups, not from imperial administrators.

DRAFT

Such groups drafted and lobbied for the passage of the Colonial Debts Act, the West India Mortgages Acts, and bankruptcy laws for Scotland, some of the few laws that sought to manage latitude in commercial law. Those laws eased the operations of commerce and helped structure relations between an increasingly diverse and varied collection of imperial possessions. Gradually, slowly, they built up an imperial commercial law.

Thinking about the Empire through commercial laws like these also gives us another perspective on the Empire as a whole: Strategies for imperial management relied on treating the component parts of the empire as regional groups. Imperial commercial law was constructed neither on the level of the whole empire nor on that of the individual colony, but instead through “regional” laws like those for the Americas, the West Indies, and British India. “Local” laws for Scotland might be seen as an exception to this general pattern, but the fundamental difference between the Scots and English legal systems and the fact of Scotland’s presence in Britain account for its different treatment. For imperial administrators, differential legal treatment of various imperial spaces served as a means to order the empire.

Although the British Empire had a unity and coherence, we would do well to remember that it was composed of drastically different places and the same laws could not be effective throughout. The story of private commercial law across the Empire reveals that imperial policy produced special exceptions and rules for colonies. Other policies, focusing on taxes and customs, attempted to iron out those wrinkles of imperial difference. Enforcing English norms on tax and customs collection in the American colonies might have worked in an empire of uniform law and custom. It could not have in an empire in which latitude’s ubiquity was a fundamental part of the ground rules and expectations. Policymakers in the 1760s and 1770s neglected that fact to their detriment. Perhaps some of the reasons for this neglect lie in the fact that it was

DRAFT

politicians, not merchants or those with expertise in colonial affairs, who drafted the laws at the heart of the imperial crisis.

DRAFT