

Imperial Politics, English Law, and the Strategic Foundations of Judicial Review in America

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Abstract

In the colonial period of American history, the royal Privy Council evaluated acts of colonial assemblies on grounds of both policy and higher law. Assembly acts were sometimes nullified through this process. In this way, Council review constituted the origin of judicial review in America. This paper presents a formal model of this review procedure to understand its strategic value to the imperial crown. I argue that Privy Council legislative review counteracted political pressure on imperial governors in the colonies, to approve laws contrary to the empire's interests. Optimal review in the model combines both legal and substantive considerations, because this gives governors strong incentives to avoid higher level review by vetoing bad laws. Thus, in addition to obvious benefits for legal consistency in the empire, legislative review helped the crown to grapple with agency problems in imperial governance.

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Among the institutions that limit the power of government in the United States, judicial review is prominent and important. *The Federalist* No. 78 contends that judicial review keeps the legislature “within the limits assigned to their authority.” Through judicial review, courts have articulated new rights and defended old ones that are in conflict with legislative enactments. Through review of state laws, federal judicial review also ensures consistency with and supremacy of federal law.

What are the origins of judicial review in the US? *Marbury v. Madison* itself noted that courts did not claim a new power in 1803, they merely used an existing one (Snowiss 1990, Treanor 2005).¹ Moreover, the establishment of judicial review is not simply a legal problem, it is a political one: it is about authority and power over public policy. *The Federalist* No. 78 notes the existence of the power under the Constitution,² but makes no pretense that the Constitution invented it.

Common arguments about the origins of political institutions in America, and particularly limited government, look to early modern English practice. It is sometimes argued, perhaps more as shorthand than as a full throated theory, that the English imported key institutions with them to America (e.g. North 1990). Yet judicial review does not and did not exist in Britain, where parliamentary supremacy has held since 1688.

Legal historians have located the origins of judicial review not in the constitution of Britain or the rational design of America’s constitution framers, but in the British imperial constitution—or what Mary Sarah Bilder (2004) has called “the Transatlantic Constitution” (cf. Greene 1986). Unlike Parliament, colonial assemblies exercised powers (according to the British view of the constitution) pursuant to grants by the crown. Therefore, to ensure their outputs were beneficial to the crown and the empire as a whole, colonial legislation was reviewed by the royal Privy Council in London. Review combined considerations of the substantive merits of colonial policy and legal evaluations of consistency with the laws of England. This legislative review habituated colonists to external limits of assembly power relative to more fundamental or higher level law. Accord-

¹Moreover, *Marbury* is only about federal judicial review of federal legislation. Less theoretically problematic—indeed taken for granted as a corollary of federalism—was federal judicial review of state legislation (Treanor 2005, Bilder 2006).

²See also *Brutus*, Essays XV and XVI, 1788.

ingly, historians have identified review by the king-in-council as the forerunner of the contemporary American practice of judicial review (Russell 1915; McGovney 1944; Bilder 2004; Bilder 2006).³

The purpose of this paper is to understand the incentives of the British crown to adopt this forerunner of modern judicial review as part of the imperial constitution. Having empowered colonial assemblies to mitigate a more fundamental agency problem between the crown and governor (Gailmard 2017), the crown's basic problem was to ensure that acts of colonial assemblies were beneficial, and not harmful, to the interests of the crown and empire. One such incentive for the crown is nearly self evident: clearly, judicial review is useful for improving legal consistency across the empire. I argue, as well, that it serves the substantive interests of the crown in ensuring benefits to the empire from acts of colonial assemblies.

The governor, an agent of the crown armed with veto power (Greene 1898), was the first line of defense against bad laws from colonial assemblies. But the governor was often subjected to immense political pressure from the assemblies (Greene 1963), so that their passage of a law was no guarantee of its benefits to the crown (Russell 1915). Thus, as a reviewer of legislation, the governor was an imperfect agent of the crown. The crown, too, had an arsenal of sanctions to inflict on governors for passing bad laws—but these were only meted out if the crown determined an inappropriate law was passed. For this purpose, crown review was also necessary.

This is where legislative review by the Privy Council enters the story. Legal skepticism of colonial laws by the Council acted as a commitment or incentive to review these laws in both legal and substantive terms—for only high substantive benefits could outweigh the cost of legal inconsistency. That stronger commitment to review, in turn, made crown sanctions on the governor more certain. This neutralized the assembly's pressure on the governor, and emboldened the governor to veto laws the crown and Council would find undesirable.

The key point is that legal skepticism of colonial laws by the Privy Council

³In his comprehensive survey of early judicial review, Treanor (2005) notes its absence in both the British constitution and colonial constitutions. However, he does not consider the imperial or Transatlantic constitution.

changed the bargaining dynamic within the colonies between governor and assembly. Therefore, *legal* analysis and review in the Council was useful for solving a *political* problem in the colonies. The optimal review that emerges in equilibrium is sensitive to matters of both law and policy.

Understanding the development of this colonial institution is important for two reasons. First, it illuminates the incentives of sovereigns voluntarily to limit their own powers. While legislative review was an assertion of power over colonial assemblies, it was a limited power. The sovereign restricted the grounds by which acts of subordinate assemblies could be invalidated (Russell 1915; Smith 1950; Bilder 2004). Thus, in the British imperial constitution, it was a type of limitation of sovereign power. It is often recognized that sovereigns benefit from committing to limited powers (cf. North and Weingast 1989). Here, the rationale is that a limited and definite scope of royal review makes that review predictable and intelligible to agents. Because review is predictable, it has clear effects on the incentives of agents to resist political pressure from assemblies.

Second, judicial review is one of the touchstones of American constitutionalism, and at the highest level, a crucial part of the policy making process. Understanding the structure of this system requires understanding the origins of judicial review. While the link from colonial practice to the US Constitution was obviously mediated by the framers, it is noteworthy that many of them experienced judicial review in colonial politics. For example, this experience probably prompted Madison's initial plans for a Council of Revision, to serve the function of the privy council in ensuring consistency between state and federal laws (Bilder 2006).

This paper also builds on the formal literature on judicial review, set mostly in the contemporary US context. Most formal work on ex post review, judicial or otherwise, highlights its upstream effects on the policies that get adopted in the first place (Shipan 2000; Rogers 2001; Bueno de Mesquita and Stephenson 2007; Fox and Stephenson 2011; Fox and Vanberg 2014; Patty and Turner 2018). Dragu and Board (2015) emphasize that judicial review can enhance information transmission in policy making; in a similar spirit applied to administrative regulation, Gailmard and Patty (2017) argue that a combination of political and legal considerations in judicial review is useful for producing more information about

policy consequences. Beim et al. (2014), while not addressing judicial review per se, also present a hierarchical model of review. A key difference is that the intermediary can dissent but not veto, and there is one dimension of evaluation. Cameron and Kornhauser (2012) and Clark and Carrubba (2012) present models of review with multiple dimensions of evaluation (e.g. “legal” and “substantive quality”); my approach shares this feature for reasons explained below.

Taken together, this paper and Gailmard (2017) have several implications for the understanding of foundational institutions of American government. First, two of the institutional linchpins of the US Constitution—separation of powers and judicial review—can be foreseen in the strategic response by the British empire to agency problems created in imperial governance. Second, and more specifically, these aspects of American government co-evolved over 160 years of imperial rule. The need for the institutions leading to judicial review arose only because of the design of institutions leading to separation of powers. Only the empowerment of local assemblies across the several colonies, responding to diverse conditions and their own parochial interests, generated the possibility of incoherence and conflicting interest in colonial laws, and incongruence with the laws of England. Third, at a broad level, the model implies that government begets more government. With limited organizational forms and only partial understanding of their effects, no institutional device turns out to be an unalloyed good for its designer. As is often the case in complex environments with incomplete contracts, the solution to one agency problem generated another, which in turn necessitated a new institutional device to mitigate it. In this way, experience leads to a thickening of institutional structure, each layer of which reflects a strategic response to problems revealed in lower layers.

The rest of the paper is organized as follows. In the next section I review key elements of the institutions and practice of legislative review in the first British empire. Next I lay out the formal model. Following this I analyze the model and identify key equilibria. Then I present the key results of the paper, on optimal judicial review from the crown’s point of view; finally, I conclude.

Crown Review of Colonial Legislation

As England's New World colonies (and domestic politics) stabilized in the 17th century, the crown realized that institutions of oversight and control in London were necessary to achieve its interests from the colonies and monitor their conditions. For most of the 17th century, the crown alone governed colonial affairs. It entrusted this oversight to the royal Privy Council, comprised of the crown's most senior ministers. Formally, the king-in-council was an executive body with the power to issue binding directives on the colonies (and, until the Revolution of 1688, England itself). By the end of the 17th century, the Privy Council was entrusted with two distinct tools to invalidate acts of colonial assemblies: *(i)* repeal or veto of colonial statutes, and *(ii)* judicial annulment of colonial statutes (McGovney 1945). These can be called "legislative review" and "judicial review," respectively. Despite some technical differences in institutional proceedings and legal interpretation,⁴ these types of review shared the same fundamental assumptions and had similar effects.⁵

Both legislative and judicial review were handled by committees or specialized bodies that advised the Privy Council on formal orders (Dickerson 1912, Smith 1950). For legislative review, after numerous experiments with structure and membership, in 1696 the process stabilized with first cut review by the "Lords of Trade and Plantations," more commonly known as the Board of Trade. From 1696 to the American Revolution, the formal structure of the Board changed hardly at all; only its personnel and political stature within English administrative politics did. In his classic study of Board procedures and politics, Dickerson (1912) observed, "The most important duty of the Board was to make the colonies commercially profitable to the mother country" (p. 25). To deliver on that duty, it had powers of *(i)* nomination of and instructions to colonial governors;⁶ and

⁴Legislative review could find only that a law was invalid *prospectively*; judicial review could find that it was invalid *retrospectively*. Thus, when invalidated by judicial review, it was as if the law had never been passed, and any public or private acts based on the law also became invalid. When invalidated by legislative review, the law was invalid going forward (McGovney 1945).

⁵Roughly 500 colonial enactments were invalidated under legislative review (Russell 1915); roughly 500 cases were heard by the Privy Council on appeal from colonies in the future US (Smith 1950), regardless of final disposition of the colonial law.

⁶Formal selection of governors was a form of patronage reserved for the crown.

(ii) reviewing of acts of colonial assemblies.

The Board of Trade consisted of eight members, appointed by the crown and senior ministers. Key members typically also had seats in the House of Lords or House of Commons. Several of the crown's senior ministers also served as *ex officio* members of the Board. Thus, the Board of Trade blended the influence of crown and Parliament in colonial oversight (Dickerson 1912). Its members (especially the members from Parliament) tended to serve lengthy terms, thereby developing expertise in colonial matters. In addition, it frequently consulted on specific legislation with the Attorney General of England or the King's Counsel, and other senior officers of government as their substantive expertise was needed (Russell 1915).

The Board of Trade and Privy Council worked closely together (such that they are modeled as a single unit below), but formally they were separate bodies. Procedurally, the Board took first review of colonial legislation and issued reports and advice to the Privy Council, which then made an official and legally binding disposition. If the Privy Council nullified or formally approved a colonial legislative act, this was officially recorded as an Act of the Privy Council and communicated to the governor and assembly of the colony under the privy seal, along with the reasons for the decision (if the law was nullified). The whole process of review, from communicating the act from the colonial assembly, to gathering necessary background by the Board of Trade, to official hearing by the Privy Council, to recording of the Act, and communication back to the colony, typically took 1-2 years and sometimes more.

When the Privy Council did issue a formal disposition, it almost always followed the Board of Trade's advice. But in practice, most colonial laws were in fact not reviewed at all, and no official disposition, positive or negative, was issued. Instead, most colonial acts were left to "lie by," thus taking effect in the colony without formal approval (Russell 1915).⁷ The reason for this is that the Board, and especially Council, were frequently occupied with numerous pressing issues of domestic and imperial politics, and full review of colonial legislation consumed

⁷After the Seven Years' War, the crown increasingly required colonial laws to include "suspending clauses," which prevented them from taking effect until formal disposition by the Council. Given the delays involved, this created a legal incoherence in the colonies, their frustration at which is reflected in the list of grievances in the Declaration of Independence.

precious time. In short, review entailed an opportunity cost for the Board and Privy Council.

When the Board and Council did review, it was based on both legal and substantive considerations for consistency with the empire's objectives (Russell 1915). In almost all cases, the Board of Trade evaluated whether colonial laws were "repugnant to the Laws of England," a state prohibited (eventually) by every colonial charter; or whether they were consistent enough and any differences amounted to salutary "divergences" in the best interests of the colony. This formula—seeking to prevent "repugnancy" to English law, but also to permit useful "divergences" to address particular situations within a colony—was the central approach to crown review of colonial legislation (McGovney 1945, Bilder 2004). It required assessment of a colonial law both in terms of its legal position within English law, and the substantive conditions in the colony motivating it.

There was a crucial assumption behind Privy Council review of colonial legislation for "repugnancy and divergence": that several organs of law—the charter of the colony itself; the Board of Trade's instructions to the colony's governor; the laws of England; and the policy of the empire with respect to trade—took precedence over colonial legislative acts. Thus, unlike England's Parliament, which was supreme as of 1688, the American colonial assemblies were limited and subject to external legal review from the beginning. In this way, a limit on legislative authority provided by specific, written documents was built in to the American colonists' legislative tradition. This limit is the cornerstone of judicial review in America, and is unlike any limit operating on the parliament of Britain then or now.

Another important assumption was that Privy Council determinations in both legislative and judicial review were bound by law. The Council could not justify any ruling it wished by inventing a legal rationale, much less simply issuing an edict. This was more than a theoretical proposition; for example, in 1676, the Council wished to subject the assembly of Jamaica to its complete control. It proposed to apply Poynings' Law to Jamaica, by which the Council would draft complete legislation, send it to the colony, and demand ratification by the colonial assembly. Jamaica's agents sought intercession from the English Attorney General, who held that assembly rights, once ceded, could not be rescinded. The

Council stood down, bound by the law of the empire (Russell 1915).

All laws passed by colonial assemblies under royal control⁸ were subject to legislative review by the Board and Council. The colonial governor, also supervised by the Board, played an important role in this review. Governors exercised veto power over enactments of colonial assemblies. The Board furnished the governor with instructions on specific laws he was not to pass due to inconsistency with English law or imperial policy (Labaree 1930). Beyond simply carrying these out, the governor was useful because he was informed about substantive conditions within the colonies that might rationalize colonial laws.

However, the colonial assemblies often had their own designs, and not much concern for repugnancy to the laws of England when colonial conditions called for divergence (Bilder 2004). The assemblies thus exerted great pressure on governors to pass laws they desired, irrespective of the instructions (Greene 1898). For example, assemblies would withhold the governor's salary (which it was their obligation to pay) or refuse to pass military supply bills until the governor complied with their wishes (Greene 1898, Greene 1963). The Council could apply more significant sanctions, up to and including recall (and loss of the entire stream of future rents from office), for governors that passed prohibited laws over their instructions, or laws that were clearly detrimental to the empire's interests (Greene 1898). But applying the sanctions required the Board and Council to incur the opportunity cost of review to discover a violation.

Moreover, despite the size of these sanctions, the Council came to realize that under some cases, the governor needed flexibility to pass laws that were urgently in the colony's and empire's best interests, despite formal prohibitions or legal inconsistency. For example, mercantilist policies continually drained hard currency from the colonies, yet colonial trade and military supply demanded financing. Thus, colonies repeatedly passed bills for emission of paper currency or bills of credit, despite clear instructions for governors to prohibit them. In times of great stress on currency or intercolonial wars, the Council realized the need to look the other way on these violations of governors' instructions: the bills were left to stand *without Privy Council review* (Russell 1915) because, despite

⁸Eventually, this category included all colonies in the future US except Connecticut and Rhode Island, which never surrendered their charters.

their obvious legal inconsistency, substantive conditions implied they were in the empire's interests. A key requirement for this dynamic is that the governor's passage of a bill is per se informative about its substantive benefits. The strategic depiction of governor and Council review below recreates this dynamic.

A Model of Legislation and Review

This section lays out the model of Council legislative review as an extensive form game. The players are the governor G , and the crown/Council C . The colonial assembly A is left implicit and its strategic behavior is not considered here. Assume that A has enacted a policy $a = 1$; the issue is whether G and C should maintain it, or revert to a status quo $a = 0$.

Suppose there are two dimensions or attributes of policy $a = 1$, denoted $\Delta_1 \in \{-1, 1\}$ and $\Delta_2 \in \{-1, 1\}$. Assume that $\Pr[\Delta_1 = 1] = \delta \in (0, 1)$; its realization is observed G but only its distribution is known by C . Assume that Δ_2 is drawn and fixed at the start of the game and observed by all players. Implicitly, the attributes of $a = 0$ are $\Delta_1 = \Delta_2 = 0$; put differently, $a = 1$ is judged relative to $a = 0$.

Here Δ_1 represents the substantive merits of the policy; it works as a “state of the world” in typical models of policy making with uncertainty. I assume that, as actors on the ground in the colony, the assembly and governor were better informed than the crown about local conditions and the importance of a given assembly act in light of them (Greene 1898, Olson 1992). The crown could acquire information on such factors, but it would take some time, and being filtered through the perspective of other actors such as colonial agents and merchant interest groups (Dickerson 1912, Russell 1915), the information was of uncertain quality.

On the other hand, Δ_2 captures broader, imperial-level legal considerations, such as “repugnancy to the laws of England.” For example, beneficial inheritance laws might specify equal division among all heirs in the colonies, with plentiful land; but this would conflict with the law of England, primogeniture, favoring the eldest male heir. I assume that the Board of Trade and Privy Council had relatively easy access to legal judgments on such considerations (Dickerson 1912),

and could share them with governors through instructions and circulars (Labaree 1930). Thus, this attribute is common knowledge.

In the following, capital Greek letters are random variables; lower case Greek letters are probabilities or exogenous (scalar) parameters; and Roman letters are endogenous choices. Assume that all exogenous random variables are statistically independent.

The sequence of play is as follows.

0. Nature draws Δ_1, Δ_2 for $a = 1$ and reveals the results as specified above.
1. G upholds ($u_G = 1$) or vetoes ($u_G = 0$).
 - (a) If G upholds, on to next step.
 - (b) If G vetoes, $a = 1$ is rejected, game ends, G is sanctioned κ_A by A .
2. If G upholds, C can review ($r = 1$) or not ($r = 0$) at cost γ , and learns Δ_1 with probability λ .
 - (a) If $\Delta_2 = -1$, or review is informative ($\Lambda = 1$), on to next step.
 - (b) If $\Delta_2 = 1$, and either review is uninformative ($\Lambda = 0$), or no review is performed ($r = 0$), $a = 1$ stands, game ends.
3. C upholds ($u_C = 1$) or vetoes ($u_C = 0$). If review is performed ($r = 1$), and is informative ($\Lambda = 1$), and $\Delta_1 = -1$, G is sanctioned κ_C by C .

C 's review is a function of Δ_2 , which C observes; it is informative about Δ_1 , which C does not observe. Let $\Lambda \in \{0, 1\}$ denote whether C learns Δ_1 , given that review is performed; then $\Pr[\Lambda = 1] = \lambda$. Also note that a veto by C requires either information about Δ_1 , or legal inconsistency ($\Delta_2 = -1$). That is, C cannot reject $a = 1$ without compelling information. The Board of Trade and Privy Council were law-bound institutions and their reasons for rejection were communicated to colonial assemblies.

Let $x \in \{0, 1\}$ denote the colonial policy chosen in this extensive form. If $\min\{u_G, u_C\} = 0$, then $x = 0$; otherwise, $x = 1$. Ex post utilities are:

$$U_C = \left(\Delta_1 + \sigma \left(\frac{\Delta_2 - 1}{2} \right) \right) x - r\gamma,$$

$$U_G = \Delta_1 x - u_G r \Lambda \left(\frac{1 - \Delta_1}{2} \right) \kappa_C - (1 - u_G) \kappa_A.$$

Thus, the crown's utility is composed of policy payoffs and review costs. When $a = 1$ is upheld, C obtains utility $\Delta_1 - r\gamma$ if $\Delta_2 = 1$ (legal consistency of $a = 1$); and obtains $\Delta_1 - \sigma - r\gamma$ if $\Delta_2 = -1$ (legal inconsistency of $a = 1$).⁹ Here $\sigma > 0$ captures the salience of legal relative to substantive issues for C . For example, in time of peace, a colonial credit bill that allows purchase of militia supplies may be very important—even if inconsistent with the laws of England. In this case the salience of Δ_2 is low. But in time of peace, the inconsistency of the same bill with English law regulating currency looms larger in imperial calculations.

The governor's utility is composed of policy payoffs and sanction costs from the crown or assembly. If G upholds $a = 1$ (so $u_G = 1$), G incurs a sanction κ_C if the crown reviews the policy, the review is informative, and the policy is substantively undesirable. If G vetoes $a = 1$ (so $u_G = 0$), G incurs a sanction κ_A from the colonial assembly with certainty.

Note that governor and crown share common interests in terms of the substantive attributes of the policy, but G does not internalize C 's considerations of legal consistency. Substantively, the legal aspects in Δ_2 are broader, imperial-level considerations that were not the province of governors, who focused primarily within their own colonies (Greene 1898).¹⁰ Additionally, both players obtain policy utility 0 from the status quo policy $a = 0$; this simply reflects that the utility of $a = 1$ is judged relative to the known utility of $a = 0$.

Analysis

The governor is privately informed about substantive attributes Δ_1 of interest to the crown. A key question is whether G 's veto decision u_G signals this information. Ideally for the crown, the governor would uphold if and only if $\Delta_1 = 1$, i.e., would fully reveal its information through its veto. The natural equilibrium concept to investigate this issue is perfect Bayesian equilibrium, which preserves sequential rationality under incomplete information.

⁹Thus, legal consistency confers no utility in itself, whereas legal inconsistency is costly in itself. Of course, the level of utility is only a normalization; the important point is the difference created when $\Delta_2 = -1$ vs. $\Delta_2 = 1$.

¹⁰The key results below would hold if G did internalize the cost of legal inconsistency, as long as assembly sanctions are large enough relative to legal salience.

In the following, $\phi_{\Delta_1} \equiv \Pr[u_G = 1 | \Delta_1]$ denotes G 's probability of upholding action $a = 1$ as a function of Δ_1 ; $\rho_{\Delta_2} \equiv \Pr[r = 1 | \Delta_2, u_G = 1]$ denotes C 's probability of review as a function of Δ_2 . Let χ denote G 's belief that $x = 1$ is the final policy, given $u_G = 1$.

Lemma 1 *If $\Delta_1 = 1$, G upholds ($\phi_1 = 1$).*

Upholding when $\Delta_1 = 1$ gives G expected utility $\chi \geq 0$, while vetoing gives $-\kappa_A < 0$. Upholding a good bill gives a lottery over favorable policy benefits, and avoids political pressure from A . So G always upholds $a = 1$ when it is beneficial on the merits in the colony. The only question about G 's strategy is ϕ_{-1} . Say that G *separates* if $\phi_{-1} = 0$ and G *pools* if $\phi_{-1} = 1$.

Crown Disposition

Consider the final node of the game, C 's decision to uphold or invalidate the colonial legislation. By the time this decision is made, review is already done, and the decision is made on the policy and legal merits given the information at the time.

If C reviews and it is informative ($r = 1, \Lambda = 1$), then C has full information about Δ_1, Δ_2 . If $\Delta_2 = 1$, C will uphold if and only if $\Delta_1 = 1$. If $\Delta_2 = -1$, C will uphold if and only if $\Delta_1 > \sigma$. This is only possible if $\sigma < 1$, i.e., the salience of the legal dimension is lower than the policy dimension. That is, if $\sigma > 1$ and $\Delta_2 = -1$, then C will invalidate the statute regardless of Δ_1 .

To evaluate C 's decision in case it does not review ($r = 0$) or review is uninformative ($\Lambda = 0$), define C 's belief $\Pr[\Delta_1 = 1 | u_G = 1] \equiv d$. Recalling that G always upholds when $\Delta_1 = 1$ (lemma 1), Bayes's rule yields

$$d = \frac{\delta}{\delta + (1 - \delta)\phi_{-1}}, \quad (1)$$

and $\mathbb{E}[\Delta_1 | u_G = 1] = 2d - 1$. These values hold both when C reviews but it is uninformative, and when C does not review; that is, failure of review to reveal Δ_1 is not informative about the value of Δ_1 .

Recall that when C is uncertain of Δ_1 , $u_C = 0$ is possible only if $\Delta_2 = -1$.

C 's utility from overturning the policy is 0. Its expected payoff from upholding the policy is $2d - 1 - \sigma$. So in this case, C upholds $a = 1$ if and only if $\phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right)$. If the right hand side is at least 1, then C upholds when uncertain about Δ_1 for any strategy by G —even full pooling. This occurs when

$$\sigma \leq 2\delta - 1. \quad (2)$$

Say that C is *legally flexible* if inequality (2) holds, and C is *legally fastidious* otherwise. When C is legally flexible, it is willing to overlook legal inconsistency and uphold $a = 1$ even without hard information about Δ_1 . If C is legally fastidious, it requires hard information of policy benefits ($\Delta_1 = 1$) in order to overcome legal inconsistency.

Several polar cases establish some intuition. If $\sigma > 1$, so salience is very high, even certainty that $\Delta_1 = 1$ is not enough to save $a = 1$ when it is legally problematic for C (i.e., when $\Delta_2 = -1$). On the other hand, when $\sigma = 0$, so the legal dimension does not matter, the crown would support $a = 1$, even with full pooling by G , so long as $\Delta_1 = 1$ is more likely than not ($\delta > 1/2$). In general, the greater the salience of the legal dimensions (σ), the larger the expected policy benefits must be to ensure crown approval under a given strategy by G .

Gathering these results together, the Crown's optimal disposition, as a function of Δ_2 , its information about Δ_1 , and G 's strategy ϕ_{-1} , is as follows. When C has hard information about Δ_1 from review,

$$u_C^*(\Delta_2 = 1) = \begin{cases} 1 & \text{if } \Delta_1 = 1 \\ 0 & \text{otherwise} \end{cases} \quad (3)$$

$$u_C^*(\Delta_2 = -1) = \begin{cases} 1 & \text{if } \Delta_1 = 1 \text{ and } \sigma \leq 1 \\ 0 & \text{otherwise.} \end{cases} \quad (4)$$

When, instead, C believes $\Pr[\Delta_1 = 1] = d$,

$$u_C^*(\Delta_2 = -1) = \begin{cases} 1 & \text{if } \phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right) \\ 0 & \text{otherwise.} \end{cases} \quad (5)$$

Crown Review of Policy Merits

Moving one stage up the game tree, to the decision of the crown to review Δ_1 , C faces different tradeoffs about review depending on Δ_2 .

First, if $\Delta_2 = 1$, repeal of the colony's policy ($u_C = 0$) is only possible if $r = \Lambda = 1$. C 's expected utility of not reviewing is $\mathbb{E}[\Delta_1|u_G = 1] = 2d - 1$. If C does review, its expected utility is $\lambda d + (1 - \lambda)(2d - 1) - \gamma$. This is the probability that review is informative times the (updated given $u_G = 1$) probability that $\Delta_1 = 1$; plus the probability that review is uninformative times the expected utility of $a = 1$ given that C has no grounds to reverse.¹¹

Review is beneficial if $\gamma \leq \lambda(1 - d)$, or its cost is less than its probability-weighted marginal benefit in policy terms. From the definition of d in equation 1, and provided $\gamma < \lambda$, this condition can be further expressed as $\phi_{-1} \geq \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda-\gamma}\right)$. So, as G 's approval decision becomes less informative about Δ_1 , it is easier to satisfy C 's constraint for review. At the same time, if the review cost is very low (γ small), or the probability of beneficial policy is very low (δ small), C prefers to review even if G 's approval is very informative. Given $\Delta_2 = 1$, informative review is C 's only ticket to reverse $a = 1$. When δ is very small, C believes this reversal is likely to be beneficial.

Second, if $\Delta_2 = -1$, C can reverse $a = 1$ even without review. As noted above, if $\phi_{-1} > \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right)$, C will reject $a = 1$ absent hard information that $\Delta_1 = 1$. Thus C 's expected utility given review is $\lambda d(1 - \sigma) - \gamma$. C 's expected utility given no review is 0. This case is possible (but not assured) if C is legally fastidious ($\sigma > 2\delta - 1$: inequality 2 fails).

If $\Delta_2 = -1$ and $\phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right)$, C will uphold $a = 1$ in the absence of hard information about Δ_1 . In this case, C 's expected utility given review is $\lambda d(1 - \sigma) + (1 - \lambda)(2d - 1 - \sigma) - \gamma$. C 's expected utility given no review is $2d - 1 - \sigma$. This case is assured if C is legally flexible ($\sigma \leq 2\delta - 1$: inequality 2 holds).

Gathering these results together and using the posterior d (equation 1), C 's best response review $R_{\Delta_2}^*$ is characterized as follows.

¹¹The $\lambda(1 - d)$ probability event that review is informative, and $\Delta_1 = -1$, receives no weight, because C will reverse to $x = 0$ in this case and obtain 0 policy utility.

If $\Delta_2 = 1$,

$$R_0^* = \begin{cases} 1 & \text{if } \phi_{-1} \geq \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda-\gamma}\right) > 0 \\ 0 & \text{otherwise,} \end{cases} \quad (6)$$

If $\Delta_2 = -1$ and $\phi_{-1} > \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right)$,

$$R_{-1}^* = \begin{cases} 1 & \text{if } \phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{\lambda(1-\sigma)-\gamma}{\gamma}\right) \\ 0 & \text{otherwise.} \end{cases} \quad (7)$$

If $\Delta_2 = -1$ and $\phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right)$,

$$R_{-1}^* = \begin{cases} 1 & \text{if } \phi_{-1} \geq \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda(1+\sigma)-\gamma}\right) > 0 \\ 0 & \text{otherwise.} \end{cases} \quad (8)$$

In equation (6), $\lambda > \gamma$ defines the non-negativity constraint; in equation (8), $\lambda(1 + \sigma) > \gamma$ does. Informative review precludes upholding a policy that is undesirable on one or both dimension; thus, it adds utility 1 or $1 + \sigma$, respectively, with probability λ . This probability-weighted gain must exceed the cost of review, for review to be worthwhile in this case.

Some special cases are straightforward.

Lemma 2 *If G separates and $\gamma > 0$, C never reviews ($\rho_{\Delta_2} = 0$).*

This is apparent from inequalities (6)-(8) for R^* . Review is useful to C for two reasons. First, it gives C information. Second, if $\Delta_2 = 1$, it gives C a chance to repeal $a = 1$. If G separates, review is not informative. Given u_C^* , separation also implies C is certain to prefer upholding $a = 1$, so review is also not necessary to enable repeal. Since review is costly ($\gamma > 0$) and it confers no benefit when G separates, C does not review.

Lemma 3 *If $\phi_{-1} > 0$ and γ is sufficiently small, then C reviews with positive probability.*

This is apparent from inequalities (6)-(8) for R^* ; in each case, for a given $\phi_{-1} > 0$,

$\gamma \rightarrow 0$ triggers $R^* = 1$. If information about Δ_1 and/or the right to invalidate $a = 1$ are sufficiently cheap, C always prefers to purchase. Positive probability by C helps to support information transmission by G through u_G .

Governor's Review

G 's decision to uphold, u_G , balances the chance of sanctions from the Assembly below and from the crown above. The crown's decision, and ability, to levy sanctions depends on Δ_2 . Let ρ denote G 's belief that C chooses $r = 1$ given $u_G = 1$, and χ denote G 's belief that $x = 1$ is the final policy, given $u_G = 1$. If $\Delta_2 = -1$ and $\phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right)$, or if $\Delta_2 = 1$, then $\chi = 1 - \rho\lambda$. Otherwise, $\chi = 0$.

Recall that $u_G = 1$ with certainty when $\Delta_1 = 1$. Given $\Delta_1 = -1$, G 's expected utility from $u_G = 0$ is $-\kappa_A$. G 's expected utility from $u_G = 1$, given its information at the time it decides, is $-\chi - \rho\lambda\kappa_C$, or

$$EU_G^1 = \begin{cases} -(1 - \rho\lambda) - \rho\lambda\kappa_C & \text{if } \phi_{-1} \leq \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right) \\ -\rho\lambda\kappa_C & \text{if } \phi_{-1} > \left(\frac{\delta}{1-\delta}\right) \left(\frac{1-\sigma}{1+\sigma}\right). \end{cases} \quad (9)$$

Thus, G separates if $\rho\lambda(\kappa_C - 1) \geq \kappa_A - 1$ in the first case, and $\rho\lambda\kappa_C \geq \kappa_A$ in the second.

Equilibria

The historically interesting cases involve $\kappa_C > \kappa_A > 1$.¹² If Assembly and Crown sanctions meet these conditions, there is no equilibrium in which G separates (i.e., approves if and only if $\Delta_1 = 1$.)

¹²For the sake of completeness, other cases are analyzed in the appendix. Briefly, the results show that a separating PBE is possible with $\kappa < 1$; the Governor would rather face the cost of assembly sanctions than the cost of bad policy. But if $\kappa_C < 1$ and crown review is both very informative and very cheap, a pooling equilibrium is also possible. In this case G prefers to "pass the buck" to C , avoid the cost of assembly sanctions, and let C clean up bad policy choices through its review. This is the pathological effect of judicial review often highlighted in formal models on the topic.

Lemma 4 *If $\kappa_A > 1$ and $\gamma > 0$, there is no separating perfect Bayesian equilibrium.*

Recall that (by lemma 2) $\rho = 0$ in a separating equilibrium. So $\kappa_A > 1$ implies $\rho\lambda(\kappa_C - 1) < \kappa_A - 1$, and thus $\phi_{-1} = 1$. If there were a separating equilibrium, lemma 2 would imply that C never reviews (and upholds whenever possible). But if C never reviews and κ_A is large, G is tempted to approve laws even when $\Delta_1 = -1$, since the cost of bad policy is less than that of sanctions from the Assembly. Intuitively, lemma 4 means that if political pressure from the Assembly on the Governor is relatively high, the Council must put countervailing pressure on the Governor (in the form of review and possible sanctions) to obtain any information from the Governor's decision. If C rubber stamps colonial legislation, that rubber stamp will propagate down through the legislative review process.

While separation is not possible with high political pressure from the Assembly, partial information may still be conveyed to C by G 's disposition. In the remainder I focus on the most informative possible PBE for given parameter configurations. Consider first the case of $\Delta_2 = 1$, so the colonial policy is not inconsistent with English law and imperial policy. Without informative review, C has no hard evidence to justify reversing the policy.

Proposition 1 *Suppose $\kappa_A > 1$ and $\Delta_2 = 1$. Then if $\lambda(\kappa_C - 1) \geq \kappa_A - 1$ and $\gamma \leq \lambda(1 - \delta)$, there is a mixed strategy perfect Bayesian equilibrium in which G upholds $a = 1$ with probability*

$$\phi_{\Delta_1}^* = \begin{cases} \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda-\gamma}\right) & \text{if } \Delta_1 = -1 \\ 1 & \text{if } \Delta_1 = 1 \end{cases}$$

and C reviews an upheld policy with probability

$$\rho_{\Delta_2=1}^* = \frac{\kappa_A - 1}{\lambda(\kappa_C - 1)}.$$

Proof: From C 's best response R_0^* when $\Delta_2 = 1$ (inequality 6), $\phi_{-1}^* = \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda-\gamma}\right)$ makes C indifferent between $R_0 = 1$ and $R_0 = 0$. Therefore, $\rho_{\Delta_2=1}^*$ is a best response to ϕ_{-1}^* . When C reviews with probability $\rho_{\Delta_2=1}^*$, equation (9) indicates

that G is indifferent between $u_G = 1$ and $u_G = 0$ for $\Delta_1 = -1$; therefore, (ϕ_1^*, ϕ_{-1}^*) is sequentially rational. ■

Corollary 1 *Suppose $\kappa_A > 1$ and $\Delta_2 = 1$. Then if $\lambda(\kappa_C - 1) < \kappa_A - 1$ or $\gamma > \lambda(1 - \delta)$, G pools $(\phi_1^* = \phi_{-1}^* = 1)$ in all perfect Bayesian equilibria.*

If $\lambda(\kappa_C - 1) < \kappa_A - 1$, the Crown's sanctions, when weighted by the probability they will be meted out, are not very potent relative to the Assembly's. The governor would rather face the chance of Crown sanctions, and bad policy, than the certainty of Assembly sanctions. The governor therefore pools even if the Crown reviews with certainty. The crown reviews with certainty if γ is small enough, and not at all otherwise.

If $\gamma \geq \lambda(1 - \delta)$, review is too costly for C , relative to its expected benefits, to ever engage in it—even if G is pooling. With $\rho = 0$, G in turn passes everything to avoid Assembly sanctions—which are worse for G than the cost of bad policy.

Now consider $\Delta_2 = -1$, so $a = 1$ is inconsistent with English law and imperial policy. C can reverse the policy even without review. Note that as long as $\kappa_C > 1$, G 's expected utility from upholding $a = 1$ is decreasing in C 's review probability ρ . Ideally, the needle G wishes to thread is upholding the policy (thus avoiding κ_A) while also ensuring that C does not review (thus avoiding κ_C). While this would expose G to the cost of bad policy, it would avoid the larger (given $\kappa_A > 1$) cost of A 's sanctions. If C is legally fastidious (inequality (2) fails), it is possible for G to thread this needle by pooling.

Proposition 2 *Suppose $\kappa_A > 1$ and $\Delta_2 = -1$. If C is legally fastidious ($\sigma > 2\delta - 1$), there is a perfect Bayesian equilibrium in which G pools $(\phi_{-1}^* = \phi_1^* = 1)$, C never reviews ($\rho^* = 0$), and the policy is always reversed ($u_C^* = 0$).*

Proof: If $\sigma > 2\delta - 1$ and $\Delta_2 = -1$, C 's best response to $(\phi_1, \phi_{-1}) = (1, 1)$ is $R_{-1} = 0$ (inequality 7). Since G 's expected utility (equation 9) is decreasing in the review probability ρ , $\phi_{-1} = 1$ is sequentially rational given C 's best response function. As noted at equation (2), $\sigma > 2\delta - 1$ implies C never approves ($u_C = 0$) after $\rho = 0$. ■

In this case, C is already skeptical of $a = 1$, and will reject it absent hard evidence proving $\Delta_1 = 1$. But the value of review to C is therefore *decreasing* in ϕ_{-1} , as a greater chance of pooling by G only makes C more skeptical of an upheld policy.

When C is legally fastidious, Δ_2 is very important relative to Δ_1 . Then $\Delta_2 = -1$ is sufficient for rejection of $a = 1$, regardless of Δ_1 and without any further review. This reflects the hierarchy of rationales sometimes observed by the Council in review of colonial legislation. Sometimes, inconsistency with English law or imperial policy was enough to get a colonial statute invalidated in the Council—irrespective of its merits for the colony. When these breeches of English law were especially clear and important to the Board or Council, review on the merits may not even take place; the inconsistency was enough to invalidate the law. What proposition 2 reveals is that this strategy depends on the governor’s behavior. It is a reasonable response by the crown to both high importance of legal issues, and low confidence that the governor was reversing bad policies rather than sending them for review. In other words, summary rejection of colonial policy on legal grounds alone, without substantive review, is partly a recognition by the crown of the political interaction between governor and assembly that often led to approval of questionable laws that were not worth the Board or Council’s time to investigate fully.

When C is legally flexible ($\sigma \leq 2\delta - 1$), G is not able to obfuscate its way out of review by C . When G pools, the value of information to C is high in this case. G can only reduce the probability of C ’s review by reducing the probability of passing laws when $\Delta_1 = -1$.

Proposition 3 *Suppose $\kappa_A > 1$ and $\Delta_2 = -1$. If C is legally flexible ($\sigma \leq 2\delta - 1$), $\lambda(\kappa_C - 1) \geq \kappa_A - 1$, and $\gamma \leq \lambda(1 + \sigma)(1 - \delta)$, there is a mixed strategy perfect Bayesian equilibrium in which G upholds $a = 1$ with probability*

$$\phi_{\Delta_1}^* = \begin{cases} \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda(1+\sigma)-\gamma}\right) & \text{if } \Delta_1 = -1 \\ 1 & \text{if } \Delta_1 = 1 \end{cases}$$

and C reviews an upheld policy with probability

$$\rho_{\Delta_2=-1}^* = \frac{\kappa_A - 1}{\lambda(\kappa_C - 1)}.$$

Proof: When $\sigma \leq 2\delta - 1$ and $\Delta_2 = -1$, inequality (8) characterizes C 's best response review. From this inequality, $\phi_{-1}^* = \left(\frac{\delta}{1-\delta}\right) \left(\frac{\gamma}{\lambda(1+\sigma)-\gamma}\right)$ makes C indifferent between $R_0 = 1$ and $R_0 = 0$. Therefore, $\rho_{\Delta_2=-1}^*$ is a best response to ϕ_{-1}^* . When C reviews with probability $\rho_{\Delta_2=-1}^*$, equation (9) indicates that G is indifferent between $u_G = 1$ and $u_G = 0$ for $\Delta_1 = -1$; therefore, (ϕ_1^*, ϕ_{-1}^*) is sequentially rational. ■

Therefore, by applying countervailing pressure from C to G (to balance the pressure from A on G), the Crown can extract some information about Δ_1 from G 's review. But the conditions must be just right. Not only must C be legally flexible, but the Crown's sanction and informativeness of review must be large enough.

Corollary 2 *Suppose $\kappa_A > 1$, $\Delta_2 = -1$, and C is legally flexible. Then if $\lambda(\kappa_C - 1) < \kappa_A - 1$ or $\gamma > \lambda(1 + \sigma)(1 - \delta)$, G pools ($\phi_1^* = \phi_{-1}^* = 1$) in all perfect Bayesian equilibria.*

Given $\kappa_A > 1$, $\lambda(\kappa_C - 1) < \kappa_A - 1$ implies C must review with probability greater than 1 in order to make G indifferent about approving and vetoing a bad policy. Since C 's sanction on G is diluted by the probability review is informative (λ), C 's sanction must be relatively greater to compensate for this and remain effective. Otherwise, G prefers to pool. G also prefers to pool when there is no chance that C will review, and this is the case when $\gamma > \lambda(1 + \sigma)(1 - \delta)$. Note that this γ threshold is greater than when $\Delta_2 = 1$; because legal inconsistency lowers the value of $a = 1$ to the crown, it will pay greater costs to investigate.

The Value of Review to the Crown

When $\kappa_A > 1$, there is a simple first order effect of second stage “judicial” review on the governor's incentive to veto bad laws, and ultimately on the crown's

welfare. Without second stage review by the crown in this case, the governor would pass all laws. Second stage review is necessary to expose G to a chance of even greater sanctions at the hands of the crown. Complete agreement between G and C on policy terms is not enough to ensure desirable behavior by the governor. Thus, procedures for selecting ideologically identical agents could have been perfect (and, in practice, they were decidedly not), and the pressure exerted by colonial politics on governors still would have engendered an agency problem between the governor and crown.

The effect of the interplay of legal and policy dimensions in review is more subtle. From the standpoint of institutional design, it is also more interesting. A central implication of this model for understanding British imperial institutions of colonial legislative review is this: *The quality of colonial policy improves when review is based on both its substantive merits and legal considerations.* Concern for legal consistency, reflected by σ , adds a degree of skepticism to crown review of colonial legislation. If the crown is skeptical but flexible, the governor has strong incentives to veto bad laws, so that passing a law is per se informative to the crown. Thus, injecting a legal dimension to review of colonial policy leads to enactment of better policy in purely substantive terms, because it favorably changes the political environment.

To see this formally, consider C 's ex ante expected utility, when $\Delta_2 = -1$ (so $a = 1$ is legally inconsistent), $\sigma \leq 2\delta - 1$, and there is non-trivial mixing:

$$EU_C^m = \delta(1 - \sigma) + (1 - \delta)\phi_{-1}(\rho_{-1}(1 - \lambda) + (1 - \rho_{-1}))(-1 - \sigma) - \rho_{-1}\gamma \quad (10)$$

A good law ($\Delta_1 = 1$) confers utility $(1 - \sigma)$. When $\sigma \leq 2\delta - 1$, a good law is always upheld. A bad law ($\Delta_1 = -1$) confers utility $(-1 - \sigma)$. Conditional on passage by the governor, a bad law is upheld if either crown review is uninformative or not performed at all. Therefore, equation (10) is the probability-weighted utility of upholding a good law, plus the probability-weighted utility of upholding a bad law, minus the probability-weighted cost of review.

Now compare equation (10) with equilibrium values of ϕ_{-1}^* from propositions 1 and 3: $\phi_{-1}^* = \left(\frac{\delta}{1-\delta}\right)\left(\frac{\gamma}{\lambda-\gamma}\right)$ vs. $\left(\frac{\delta}{1-\delta}\right)\left(\frac{\gamma}{\lambda(1+\sigma)-\gamma}\right)$. The term $(1 + \sigma) > 0$ in the second case causes a decline in ϕ_{-1}^* , or G 's probability of upholding a bad law, in

this case. Equation (10) is declining in ϕ_{-1}^* , so review based on both dimensions Δ_1 and Δ_2 is preferable to review based on Δ_1 alone.

Proposition 4 *If C is legally flexible ($\sigma \leq 2\delta - 1$), its utility is greater in equilibrium when it decides based on Δ_2 than when it cannot.*

Moreover, even if C itself has no concern for legal consistency, and cares only about the quality of colonial policy, it prefers to delegate review powers to an agent with $\sigma > 0$. Indeed, a reviewer with $\sigma = 2\delta - 1$ gives the smallest probability that the governor upholds a bad law (ϕ_{-1}^*), and thus greatest ex ante expected utility for C .

Corollary 3 *When $\sigma = 0$, C prefers to delegate review authority to an agent with $\sigma = 2\delta - 1$.*

Here, then, is a formal exposition of the rationale for imperial judicial review. Even if the crown itself has little or no concern for legal consistency, it prefers the agents that review colonial enactments to review and rule in part on the basis of legal consistency within the empire. Ruling on this basis is of course beneficial if the crown has a sincere preference for legal consistency. But it is also interesting that ruling on this basis is in the crown's interest even if it has no intrinsic concern for legal consistency at all, and cares only about substantive policy quality on the merits.

However, if some weight on legal consistency is good for the crown, more is not necessarily better. Fastidious insistence on legal consistency ($\sigma > 2\delta - 1$) makes the crown highly skeptical of colonial legislation ex ante. The lower the crown's posterior belief that legislation is beneficial in policy terms, the lower is the value of review, which is useful only on the slight chance of positive information that can save a bill from crown reversal. In its desire to evade both assembly sanctions and crown review, the governor plays into this skepticism by obfuscating completely through its approval decision. But that very obfuscation underlies the skepticism of C which makes review irrational in the first place. This logic underlies the rubber stamp approval of all laws, good and bad, by the governor when the crown is legally fastidious (proposition 2).

If C could commit to act as though it cared less about legal consistency, the dynamic would change—to the crown’s benefit. G would be unable to obfuscate its way out of review; instead, since C is more “open minded” about $a = 1$, it is willing to seek information about its merits. Indeed, if C could turn over its review to an agent that did not care about legal consistency, but cared only about the value of the policy in the colony (Δ_1 but not Δ_2), a legally fastidious crown would be better off.

Proposition 5 *If C is legally fastidious ($\sigma > 2\delta - 1$), its utility is greater when it cannot decide based on Δ_2 than when it can.*

To see this formally, note that when C is legally fastidious, it vetoes all bills in equilibrium (proposition 2), so $EU_C^* = 0$. On the other hand, with nondegenerate mixing, $\phi_{-1}(\rho_{-1}(1 - \lambda) + (1 - \rho_{-1})) < 1$. Thus, in equation (10), the term $(1 - \sigma) > 0$ gets more weight than $(-1 - \sigma) < 0$ provided δ is not too small. If, as well, γ is not too large, $EU_C > 0$. Intuitively, a crown with less extreme skepticism places greater value on the information from review. The chance of review, in turn, gives the governor incentive to take a harder line with respect to colonial assemblies. Crown review changes the political dynamics within the colony toward the crown’s advantage.

The results in this section are the crucial findings in this paper. In summary, the crown has an interest in review of colonial legislation that is based on both law and policy substance. This is beneficial to the crown even if its only interest is in better colonial policy, and not at all in legal consistency. Such a crown should turn over review to a body like the Board of Trade and Privy Council that blended legal and policy considerations in their legislative review. Adding legal considerations to the review brings in a layer of skepticism that, if titrated well, induces the governor to take a tougher line with colonial assemblies when they pass bad laws from the crown’s point of view. Thus, a legal basis for review is useful to the crown because it changes the political dynamics between governor and assembly within the colony. However, the legal considerations should not be too prominent in crown review; if they are, the governor plays into the crown’s deep skepticism by upholding all laws, good and bad; and the crown obstinately refuses assent for colonial legislation as a result.

Conclusion

In empowering colonial assemblies, the crown mitigated one agency problem with colonial governors (Gailmard 2017), but raised another. How could the crown induce the governor to resist assembly enactments that were contrary to the crown's interests, in the face of immense political pressure from the assemblies on the governor to pass them? In this paper, I argue that legislative review by royal agents in the Board of Trade and Privy Council helped to solve this problem.

The Board and Council's concern for consistency with higher English and imperial law added a layer of skepticism to review of colonial legislation. When this concern is moderate, but not exceedingly high, it implies that widespread rubber stamping of colonial laws by the governor will result in scrutiny from the Board of Trade. In the case of an undesirable enactment, that scrutiny will bring the governor sanctions from above. When sufficiently potent and likely, the governor knew he would be better off risking sanctions from below. The governor's best response was to veto more bad laws, making his approval *per se* informative to the Board and Council. However, the value of this skepticism had its limits: extreme concern for legal consistency inclines the Council to veto all colonial laws, for even meritorious ones would not confer sufficient benefits to overcome possible legal downsides. In this case, the governor escapes assembly sanctions—and the cost of enacting bad laws—by rubber stamping colonial laws, good and bad.

Privy Council review presupposed that there was a higher body of law that could take precedence over colonial law (Russell 1915). Colonial lawmakers acknowledged this and leveraged these arguments in defense of their preferred laws and judicial rulings (Bilder 2004). Thus, colonial legislatures came of age alongside review of their enactments for consistency with, and possible invalidation from, more fundamental law. For the entire colonial period, legislative power in America never existed without this review. At the same time, the crown's incentive to institute this review stemmed from its creation and support for separation of powers as a check on colonial governors. Thus, separation of powers and judicial review coevolved in America.

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Appendix

This appendix considers equilibria when $\kappa_C > \kappa_A > 1$ does not hold, i.e. when either assembly or crown sanctions on the governor are relatively small. Separation and pooling by G are each possible in equilibrium. NOTE: this analysis is incomplete.

Proposition 6 *If $\kappa_A \leq 1$ and either (i) $\Delta_2 = 1$, or (ii) $\Delta_2 = -1$ and $\sigma < 1$, there is a separating perfect Bayesian equilibrium in which C upholds if and only if $\Delta_1 = 1$ ($\phi_1^* = 1; \phi_{-1}^* = 0$), C never reviews ($\phi^* = 0$), and (when $\Delta_2 = -1$) C always upholds ($u_C^* = 1$).*

Yet $\kappa_A \leq 1$ is merely a necessary, but not sufficient, condition for u_G to convey any information through its review.

Proposition 7 *If $\sigma < 1$, γ and κ_C are sufficiently small, and λ and δ sufficiently large, there is a threshold $\tau < 1$ such that for $\kappa_A > \tau$, there is a pooling perfect Bayesian equilibrium in which G upholds all policies ($\phi_{-1}^* = \phi_1^* = 1$) and C reviews all policies.*

The idea is that in some cases, G prefers to let C bear the cost of review, when it is likely to be informative/favorable/not costly for G . In these cases, G is unlikely to face either bad policy consequences or Crown sanctions from approving the law even when $\Delta_1 = -1$, and approval lets it avoid sanctions from A . In essence, G is passing the buck to C