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# Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter

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CHARTER CONSTITUTIONALISM:  
THE MYTH OF EDWARD COKE AND THE  
VIRGINIA CHARTER\*

MARY SARAH BILDER\*\*

*[All and every the persons being our subjects . . . and every of their children, which shall happen to be born within . . . the said several colonies . . . shall have and enjoy all liberties, franchises and immunities . . . as if they had been abiding and born, within this our realm of England . . .—Virginia Charter (1606)]<sup>1</sup>*

*Magna Carta's connection to the American constitutional tradition has been traced to Edward Coke's insertion of English liberties in the 1606 Virginia Charter. This account curiously turns out to be unsupported by direct evidence. This Article recounts an alternative history of the origins of English liberties in American constitutionalism. A quarter century before the Virginia charter, provisions assuring liberties to English children born overseas were inserted in the earliest letters patent. These provisions drew on an older practice extending liberties to children born overseas. Because of these provisions, persons born in the colonies were guaranteed the same liberties as those born in England. This explanation suggests new appreciation for the interpretive flexibility of early written constitutionalism. As the liberties provisions reveal, words described the underlying concept but were not used to fix a precise definition. Thus, various words could be altered over time to ensure that the concept adapted to contemporary political and legal issues. Throughout, however, the assurance remained that those born in the colonies possessed English liberties. This Article calls this genre of early written constitutionalism "charter constitutionalism" to emphasize this elastic interpretive practice.*

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1. SAMUEL M. BEMISS, THE THREE CHARTERS OF THE VIRGINIA COMPANY OF LONDON 9 (1957) (spelling modernized).

*Charter constitutionalism deserves recognition as a founding strand of American constitutionalism.*

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#### I. MAGNA CARTA AND THE VIRGINIA CHARTER

In *Obergefell v. Hodges*,<sup>2</sup> Justice Anthony Kennedy gave a nod to the 800th anniversary of Magna Carta. Three times in the opinion, he referred to the U.S. Constitution as a “charter.”<sup>3</sup> His interpretive stance on the Fourteenth Amendment grew from his understanding of a charter tradition. He wrote:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.<sup>4</sup>

To Justice Kennedy, a charter—written over time by a community—guaranteed liberty. To some readers, Justice Kennedy’s

2. 135 S. Ct. 2584 (2015).

3. *Id.* at 2598; *id.* at 2602 (“With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”); *id.* at 2605 (“The Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.”). For other Justice Kennedy references to Magna Carta, see, for example, *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1243 n.1 (2015) (referring to Magna Carta, chapter 39); *Boumediene v. Bush*, 553 U.S. 723, 740 (2008) (tracing the writ of habeas corpus to Magna Carta, chapter 39); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (tracing rights to navigable waters to Magna Carta).

4. *Obergefell*, 135 S. Ct. at 2598.

sentence embodies modern liberal interpretive approaches to the Constitution. Its roots, however, may be in the history of American constitutionalism when written charters established the governance of the earliest English settlements. This Article retells the story of the most famous clause in the colonial charters—the one assuring English liberties to English colonists—as evidence of an early practice of written constitutionalism that I call “charter constitutionalism.”

The connection between Magna Carta and our Constitution has intrigued scholars.<sup>5</sup> Magna Carta was composed eight centuries ago for a political and economic world that seems the antithesis of modern American values. As scholars point out, the historical thirteenth-century document bears little resemblance to the myth of Magna Carta.<sup>6</sup> The conventional explanation of the relationship between Magna Carta and the U.S. Constitution emphasizes concepts (part of the “myth”) embodied in Magna Carta, regardless of the precise terms of its provisions. Trial by jury, due process, representation for taxation, even the very idea of enforcing boundaries on governmental authority—these fundamental ideas of American constitutionalism are given greater legitimacy by growing out of ancient constitutional roots.<sup>7</sup> The myth of Magna Carta often has been viewed as, at worst, harmless, and at best, the very source of expanding American rights and liberties.<sup>8</sup>

5. See, e.g., A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 1, 6, 370–82 (1968); NICHOLAS VINCENT, *MAGNA CARTA: A VERY SHORT INTRODUCTION* 93 (2012); Matthew Shaw, *Colonies and Revolutions*, in *MAGNA CARTA: LAW, LIBERTY, LEGACY* 137, 137–55 (Claire Brey & Julian Harrison eds., 2015).

6. See CLAIRE BREAY, *MAGNA CARTA: MANUSCRIPTS AND MYTHS* 47–48 (2002); J.C. HOLT, *MAGNA CARTA* 39, 48 (3d ed. 2015) (“The ‘myth’ of Magna Carta, that interpretation of it which gives it qualities which the men of 1215 did not intend, was part of the document’s potential.”); WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* ix (1965). For attribution of the “myth” metaphor to Edward Jenks, see Max Radin, *The Myth of Magna Carta*, 60 *HARV. L. REV.* 1060, 1060–61 (1947).

7. See G.R.C. DAVIS, *MAGNA CARTA* 9 (1963); HOWARD, *supra* note 5, at 371–82; DAVID STARKEY, *MAGNA CARTA: THE TRUE STORY BEHIND THE CHARTER* 153–55 (2015); CAROLINE P. STOEL & ANN B. CLARKE, *MAGNA CARTA TO THE CONSTITUTION: LIBERTY UNDER THE LAW* 9–11 (1986); VINCENT, *supra* note 5, at 4, 96–97 (2012).

8. Two refreshing counterexamples to the notion that the Magna Carta myth is merely harmless were presented at the Symposium by Paul Babie and Mary Ziegler. See generally Paul Babie, *Magna Carta and the Forest Charter: Two Stories of Property, What Will You be Doing in 2017?*, 94 *N.C. L. REV.* 1431, 1433 (2016) (noting that failing to consider Magna Carta in conjunction with the Forest Charter leads to a forgotten legacy of “community and obligations that balances [Magna Carta’s] legacy of individual rights”); Mary Ziegler, *The Conservative Magna Carta*, 94 *N.C. L. REV.* 1653, 1654 (2016) (discussing how social conservatives weave Magna Carta into their arguments that seek to resist the “tyranny of the government and the courts”).

But there is another, smaller myth buried within the conventional account of Magna Carta in America. This myth explains how Magna Carta became part of American constitutionalism. Conventional accounts connect Magna Carta by means of an explicit, intentional decision of one man to insert English liberties into the early Virginia charter. This origin story appears, for example, in the aptly titled book, *Magna Carta to the Constitution*, where the 1606 Virginia charter is described as “the first colonial document based in part on Magna Carta.”<sup>9</sup> It “extended the king’s law to Englishmen abroad.”<sup>10</sup> The “guarantees spelled out in the first Virginia Charter were inherent in Magna Carta.”<sup>11</sup> Moreover, this story gives a single person responsibility for the charter and its inclusion of liberties: Edward Coke. According to this story, Coke caused Magna Carta to cross the Atlantic, thereby influencing the development of American constitutionalism.

On both sides of the Atlantic, the major Magna Carta exhibits tell this story of Edward Coke and the 1606 Virginia charter. The British Library catalog explains:

Virginia was the first permanent English colony in North America, established by the London Company in 1607. The foundation charter of that new colony, drafted by Sir Edward Coke (d. 1634), stated that English law should be applied to the settlers.<sup>12</sup>

The Library of Congress catalog similarly states:

In 1606 King James I granted a charter to the Virginia Company to establish a commercial settlement in North America. The charter, drafted by Sir Edward Coke, who had heavily invested in the scheme to develop colonies in North America, extended the privileges and liberties of English subjects to the inhabitants of the Virginia colonies and their descendants.<sup>13</sup>

Accordingly, the fundamental liberties guaranteed by Magna Carta exist in the United States because one man—Edward Coke—

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9. STOEL & CLARKE, *supra* note 7, at 35.

10. *Id.*

11. *Id.*

12. Shaw, *supra* note 5, at 142.

13. LIBRARY CONG., MAGNA CARTA: MUSE AND MENTOR 16 (2014), <http://www.loc.gov/exhibits/magna-carta-muse-and-mentor/rights-of-englishmen-in-british-america.html#obj022> [http://perma.cc/T6VB-H2TD].

deliberately placed them in the first constitutional document—the 1606 Virginia charter.

The 1606 Virginia charter appears amenable to this interpretation as the linchpin connecting Magna Carta to American constitutionalism. The crucial language in the liberties provision states:

Also we . . . declare . . . that . . . persons being our subjects, which shall dwell and inhabit within . . . the said several colonies and plantations, and every of their children, which shall happen to be born within . . . the said several colonies and plantations, shall have and enjoy all liberties, franchises and immunities, within any of our other dominions, to all intents and purposes, as if they had been abiding and born, within this our realm of England, or any other of our said dominions.<sup>14</sup>

The charter guarantees that those born to subjects in the colonies would have legal rights as if they had been born in England. Birth in Virginia would be the same as birth in England. Magna Carta's liberties apply to the English in America just as they did to those in England.

Beyond the claim of a direct causal connection, this foundational story contains two other assumptions. These assumptions, ironically, reinforce a constrained understanding of American constitutionalism. First, by focusing on the specific words of the Virginia charter, the story implies that the precise text mattered. That is, the Virginia charter provision is interpreted with modern textualist understandings. Second, and relatedly, by insisting on an agent (Edward Coke), the story implies that the provision reflects specific intent. Thus, although the origin story takes place in the early seventeenth century, it incorporates two modern beliefs about American constitutionalism. American written constitutionalism, even in its earliest glimpses, is viewed as textual and as the product of intent. Unintentionally, this small myth about the origin of American liberties leads us to believe that written constitutionalism, even four centuries ago, reflected certain late nineteenth- and twentieth-century ideas about the nature of American constitutionalism.

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14. BEMISS, *supra* note 1, at 9 (modernized spelling). For a contemporaneous copy, see *Digital Images of the 1606 Virginia Charter*, U. HOUS., <http://aalt.law.uh.edu/AALT7/C66/C66no1709/> [<http://perma.cc/9GEN-X9CJ>]. My thanks to Professor Robert Palmer for providing digital images. The original charter given to the patentees has never been located. See BEMISS, *supra* note 1, at vii.

The history of the origin of American written constitutionalism is a historical inquiry far lengthier than can be summarized here, but a few words usefully situate the problem posed by the early colonial charters. The general transformation seems obvious: English constitutionalism was not based on a single, written fundamental law; American constitutionalism becomes defined by that concept. We know something changed about the way that people imagined constitutionalism between the late sixteenth century when colonial settlements begin and the late eighteenth century when American written constitutions begin to assume recognizable forms. But it is surprisingly difficult to explain the change with precision and persuasive power. The beginning of this subtle transformation occurred in the late sixteenth and early seventeenth centuries as the idea of a written constitution as a genre emerged slowly and tantalizingly from older understandings of constitutionalism.<sup>15</sup> Various analytical dichotomies have been used to explain the apparent shift: from ancient to modern constitutions; from unwritten to written constitutions; from little “c” to big “C” constitutions; from colonial (or transatlantic or imperial) constitutionalism to American Constitutionalism.<sup>16</sup> Across these accounts, the colonial charters

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15. See Mary Sarah Bilder, *Colonial Constitutionalism and Constitutional Law* [hereinafter Bilder, *Colonial Constitutionalism and Constitutional Law*], in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF MORTON J. HORWITZ 25, 28 (Alfred L. Brophy & Daniel W. Hamilton eds., 2009).

16. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175–97* (1967) (describing the shift to “the concept of a fixed, written constitution”); MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 1–2* (2004) (describing various meanings of “constitution”); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 5–10 (2005) (describing the evolving definition of “constitution”); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 259–68* (rev. ed. 1998) (describing written and unwritten constitutionalism). See generally CHARLES HOWARD MCLWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (photo. reprint 2007) (1940) (describing the shift from ancient to modern constitutionalism); Bilder, *Colonial Constitutionalism and Constitutional Law*, *supra* note 15, at 28 n.4 (discussing the small “c” to large “C” shift); Ken MacMillan, *Imperial Constitutions: Sovereignty and Law in the British Atlantic*, in *BRITAIN’S OCEANIC EMPIRE: ATLANTIC AND INDIAN OCEAN WORLDS, 1550–1850*, at 69, 69 (H.V. Bowen et al. eds., 2012) (arguing “that historians should begin thinking about ‘transoceanic’ imperial constitutions rather than bifurcated ‘Atlantic’ and ‘Asiatic’ models”); Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION 35*, 35 (Terence Ball & J. G. A. Pocock eds., 1988) (reviewing various categories).

alluringly appear as the first glimpse of the belief that constitutional concepts could be embodied in a written form.<sup>17</sup>

Similarly, although Magna Carta appears somehow relevant to the shift to written constitutionalism, the connection has proven difficult to precisely identify. Although English or British constitutionalism is usually described as unwritten, Magna Carta represents an anomalous, yet fundamental, written component of that tradition. Moreover, viewed as a written document, its words—predominantly replaced, reinterpreted, or repealed—were not interpreted in the manner of modern constitutions. And, its placement in English statute books defies American law's strict division between statutory and constitutional law. Finally, its cultural persistence, often as an extra-legal oppositional claim when conventional legal sources fail, makes it difficult to categorize as binding fundamental law. Magna Carta is somehow connected to American constitutionalism in the early colonial period—but precisely why that happens remains obscure.

This Article retells the history of the Virginia charter to illuminate a path of connection from Magna Carta to the early American colonial charters and then to American constitutionalism. Two linguistic problems immediately confront this inquiry. What should we call the early genre of constitutionalism that existed in the legal imagination of late sixteenth- and early seventeenth-century participants? And, what should we call the relevant phrase describing liberties in the colonial charters? To use a modern constitutional vocabulary implies that current categories and boundaries existed in a world where they did not. To use ahistorical ideas involves the problem that no one in the past would recognize the name of the concept. On balance, naming the concepts using modern terminology seems more useful for explanatory convenience.

This Article uses the term *charter constitutionalism* to describe the type of constitutionalism that appears in the late sixteenth- and early seventeenth-century colonial charters. This term is anachronistic. As I have noted in previous scholarship, the earliest charters were referred to as letters patent, not charters.<sup>18</sup> They were not referred to as constitutional documents, and many provisions in

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17. See, e.g., JAMES BRADLEY THAYER, LEGAL ESSAYS 3 (1923) (“These charters were in the strict sense written *law*.”).

18. Mary Sarah Bilder, *English Settlement and Local Governance* [hereinafter Bilder, *English Settlement and Local Governance*], in THE CAMBRIDGE HISTORY OF LAW IN AMERICA 63, 65–66 (Michael Grossberg & Christopher Tomlins eds., 2008); Bilder, *Colonial Constitutionalism and Constitutional Law*, *supra* note 15, at 31–36.



these documents were not interpreted as constitutional in nature. This term, however, emphasizes that people did view certain provisions as embodying fundamental law. And, in contrast to some modern definitions of constitutionalism, *charter constitutionalism* can help us accept a different group of interpretive possibilities. This early approach to written constitutionalism emerged with a different assumption about the purpose of the written words. The specific words and the underlying concept were not in complete correspondence. This assumption resonated with the cultural perception of Magna Carta as a written document of underlying concepts. In fact, the preference during this period for spelling Magna Carta as Magna *Charta* visually underscored the centrality of the idea of a charter as a particular constitutional genre. *Charters* were a foundational genre in the transformation from unwritten to written constitutionalism.<sup>19</sup>

I similarly use the term “liberties assurance” to describe the charter provisions that sought to provide those born in the colonies with the same liberties as those born in England or the dominions.<sup>20</sup> These provisions were surprisingly vague with respect to what was being described, for what purposes, and in comparison to whom. Christopher Tomlins accurately describes this complexity of the basic concept when he refers to “more generally the actual compass of ‘as if’—that is, of English law (liberties, franchises, immunities) outside the realm of England.”<sup>21</sup> Sometimes the concept has been summarized as the “rights of Englishmen”—but “rights” is too narrow.<sup>22</sup> “Liberties” reminds us that we are in an earlier moment, with the caveat that “liberties” was not the only word used. “Assurance” emphasizes that these provisions are not easily categorized within modern distinctions (for example, aspirational promises, positive legal grants, or confirmatory declarations of

19. See Bilder, *Colonial Constitutionalism and Constitutional Law*, *supra* note 15, at 35 (describing the preferred seventeenth-century *Charta* spelling with its “visual insistence on charter”).

20. See Elizabeth Mancke, *The Languages of Liberty in British North America, 1607–1776*, in *EXCLUSIONARY EMPIRE: ENGLISH LIBERTY OVERSEAS, 1600–1900*, at 25, 25 (Jack P. Greene ed., 2010) (stating that the “charters acknowledged that overseas English subjects were entitled to traditional English legal and political protections”).

21. CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, at 83 (2010).

22. See HOWARD, *supra* note 5, at 24–25; see also Justin Champion, *From Liber Homo to ‘Free-born Englishman’: How Magna Carta Became a ‘Liberty Document’, 1508–1760s*, in *MAGNA CARTA: THE FOUNDATION OF FREEDOM, 1215–2015*, at 102, 103–19 (Nicholas Vincent ed., 2015); LIBRARY CONG., *supra* note 13, at 16 (titling section on Virginia charter and Coke, “Rights of Englishmen in British America”).

existing law). Indeed, it seems every word used was open-ended and defined only in reference to something else. A person was not declared to be a “subject.” A person was not given *X* liberties (or rights or privileges or franchises). A person was not even described as having been born in the realm. Instead, a person was assured a body of legal benefits (alternatively called privileges, liberties, franchises, or immunities) as if the person had been born in a certain relationship to the Crown usually defined by geography (the realms of England and Ireland or any other place in allegiance to the Crown). The “liberties assurance” describes this referential concept.<sup>23</sup>

This Article challenges both the idea of the Virginia charter as the connection between Magna Carta and American constitutionalism and the modern constitutional assumptions underlying the traditional historical account. In so doing, it seeks to expand our ideas about our written constitutional heritage. In an influential article on Edward Coke’s constitutionalism, law professor Daniel Hulsebosch pointed to the difficulty Americans have with the “notion of a framer in a legal world without a unitary, written constitution.”<sup>24</sup> This Article takes Hulsebosch’s insight in a different direction by arguing that a community over time can frame a constitutional concept. The story in these pages reveals a constitutional provision (the liberties assurance) arising from a community of legal actors.<sup>25</sup> The inherent ambiguities and overlapping understandings of a community explain the resilience of the provision. An enduring concept, existing across varied semantic expressions, was the essence of charter constitutionalism.

This Article proceeds by revisiting the traditional account of the Virginia charter and then describing an alternate history. Part II traces the conventional narrative in which Edward Coke endowed the American colonists with the rights of Englishmen by drafting the

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23. An analogous approach was used in the Civil Rights Act of 1866. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2006)) (“That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.”).

24. Daniel Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439, 444 (2003).

25. *See infra* Section III.A.

Virginia charter. The first Section of Part II describes the traditional account; the second Section argues that the evidence for the account is tenuous. Part III offers an alternative narrative. The first Section of Part III argues that the liberties assurance was the result of collective creation by a large group of late sixteenth-century Elizabethans. The second Section argues that the concept of the liberties assurance arose even earlier and that the language drew on long experience with efforts to ensure the legal status of children born overseas. The third Section traces the liberties assurance from its earliest appearance in the 1578 letters patent to Humphrey Gilbert through to the 1732 Georgia charter. The final Part offers a few brief reflections on the importance of charter constitutionalism for American constitutionalism.

## II. THE RIGHTS OF ENGLISHMEN AND EDWARD COKE

The conventional narrative connects the expansion to America of the rights of Englishmen through Edward Coke. Supporting this story has been the apparent confluence of historical events—the 1606 Virginia charter, Edward Coke’s status of Attorney General in 1606, his important opinion in *Calvin’s Case* (1608), and his later advocacy of Magna Carta.<sup>26</sup> Different strands of this story can be found in explanations about the legality of the American Revolution, the development of colonial law, and the history of American citizenship.<sup>27</sup> Scholarly repetition of the story, however, has not made its essential connections any firmer.

### A. *Edward Coke and the Charter*

For the past century, various accounts of the 1606 Virginia charter have attributed the document to Edward Coke. Coke’s appearance is curious. His responsibility is presented with caveats. His precise role is often left somewhat vague. Nonetheless, the early seventeenth-century progenitor of English liberties serves in these accounts as a framing agent for American liberties.

Over a century ago, the basic narrative connecting the Virginia charter to American constitutionalism appeared in an influential article by Harold Hazeltine, Downing Professor of the Laws of

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26. See generally *Calvin’s Case, or the Case of the Postnati* (1608), 77 Eng. Rep. 377; 7 Co. Rep. 1 b (listing Coke as Lord Chief Justice of the Court of Common Pleas).

27. See, e.g., JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 7–9, 13–61 (1978); TOMLINS, *supra* note 21, at 156–90; CRAIG YIRUSH, *SETTLERS, LIBERTY, AND EMPIRE: THE ROOTS OF EARLY AMERICAN POLITICAL THEORY, 1675–1775*, at 7–11 (2011); Barbara A. Black, *Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157, 1207–11 (1976).

England at Cambridge.<sup>28</sup> Hazeltine focused on the “claim of the colonists that they possessed the rights of Englishmen.”<sup>29</sup> The “solid documentary basis” for the claim was the “solemn enunciation of the principle in royal charters.”<sup>30</sup> The charters were “the earliest written constitutions of the colonies.”<sup>31</sup> The 1606 Virginia charter deserved particular praise. Hazeltine declared:

In this famous document—the final form of which was in part the work of Coke himself—the King not only claimed the right to colonize a large portion of the territory of the New World, but he also asserted the principle that English colonists in this territory were to enjoy the same constitutional rights possessed by Englishmen in the home-land.<sup>32</sup>

Hazeltine left Coke’s contribution slightly vague (“in part the work of Coke himself”).<sup>33</sup> The argument, however, created the impression that Coke had been the one to assert the principle that the charters extended constitutional rights of Englishmen to the colonists.<sup>34</sup>

Edward Coke’s potential influence proved understandably irresistible to Professor A.E. Dick Howard in his influential 1968 book on Magna Carta and American constitutionalism, *The Road from Runnymede: Magna Carta and Constitutionalism in America*.<sup>35</sup> Howard explained that the “Virginia Charter of 1606 takes on even greater significance when one considers that the text of the charter may well have been scrutinized by the sometime English Attorney General Edward Coke . . .”<sup>36</sup> Eliding over the “may well have” caution, Howard declared, “[t]he guarantee of the rights of Englishmen would have had special significance to Coke, who was to

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28. See generally H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 1 (1917) (“The earliest and perhaps the most important phase of this imperial history of Magna Carta is its effect upon the constitutions and laws of the American Colonies and of the Federal Union that was established after their War of Independence.”).

29. *Id.* at 8.

30. *Id.*

31. *Id.*

32. *Id.* at 6–7 (noting that “the Elizabethan patents to Gilbert and Raleigh” had “embodied” the principle but it was “not until after James’s patent to the Virginia Company that the principle first took root in American soil”).

33. *Id.*

34. The link is explicit in a footnote: “On the charters as the earliest American constitutions and as the foundation of the constitutions of the national era . . .” *Id.* at 8 n.8.

35. HOWARD, *supra* note 5, at 14–34.

36. *Id.* at 18 (noting possible participation of Sir John Dodderidge, Solicitor General, and Lord Chancellor Ellesmere).

become the great seventeenth-century expositor of the common law.”<sup>37</sup> Howard then connected Coke to American constitutionalism: “And it was Coke who was to have such dramatic influence on the course of American legal and constitutional thought . . . .”<sup>38</sup> The charter, Coke, and constitutionalism were again connected.

The narrative achieved dominance when Nicholas Vincent adopted it in 2012 in his widely read *Magna Carta: A Very Short Introduction*. Magna Carta embodied “the idea of a charter of liberties, embodying the subject’s rights against the sovereign.”<sup>39</sup> This idea underlaid “the chartered privileges which kings themselves continued to grant, not least to the fledgling American colonies.”<sup>40</sup> For Vincent, there was an irony to the connection because “Magna Carta and the principles of English liberty were exported across the north Atlantic” by “precisely those Stuart Kings, James I and Charles I, who were elsewhere accused of suborning [sic] the ancient constitution.”<sup>41</sup> Coke was perhaps the explanation. Vincent stated that “Coke played a part in drafting the first charter of the Virginia Company in 1606, promising colonists ‘all liberties, franchises and immunities . . . as if they had been abiding and born within this our realm of England.’”<sup>42</sup> Once again, we have the same story: Magna Carta, Coke, the charter, and, eventually, American constitutionalism.

The narrative has proven alluring to recent scholars tracing the development of other fundamental strands of colonial American law, and in particular to those focusing on the influence of *Calvin’s Case*.<sup>43</sup> In 1608, Coke published his opinion in the case involving the status of Scottish subjects of James VI of Scotland (after his accession to the British crown as James I), particularly the Scots’ rights to inherit and

37. *Id.*; see also *id.* at 15 n.4 (focusing on “significant language” of liberties assurance and relegating “like provisions” of earlier patents to footnote mention).

38. *Id.* at 18–19 (noting that Coke “later wrote the famous *Institutes* on the laws of England, in which he said that any statute passed by Parliament contrary to Magna Carta, the cornerstone of the rights of Englishmen, should be ‘holden for none’”).

39. VINCENT, *supra* note 5, at 93.

40. *Id.*

41. *Id.*

42. *Id.*

43. See, e.g., Harvey Wheeler, *Calvin’s Case (1608) and the McIlwain-Schuyler Debate*, 61 AM. HIST. REV. 587, 597 (1956) (summarizing a colonial American debate between McIlwain and Schuyler relating to *Calvin’s Case*). For a different approach connecting Coke, constitutionalism, and the November 1606 Articles, Instructions, and Orders, see David Thomas Konig, *Colonization and the Common Law in Ireland and Virginia, 1569–1634*, in THE TRANSFORMATION OF EARLY AMERICAN HISTORY: SOCIETY, AUTHORITY, AND IDEOLOGY 70, 81 (James A. Henretta et al. eds., 1991) (describing Coke’s common law principle of interpreting charters “fully and beneficially”).

own land in England and to take advantage of other privileges of the laws of England.<sup>44</sup> As Steve Sheppard notes, the case “had tremendous implications for James’s view of forging a single nation of Great Britain, as well as for the rights of subjects living in the new colonies overseas.”<sup>45</sup> It is not surprising therefore that the Coke–Virginia charter story appears in the scholarship related to *Calvin’s Case*. In exploring the origins of birthright citizenship, Polly Price connected the case to Coke, the Virginia charter, and the rights of Englishmen.<sup>46</sup> In arguing for Coke’s importance in conceptualizing the legal status of the colonies, Daniel Hulsebosch linked the case to Coke and the charter.<sup>47</sup> In Christopher Tomlins’s Bancroft Prize–winning book on English settlement, he traced connections among the case, Coke, and the earliest charters in a section entitled “Natural Subjects and Free Denizens—Calvin’s Case.”<sup>48</sup> Similarly, Ken Macmillan interwove the case, the 1606 Virginia charter “possibly authored by Coke, who was Attorney General until July 1606[.]”<sup>49</sup> and the provisions of the early charters in the most detailed recent work on imperial constitutionalism.<sup>50</sup> The important connection to Magna Carta is made apparent in Macmillan’s comment:

As Coke, Hale, and later writers such as John Locke and William Blackstone explained, in exchange for their allegiance, those living in the colonies retained basic rights to life, limb, health, reputation, property, and protection that all subjects enjoyed as part of their English subjecthood and as guaranteed by natural law.<sup>51</sup>

44. *Calvin’s Case, or the Case of the Postnati* (1608), 77 Eng. Rep. 377, 380–82; 7 Co. Rep. 1 b, 2 b–4 b (deciding that Scots born after James’s succession (the *postnati*) were English subjects; however, those born before (the *antenati*) were not).

45. *Id.* at 166.

46. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997) (noting that “two years prior . . . the English King granted to the colonists of Virginia a charter that guaranteed them the ‘rights’ of Englishmen”).

47. Hulsebosch, *supra* note 24, at 460 (noting that Coke “had drafted the company’s original charter, and the dicta in his opinion contained a disquisition of the legal relationship between the realm of England and other royal dominions”); see also Liam Séamus O’Melinn, *American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 COLUM. L. REV. 104, 121 n.88 (1995) (stating that “when Coke drafted the Virginia charter of 1606 he intended to safeguard the colonists in their privileges”).

48. TOMLINS, *supra* note 21, 82–89.

49. KEN MACMILLAN, *THE ATLANTIC IMPERIAL CONSTITUTION: CENTER AND PERIPHERY IN THE ENGLISH ATLANTIC WORLD* 25 (2011) [hereinafter MACMILLAN, *THE ATLANTIC IMPERIAL CONSTITUTION*].

50. See *id.* at 15–16, 25–27.

51. *Id.* at 27.

As he notes, this collection of rights had been the “unique marker of English identity since the Magna Carta.”<sup>52</sup> To write about *Calvin’s Case* in the American colonial context seems to require repetition of the claim that Magna Carta’s liberties extend to American soil through the early colonial charters.

The seductive nature of this narrative reflects our desires for the origins of American constitutionalism. The written charters are seen as shadowy versions of early American constitutions. Rights language appears because of the influence and deliberate decision of one of the greatest of early English legal thinkers and jurists. The language is intentional, that is, it is designed to extend rights symbolized by Magna Carta to English colonists in America. The language is also positivist, that is, there is no uncertainty about whether in the absence of the words the same rights would have been extended. It is ultimately an almost heroic, reassuring narrative about the 800-year-old genealogy of American constitutional rights.

### B. *Uncertain Connections*

Despite the understandable appeal of the narrative, the supporting evidence is more tenuous than prior academic embrace considers. As this Section explores, no known evidence establishes Coke’s actual drafting of the charter.

Coke’s responsibility for the 1606 Virginia charter has been assumed because of his role as attorney general during the granting of the Virginia charter. The charter was granted on April 10, 1606.<sup>53</sup> Coke was Attorney General from April 1594 to June 1606, when he became Chief Justice of Common Pleas.<sup>54</sup> Despite secondary accounts describing Coke’s assistance in the charter process,<sup>55</sup> his personal involvement is not based on any direct evidence from Coke’s papers.<sup>56</sup>

52. *Id.* at 2.

53. See BEMISS, *supra* note 1, at 1.

54. Edward Coke, 1 SELECTED WRITINGS OF EDWARD COKE xxxix, xlvi (Steve Sheppard ed., 2003).

55. See, e.g., *id.* at xlv (“Coke assists Popham in drafting the First Royal Charter of the new Virginia Company, a charter that assures that British subjects in the colony and their children born there ‘shall have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.’ This promise is renewed in the Charter of 1609 and later charters.”).

56. See, e.g., Finbarr McCarthy, *Participatory Government and Communal Property: Two Radical Concepts in the Virginia Charter of 1606*, 29 U. RICH. L. REV. 327, 340, 342 n.54 (1995) (describing Alexander Brown and Charles Andrews as sources). Andrews simply states that “the text was undoubtedly scrutinized” by Coke and Dodderidge. 1 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 85 (1934).

The Privy Council registers for these years were destroyed in a fire in 1619.<sup>57</sup> And no draft of the Virginia charter—never mind one with Coke’s handwriting—has been found. Instead, earlier scholars extrapolated from the general drafting process and surmised Coke’s involvement.

Relatively little scholarship exists on the drafting of the letters patent and colonial charters.<sup>58</sup> A letters patent was an official document from the crown, in these instances, authorizing the colonization of areas at the time not known to or populated by the British. The process apparently remained the same over the centuries: interested parties filed a petition; a warrant was created with instructions; and the attorney general and solicitor general reviewed the draft, as did the Privy Council.<sup>59</sup> Surviving manuscripts indicate that, in some instances, certain attorneys general (including Coke) made additions to letters patent.<sup>60</sup> For example, in 1619, records revealed Coke looked at the patent for a company planning to settle the country near the Amazon.<sup>61</sup> It is certainly possible that Coke as attorney general had some role in the Virginia charter. Nevertheless, it is equally likely that the general drafting was largely complete before the attorney general’s review. The attorney general was not

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Alexander Brown cites only to the Deane article which only lays out the letters patent process. 1 ALEXANDER BROWN, *THE GENESIS OF THE UNITED STATES* vi–vii (1890). Indeed, Brown writes, “I think” the first draft “was drawn by Sir John Popham” but then “subject to alterations” as it passed through various hands. *Id.* The Deane article was itself based only on a general description of the letters patent process in the nineteenth century by the Public Records Keeper. See Charles Deane, *The Forms in Issuing Letters-Patent by the Crown of England*, in MASS. HIST. SOC’Y, 11 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 166, 167–69 (1871).

57. *Privy Council: Registers (PC2)*, NAT’L ARCHIVES, <http://discovery.nationalarchives.gov.uk/details/r/C11475> [<http://perma.cc/W8U4-2CN9>].

58. See, e.g., Bilder, *Colonial Constitutionalism and Constitutional Law*, *supra* note 15, at 32–33; Bilder, *English Settlement and Local Governance*, *supra* note 18, at 65–67; MACMILLAN, *THE ATLANTIC IMPERIAL CONSTITUTION*, *supra* note 49, at 23; KEN MACMILLAN, *SOVEREIGNTY AND POSSESSION IN THE ENGLISH NEW WORLD: THE LEGAL FOUNDATIONS OF EMPIRE, 1576–1640*, at 79–120 (2006) [hereinafter MACMILLAN, *SOVEREIGNTY AND POSSESSION*]. For support of the idea that companies kept records of useful patent language, see discussion of Presidents of Patents, Grants & Commissioners by the Virginia Company (July 1, 1622), in 1 *THE RECORDS OF THE VIRGINIA COMPANY OF LONDON* 64, 67 (Susan M. Kingsbury ed., 1906).

59. DEANE, *supra* note 56, at 167–69 (citing SECOND REPORT OF THE DEPUTY KEEPER OF THE PUBLIC RECORDS (May 15, 1841)) (describing the patent process in detail).

60. EDWARD HUGHES, *STUDIES IN ADMINISTRATION AND FINANCE, 1558–1825*, at 77–79 (1934).

61. ENGLISH AND IRISH SETTLEMENT ON THE RIVER AMAZON, 1550–1646, at 191 (Joyce Lorimer ed., 1989) (acknowledging the participation of both Coke and the Master of the Rolls in the patent certification process).



tasked individually with drawing the original letters patent;<sup>62</sup> instead, because a letters patent was based on a warrant containing instructions, “the substance had been determined in advance.”<sup>63</sup> Therefore, the patentees themselves often likely prepared initial drafts. Coke’s drafting of the liberties assurance for Virginia would have been unusual.

Further, little about Coke’s biography suggests any particular interest in the colonies. At a time when so many other legal figures appear as advisors, investors, or participants in the early English settlements, biographers and scholars have not emphasized evidence of Coke’s personal involvement.<sup>64</sup> Even among the many investors listed in the second Virginia charter, Coke’s name does not appear.<sup>65</sup> His compatriot, Chief Justice John Popham, provides a useful contrast. Popham was fascinated by and involved in early colonial settlement efforts. Popham’s biographer included a chapter entitled “Virginia Planter” and subtitled the book, “Leading to the Establishment of the First English Colony in New England.”<sup>66</sup> In contrast, Coke’s interest appears to have been relatively nonexistent or, at least, perceived as unworthy of notice by biographers.

Of course, Coke was not ignorant of the 1606 Virginia charter. He seems most likely to have looked it over; he may have even made alterations. But there is no evidence that he drafted the letters patent

62. HUGHES, *supra* note 60, at 80.

63. *Id.*

64. See, e.g., THOMAS G. BARNES, SHAPING THE COMMON LAW: FROM GLANVILL TO HALE, 1188–1688, at xxxiii–lxxiii (Allen D. Boyer ed., 2008) (no mention of settlement activities in chapter on Coke); ALAN CROMARTIE, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450–1642, at 179–233 (2006) (no mention of settlement activities in chapter on Coke); LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE 387–406 (Allen D. Boyer ed., 2004) (no apparent mention of settlement activities in the index); 1 SELECTED WRITINGS OF EDWARD COKE, *supra* note 54, at xxxiii (no mention in chronology of events other than 1621 recommendation of Roger Williams, to be scholar at Sutton Hospital); DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578–1616, at 91 n.2 (J.H. Baker ed., 2014) (discussing Popham’s involvement in the settlements, but not Coke’s); Hulsebosch, *supra* note 24, at 444 (arguing that *Calvin’s Case* helped to underpin the legalities of English settlement but not discussing direct involvement).

65. The Second Virginia Charter (1609), reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3790, 3790–95 (Francis Newton Thorpe ed., 1909) [hereinafter 7 FEDERAL AND STATE CONSTITUTIONS] (listing a Sir William Cooke and Captain John Cooke).

66. See DOUGLAS WALTHEW RICE, THE LIFE AND ACHIEVEMENTS OF SIR JOHN POPHAM, 1531–1607, at 3, 7 (2005); SMITH, *supra* note 64, at 91–114 (describing Popham’s participation in the Fens draining project and Coke’s concerns).

from scratch or made major substantive changes. There is no evidence to attribute to Coke the linguistic differences in the liberties assurance between the 1606 Virginia document and the earlier letters patent. Thus Coke seems unlikely to have been the framer depicted in the conventional account.

Of equal importance, the language of the 1606 Virginia charter was not unique in extending liberties. The judicious use of ellipses renders the charter phrase in particularly appealing modern terms: “[persons shall] have and enjoy all Liberties, Franchises, and Immunities . . . to all Intents and Purposes, *as if they had been abiding and born, within this our Realm of England.*”<sup>67</sup> The genealogy and later influence of the language, however, suggests interpretive caution. As will be described later in this Article, the liberties assurance originated in earlier Elizabethan letters patent, and before that, even older denization letters, patents, and statutes addressing the status of overseas children.<sup>68</sup> The 1606 charter misleadingly appears to be new because the previous letters patent referred to the “privileges of free denizens.”<sup>69</sup> The 1606 charter omitted the “free denizen” phrase,<sup>70</sup> but the omission is a red herring. The 1606 Virginia charter’s omission was not influential, and the “free denizen” phrase reappeared in the second Virginia charter in 1609, the 1610 Newfoundland charter, the 1615 Bermuda charter, and the 1620 New England charter.<sup>71</sup> To the extent that a Virginia charter was influential on other charters, it was the 1609 charter (including this free denizen phrase borrowed from earlier charters) that was precisely copied for other charters.<sup>72</sup> Moreover, recent scholars such as Tomlins and MacMillan pay little heed to the semantic differences among the language of the early charters.<sup>73</sup> The 1606 Virginia charter’s appealing language has been overinterpreted.

67. See Price, *supra* note 46, at 74.

68. See *infra* Section III.B.

69. See, e.g., Charter to Sir Walter Raleigh (1584) (spelling modernized), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 53, 55 (Francis Newton Thorpe ed., 1909) [hereinafter 1 FEDERAL AND STATE CONSTITUTIONS].

70. The First Charter of Virginia (1606), *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 65, at 3783, 3788.

71. See *infra* text accompanying notes 291–94.

72. Compare *infra* note 294, with *infra* notes 295–305.

73. See MACMILLAN, SOVEREIGNTY AND POSSESSION, *supra* note 58, at 92 (providing a general description); TOMLINS, *supra* note 21, at 82 n.59, 157–58 n.80 (noting that “[t]his was established from the outset”).

Interestingly, the 1606 Virginia charter's language was likely forgotten until the 1740s. One cannot find a contemporaneous popular printing of the 1606 charter. The Virginia Company published nine documents between 1609 and 1615—but they did not print the 1606 charter.<sup>74</sup> Afterwards in 1623, the original records of the Company were confiscated.<sup>75</sup> In 1625, when Samuel Purchas printed the Virginia charter, he used only the very first sections and did not include the liberties assurance.<sup>76</sup> He emphasized that specifics were “too long to rehearse, seeing this Patent hath beene often altered and renewed.”<sup>77</sup>

The apparent importance of the 1606 charter dates from its rediscovery in the eighteenth century. A manuscript containing company records in the library of the Earl of Southampton was sold to William Byrd of Virginia.<sup>78</sup> The manuscript was copied by William Stith and published in *History of the First Discovery and Settlement of Virginia*.<sup>79</sup> Thomas Jefferson later acquired the manuscript, referred to as the Bland copy (it resides today at the Library of Congress).<sup>80</sup> Due to Stith's rediscovery of the manuscript, the 1606 charter began to appear in eighteenth-century political debates.<sup>81</sup>

74. 1 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON, *supra* note 58, at 32.

75. *Id.* at 107–15 (“The danger of confiscation of the company's records [occurred] on May 22, 1623, when the Privy Council enforced a previous [confiscation] order . . .”); *see also id.* at 18 (referring to nineteenth-century reprints of charter). The original charter is not extant. There is a microfilm copy at The National Archives, United Kingdom, Patent Roll, 4 James 1 PRO/TNA C66/1709. There is also “an early, but damaged copy,” in The Plymouth City Archives, United Kingdom, W.360/57. *See* 1 THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER 1606–1609, at 24 n.1 (Philip Barbour ed., 1969).

76. 18 SAMUEL PURCHAS, PURCHAS HIS PILGRIMES 399, 403 (Glasgow Univ. Press 1906) (1625) (including that each of the two colonies have “libertie to carrie all Subjects (not restrained) which will goe with them”).

77. *Id.* at 403.

78. *See* 1 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON, *supra* note 58, at 42–44, 47. Thomas Jefferson believed they were “copied from the originals, under the eye, if I recollect rightly, of the Earl of Southampton, a member of the company.” *Id.* at 43 (citing NAT'L INTELLIGENCER, Oct. 19, 1825).

79. *See id.* at 43–44; EDWARD D. NEILL, HISTORY OF THE VIRGINIA COMPANY OF LONDON ch. iv (1869); *see also* WILLIAM STITH, THE HISTORY OF THE FIRST DISCOVERY AND SETTLEMENT OF VIRGINIA 35–36, app. 1 (photo. reprint 1965) (1747).

80. 1 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON, *supra* note 58, at 42.

81. *See, e.g.*, JAMES ABERCROMBY, DE JURE ET GUBERNATIONE COLONIARUM, reprinted in MAGNA CHARTA FOR AMERICA 172–73, 212 (Jack P. Greene et al. eds., 1986) (“And, on the part of the Crown it is stipulated, and declared by Charters, that the Inhabitants of the Colonys shall be held and deemed, as free Denizens and Lieges of the Kingdom of England, with all the Rights, Privileges, and Immunitys, incident to Natural born Subjects, as if they had been *Born* and *Abiding*, within the Realm of England, words very significant.”); THE CHARTERS OF THE BRITISH COLONIES IN AMERICA 67 (John Almon ed., 1774).

Lastly, the assumption that Coke's opinion in *Calvin's Case* accurately reflected categorical distinctions among denizens, aliens, and others may not reflect the broader legal understanding. Coke was only one of numerous judges and lawyers who expressed opinions on the legal issues relating to the status of the Scots.<sup>82</sup> Indeed, Ellesmere made the unusual decision to publish his speech in the Exchequer chamber, emphasizing that the twelve judges had "concurred in judgment, but upon several reasons."<sup>83</sup> The judges themselves distinguished *Calvin's Case* from the situation of "persons born beyond seas."<sup>84</sup> In arguing over the issue, Francis Bacon suggested no dispute over the status of overseas children: "[A]ll children born in any parts of the world, if they be of English parents continuing at that time as liege subjects to the king, and having done no act to forfeit the benefit of their allegiance, are *ipso facto naturalized*."<sup>85</sup>

Like Bacon's comments, Ellesmere's own conclusion was expansive: "[A]ll, that have been born in any of the king's dominions since he was king of England, are capable and inheritable in all his dominions without exception."<sup>86</sup> Coke's opinion may have overstated the distinctions between terms such as "denizen" and "subject." Indeed, Bacon explained that the word *denizen*, was "sometimes . . . confounded with a natural born subject."<sup>87</sup> Intriguingly, Ellesmere's published speech cautioned readers about the veracity of claimed legal distinctions, noting, "a man may wander

82. 2 CORBET'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 562, 568–69 (1809) [hereinafter 2 STATE TRIALS] (describing Popham, Flemming, and Coke's opinions); *id.* at 576 (describing the Walmsley dissent and other justices' agreement); *id.* at 669 (emphasizing Popham's opinion).

83. Lord Chancellor Ellesmere's Speech in the Exchequer Chamber, in the *Case of the Postnati* (1608) [hereinafter Chancellor Ellesmere's Speech], in 2 STATE TRIALS, *supra* note 82, at 659, 668 (spelling modernized); see LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 184, 207 (Cambridge Univ. Press 1977).

84. *Calvin's Case, or the Case of the Postnati* (1608), 77 Eng. Rep. 377; 7 Co. Rep. 1 b, reprinted in 2 STATE TRIALS, *supra* note 82, at 572.

85. Speech of Lord Bacon as Counsel for Calvin, in the Exchequer Chamber, in the *Case of the Postnati* (1608) (emphasis added) [hereinafter Speech of Lord Bacon], in 2 STATE TRIALS, *supra* note 82, at 595, 601; see Harvey Wheeler, *The Semiotics of "Constitution" in England and America*, SIRBACON.ORG, <http://www.sirbacon.org/wheelerconstitution.htm> [perma.cc/XP4Y-QG3A] (arguing for Bacon's brief in *Calvin's Case* as "the institutional genome" of constitutionalism in England and America).

86. Chancellor Ellesmere's Speech, *supra* note 83, at 695 (spelling modernized); see MACMILLAN, ATLANTIC IMPERIAL CONSTITUTION, *supra* note 49, at 17 (suggesting that reciprocal sovereignty depended on allegiance).

87. Speech of Lord Bacon, *supra* note 85, at 576, 582; see Francis Bacon, 7 THE WORKS OF FRANCIS BACON 639, 648 (Spedding et al. eds., 1879).

and miss his way in mists of distinction.”<sup>88</sup> Despite the lengthy erudite reasoning, Coke’s opinion may not have had the extensive relevance to the status of overseas children that has been assumed. As Jacob Selwood remarks on the case, “[w]hen viewed through the lens of practice, the sheer irrelevance of the 1608 ruling is striking . . . .”<sup>89</sup> In sum, the 1606 Virginia Charter may have had little to do with Coke’s opinion two years later in *Calvin’s Case*.

If the liberties assurance did not arise because Coke inserted it into the Virginia charter, then what explains its appearance and persistence? By rotating our view away from the allure of Coke and *Calvin’s Case*, we can glimpse a new explanation. The liberties assurance drew on the experience and aspiration of a larger community. For this community, overseas children were a reality and the liberties assurance symbolized faith in the breadth of English legal protection.

### III. ADVENTURERS IN CONSTITUTIONALISM

The liberties assurance arose from a community. It was not the product of a single mind or single moment. The men behind the early English efforts to expand trade and geographic boundaries were also legal adventurers. And the legal mechanics of English settlement drew on English law. Concepts were adopted and, over time, details defined in response to new difficulties both real and theoretical. In the process, this community began to create an early type of written constitutionalism.

#### A. *Collective Creation*

In contrast to legal scholarship’s focus on Edward Coke, historical scholarship on the early settlements emphasized collective contributions. There were multiple overlapping groups of family, professional, and business relationships. This web in turn supported a cultural space in which a new understanding of constitutionalism could flourish.

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88. Chancellor Ellesmere’s Speech, *supra* note 83, at 679, 695–96 (spelling modernized). Ellesmere concluded that the *postnati* are “in reason, and by the common lawe of England, naturall-borne subjects within the allegiance of the king of England” permitted to purchase, inherit, use, and sue for real property in England. *Id.* at 696. He emphasized the many acceptable ways in which judges had read language to be completely construed in opposition to its apparent sense. *Id.* at 675–76. He noted that it “must be” because “otherwise much mischief and great inconvenience will ensue.” *Id.* at 675–76.

89. JACOB SELWOOD, DIVERSITY AND DIFFERENCE IN EARLY MODERN LONDON 99 (2010).

The first two letters patent for settlement came from the family of Katherine Champernowne. Champernowne's first husband was Otho Gilbert.<sup>90</sup> Her aunt was Queen Elizabeth's governess, Kat (Champernowne) Astley.<sup>91</sup> Her three sons were John, Humphrey, and Adrian Gilbert.<sup>92</sup> After Otho Gilbert died, Champernowne married Walter Raleigh (senior).<sup>93</sup> By her second marriage, Champernowne had two additional sons, Walter and Carew Raleigh.<sup>94</sup> The half-brothers were closely linked to the first two letters patent from Elizabeth. Humphrey Gilbert received the first letters patent for a settlement, and served as "a key node in a thickly connected network of men associated with each other and with each other's projects."<sup>95</sup> After Humphrey Gilbert disappeared and presumably died in a storm, his brother Walter Raleigh acquired a similar letters patent.<sup>96</sup> Adrian Gilbert and Carew Raleigh were also both involved with early colonization efforts. As Mary Fuller explains, a "linked succession of patent holders" from Gilbert to Raleigh to the Virginia Company created "an emerging community focused on schemes of colonization and exploration."<sup>97</sup>

The Middle Temple provided another group of connections.<sup>98</sup> Walter Raleigh and Adrian Gilbert were both members.<sup>99</sup> Richard Hakluyt (the "lawyer") and his younger cousin of the same name, Richard Hakluyt, were members.<sup>100</sup> The older Hakluyt authored several memoranda on early settlement ventures; the younger

90. ROSEMARY O'DAY, *THE ROUTLEDGE COMPANION TO THE TUDOR AGE 174–75* (2010) (entry on Humphrey Gilbert).

91. Brendan Wolfe, *Sir Walter Raleigh (ca. 1552–1618)*, *ENCYCLOPEDIA VA.*, [http://www.encyclopediavirginia.org/Raleigh\\_Sir\\_Walter\\_ca\\_1552-1618#start\\_entry](http://www.encyclopediavirginia.org/Raleigh_Sir_Walter_ca_1552-1618#start_entry) [<http://perma.cc/46T2-5FRQ>] ("[Champernowne's] aunt Katherine 'Kat' Astley . . . served as governess and confidant to the future Queen Elizabeth.").

92. RICE, *supra* note 66, at 37.

93. DAVID BEERS QUINN, *SET FAIR FOR ROANOKE: VOYAGES AND COLONIES, 1584–1606*, at 3–4 (1985).

94. *Id.*; CHARLES WESLEY TUTTLE, *CAPT. FRANCIS CHAMPERNOWNE: THE DUTCH CONQUEST OF ACADIE 70 n.3* (Albert Harrison Hoyt ed., 1889).

95. MARY C. FULLER, *VOYAGES IN PRINT: ENGLISH TRAVEL TO AMERICA, 1576–1624*, at 17 (1995).

96. *Id.* at 38 ("Gilbert's death was followed by a proliferation of plans and projects: most notable of these, Walter Raleigh's sponsorship first of explorations and then of a colony on the Outer Banks of North Carolina under a new patent, based on the wording of Gilbert's but omitting rights to Newfoundland." (spelling modernized)).

97. *Id.* at 17.

98. See Richard Hill, *The Maritime Connection in the Middle Temple*, in *HISTORY OF THE MIDDLE TEMPLE* 111, 111–45 (Richard O. Havery ed., 2011); see also John Colyer, *The American Connection*, in *HISTORY OF THE MIDDLE TEMPLE*, *supra*, at 239–42.

99. Hill, *supra* note 98, at 114–15.

100. *Id.* at 114; QUINN, *supra* note 93, at 4.

published the Gilbert and Raleigh charters in his influential *The Principal Navigations, Voyages, Traffics, and Discoveries of the English Nation*.<sup>101</sup> Ralph Lane was the 1585 Governor of Virginia under the Raleigh patent and is thought to have been a member of the Middle Temple.<sup>102</sup> Another member, Bartholomew Gosnold, undertook a successful voyage to Cape Cod in 1602 under the Raleigh patent.<sup>103</sup> Edwin Sandys, a leader in the 1606 Virginia settlement and possibly drafter of the 1609 second charter, and George Sandys, later Treasurer of the Virginia Company, were members.<sup>104</sup> George Percy, who would go on to write about the early years of the Virginia settlement and would become deputy governor in 1609, was a member.<sup>105</sup> Indeed, the role of the Middle Temple in creating the legal architecture for English settlement may stretch even farther back. John Rastell, whose interpretation of common law and statutes underpinned the transfer of English liberties and attempted to organize an early venture, was a barrister at Middle Temple.<sup>106</sup> As Finbarr McCarthy emphasizes, the 1606 Virginia venture had the “pervasive influence of men with legal knowledge and experience.”<sup>107</sup>

Business connections created by the various trading and settlement companies formed an even larger network. Stretching backwards in time, the Merchant Adventurers Company provided a model for the early efforts. The Company of Merchant Adventurers of London and its younger sibling, the Company of Merchant Adventurers of Bristol, were dominant in the sixteenth century.<sup>108</sup> As editor Susan Kingsbury notes, the Virginia Company records “correspond so closely in form and in subject-matter” to that of the Merchant Adventurers Company and the East India Company “that the similarity in form of organization and methods of conducting business is established.”<sup>109</sup> “[M]any of the members of the Virginia Company” had participated in earlier exploration efforts and were

101. See 1 THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFICS AND DISCOVERIES OF THE ENGLISH NATION 195, 207–17 (Edmund Goldsmid ed., 1885) (1589).

102. Hill, *supra* note 98, at 118–19.

103. *Id.* at 124.

104. *Id.* at 132.

105. *Id.* at 133.

106. Rastell was also the brother-in-law of Thomas More. Cecil H. Clough, *Rastell, John (c.1475–1536)*, OXFORD DICTIONARY OF NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/23149> [<http://perma.cc/7Y9Y-3WGV>].

107. McCarthy, *supra* note 56, at 339.

108. See Anne F. Sutton, *The Merchant Adventurers of England: Their Origins and the Mercers' Company of London*, 75 HIST. RES. 25, 25–26, 45 (2002).

109. 1 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON, *supra* note 58, at 14–15.

stockholders or officers in the Merchant Adventurers and other companies.<sup>110</sup>

The 1606 Virginia charter integrated these various groups with one man at the center, John Popham.<sup>111</sup> The eight patentees included Richard Hakluyt (the younger); Raleigh Gilbert (son of Humphrey Gilbert and nephew of Walter Raleigh), George Popham (nephew to Popham), and Thoman Hannam (grandson of Popham).<sup>112</sup> John Popham was a member of Middle Temple.<sup>113</sup> Beginning in 1569, he was involved with the Munster plantation, an effort to settle English subjects in Ireland.<sup>114</sup> He became solicitor general in 1579, just after Gilbert's patent.<sup>115</sup> In 1581, while serving as attorney general, he reviewed the Raleigh patent. His extant copy of the Raleigh patent reveals close attention to detail with small technical changes noted.<sup>116</sup>

From 1592 to 1607, Popham was the Chief Justice of Queen's Bench, and during that time participated directly in the effort to acquire the 1606 charter and found the Virginia settlement.<sup>117</sup> Historian David Quinn repeats a description in which Popham, then Lord Chief Justice, took "sort of 'great pains' about the plantation of a colony in Virginia, and declared himself ready to call all interested parties before him and 'by their advices set down the best manner of project.'" <sup>118</sup> Quinn suggested that "Sir John himself may have taken the lead" in drafting the 1606 charter.<sup>119</sup> Finnbar McCarthy similarly suggests that Popham "probably drafted the version" that was sent with the petition and "any revisions."<sup>120</sup>

110. *Id.* at 14.

111. See McCarthy, *supra* note 56, at 340–42.

112. ANDREWS, *supra* note 56, at 80–82.

113. RICE, *supra* note 66, at 21.

114. See MICHAEL MACCARTHY MORROGH, *THE MUNSTER PLANTATION: ENGLISH MIGRATION TO SOUTHERN IRELAND, 1583–1641*, at 41–45 (1986) (noting that it appears solicitor general Thomas Egerton, later Lord Ellesmere, drafted the "commissions, articles, and subsequent letters patent" in consultation with attorney general Popham).

115. RICE, *supra* note 66, at app. 2.

116. Sir Walter Raleigh, *Discovery of the Heathen Lands (1851–1853)* (on file with The National Archives, United Kingdom, 30/34/1). Thanks to Robert Palmer for help with copies and Frank Herrmann for deciphering Popham's handwriting.

117. See HENRY S. BURRAGE, *THE BEGINNINGS OF COLONIAL MAINE, 1602–1658*, at 38 (1914) ("Probably, also, Sir John Popham, then Chief Justice of England, had a part in the new undertaking.").

118. 1 *THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER 1606–1609*, *supra* note 75, at 14 (quoting *Cecil Papers: March 1606*, in 18 *CALENDAR OF THE CECIL PAPERS IN HATFIELD HOUSE* 69, 84 (M. S. Giuseppi ed., 1940), <http://www.british-history.ac.uk/cal-cecil-papers/vol18/pp69-92> [<http://perma.cc/FD7P-7GGM>]).

119. *Id.* (noting precedents from the Muscovy and East India Company and mentioning Sir Robert Cecil "and possibly Sir Edward Coke . . . and John Dodderidge").

120. McCarthy, *supra* note 56, at 342.



Ultimately, however, Popham's legacy would not be with the southern efforts to settle at Jamestown but instead with northern efforts to settle on the Kennebec River (now Maine).<sup>121</sup> In May 1607, George Popham, likely John Popham's nephew, led a group that built Fort St. George.<sup>122</sup> In late 1608, the entire group of colonists returned to England.<sup>123</sup> But Popham died in June 1607, never learning of the temporary success of the settlement.<sup>124</sup>

By 1609, the community interested in the settlements spread deep into English law and politics.<sup>125</sup> The 1609 Virginia charter listed 659 persons and fifty-six corporate entities as subscribers.<sup>126</sup> As one editor notes, "[f]ifty of the incorporators were members of the existing parliament, and fifty more were members of Parliament at one time or another."<sup>127</sup> Lord Cecil, Francis Bacon, Calvert (the future Lord Baltimore), Sandys, and Hakluyt were all members.<sup>128</sup> In 1621 when Sandys proposed changes for a new charter, he described the "infinity of names by reason of the multitude of Adventurers (increasing still more and more, as for that many were already named in a former Patent)."<sup>129</sup> Accordingly, the third charter abandoned individual names and referred collectively to the "Adventurers and Planters in Virginia."<sup>130</sup>

As this account establishes, in contrast to the depiction of Coke as an individual drafter of the language of the Virginia charter, the Virginia charter arose from the efforts of a large community. In fact, if one individual were to be named as bearing particular responsibility, it would likely be John Popham. But regardless, the conceptual underpinnings of the liberties assurance reflected this intertwined community.

121. See RICE, *supra* note 66, at 241, 245, 270.

122. See BURRAGE, *supra* note 117, at 76 n.2.

123. See RICE, *supra* note 66, at 256–57; see also BURRAGE, *supra* note 117, at 50–51, 54–56, 58–59, 63–99 (detailing the early efforts to colonize modern-day New England).

124. See RICE, *supra* note 66, at 261.

125. 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 65, at 3790–95.

126. *Id.*; The Third Charter of the Virginia Company (Mar. 12, 1612), reprinted in 5 NEW AMERICAN WORLD: A DOCUMENTARY HISTORY OF NORTH AMERICA TO 1612, at 226, 226 (David B. Quinn ed., 1979) [hereinafter 5 NEW AMERICAN WORLD].

127. WILLIS MASON WEST, A SOURCE BOOK IN AMERICAN HISTORY TO 1787, at 38 n.1 (1913).

128. See *id.*

129. NEILL, *supra* note 79, at 24 (quoting Manuscript Transcript of the Virginia Company (Feb. 22, 1620)) (spelling modernized).

130. *Id.* at 25 (spelling modernized).

*B. The Status of Overseas Children*

The liberties assurance drew on the experience of the adventuring community. The central concern of the clause was to ensure that children born overseas would have the same legal status of those born in England. That concept can be traced back through the privileges clause of the Gilbert and Raleigh patents to the private statutes and letters patent used to confirm the privileges of children born to English merchants overseas. The language used in the early charters comes from these sources. Interestingly, the legal status of children born overseas to English subjects under license does not appear to have been controversial.

Coke's 1608 opinion in *Calvin's Case* obscured the prior legal landscape regarding overseas children.<sup>131</sup> The opinion was interpreted by William Holdsworth as a "restatement of the law" instead of a new conceptualization of various precedents and sources.<sup>132</sup> Coke so persuasively described the past through his distinctions that it became nearly impossible to understand it in other ways. Cambridge law professor, Clive Parry, however, rejected the claim that *Calvin's Case* did "no more than to restate the law."<sup>133</sup> To Parry, the statutes and cases before 1608 "present so confused a picture that it is often impossible to say what they imply."<sup>134</sup> Other scholars cast similar doubt on the validity of Coke's description of rigid rules and clear dichotomies.<sup>135</sup> In particular, scholars have disagreed over whether there was a rigid distinction between naturalization (allegedly requiring an act of Parliament) and denization (allegedly a "limited sort of citizenship" that could be obtained by letters patent).<sup>136</sup> Parry

131. See, e.g., *Calvin's Case*, or the Case of the *Postnati* (1608), 77 Eng. Rep. 377, 380–82; 7 Co. Rep. 1 b, 2 b–4 b.

132. 9 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 74–79 (1926). For example, Holdsworth cites distinctions from Coke on Littleton as authority for fourteenth-century law. *Id.* at 77.

133. CLIVE PARRY, *NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH AND OF THE REPUBLIC OF IRELAND* 39 (1957).

134. *Id.*

135. J. M. ROSS, *English Nationality Law: Soli or Sanguinis?*, in *GROTIAN SOCIETY PAPERS: STUDIES IN THE HISTORY OF THE LAW OF NATIONS* 1, 3–4 (Charles Henry Alexandrowicz ed., 1972) ("[I]t was not until the seventeenth century . . . that it became established that mere birth in England made a person a subject of the king, and even then the rule was not quite absolute. . . . [F]rom at least the fourteenth century the *jus sanguinis* was applied to a considerable extent to the children of English parents born in foreign parts . . .").

136. LAURA HUNT YUNGBLUT, *STRANGERS SETTLED HERE AMONGST US: POLICIES, PERCEPTIONS AND THE PRESENCE OF ALIENS IN ELIZABETHAN ENGLAND* 78 (1996) (summarizing the conventional distinction); see *id.* at 78 n.59 (describing the debate and siding with Holdsworth). Yungblut does not address Clive Parry's work. See *id.* at 166

is more cautious about the “state of the law before *Calvin’s Case*.”<sup>137</sup> Leaving aside Coke’s categories allows us to see a legal framework with considerable ambiguity.

By the mid-fourteenth century, certain children born overseas were extended the same status as those born in England. In 1350, the statute *De natis ultra mare* (“of births beyond the seas”) was passed to ensure that children born abroad would be extended the most important legal right—the right to inherit real property.<sup>138</sup> The statute permitted such children to sue for inheritances despite potential allegations of an absence of proof of their legitimacy.<sup>139</sup> According to the statute:

all Children Inheritors, which from henceforth shall be born without the Ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England, shall have and enjoy the same Benefits and Advantages, to have and bear the Inheritance . . . as the other Inheritors.<sup>140</sup>

The foundational rationale involved ligeance—a word that eventually became the more common word, “allegiance.”<sup>141</sup> As historian Keechang Kim explained, the “ambiguity of the word ligeance allowed new ideas to be discussed in old terminology.”<sup>142</sup> Ligeance removed overseas children from legal disabilities that would later be characterized as those connected to alien status. The initial

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(not mentioning Parry’s work in the bibliography). On balance, Parry, Kim, and the archival evidence presented in the old William Shaw volume plausibly complicate Holdsworth’s interpretation. *See generally* LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1603–1700 [hereinafter LETTERS OF DENIZATION] (showing enactments bearing a distinction between naturalized citizens and denizens), *reprinted in* 18 THE PUBLICATIONS OF THE HUGUENOT SOCIETY OF LONDON 2 (William A. Shaw ed., 1911). Holdsworth notably cites Coke throughout the section describing the “development of the law down to *Calvin’s Case*.” HOLDSWORTH, *supra* note 132, 74, 76–77 (following the same lines as Coke’s opinion in *Calvin’s Case*).

137. PARRY, *supra* note 133, at 39. *See infra* text accompanying notes 156–64.

138. *See* A Statute for Those Who Are Born in Parts Beyond Sea 1350–1351, 25 Edw. 3 c.1 (Eng.). For debate as to whether the law was declaratory of the common law or prospective, see ALEXANDER COCKBURN, NATIONALITY, OR THE LAW RELATING TO SUBJECTS AND ALIENS 8–9 (1869).

139. *See* A Statute for Those Who Are Born in Parts Beyond Sea 1350–1351, 25 Edw. 3 c.1 (Eng.).

140. *Id.*

141. *See* KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 178 n.5 (2000) (stating that “allegiance” became the preferred spelling during or after the reign of Elizabeth I).

142. *Id.* at 150; *see also id.* at 113–25 (arguing that the background rule was concerned with legitimacy rather than nationality).

statute bearing this term was reprinted in later statute compilations.<sup>143</sup> In the sixteenth century, it became part of discussions over the legitimacy of the claims of Mary Stuart and Margaret Lenox to the English throne.<sup>144</sup> The statute implied that children born overseas could have their rights secured by the allegiance of their parents and thus be assured the same status as those born in England.

In 1368, a second statute addressed the status of children born overseas.<sup>145</sup> Once again, status defined by birth in England was established as the standard. The 1368 statute emphasized the necessity of a connection to the crown, this time by focusing on the place. The statute provided that children born in parts of France within lands “that pertain to” the king would inherit as if they had been “born within the Realm of England.”<sup>146</sup> Although ligenance was not explicitly stated, the underlying rationale seemed similar.<sup>147</sup> Those born in lands in crown allegiance had the same inheritance rights as those in England. By the end of the fourteenth century, the two statutes described a legal concept of rights, defined by birth in England, and extended to those who by place or by parentage could claim crown allegiance.

In the early sixteenth century, the lawyer John Rastell promoted overseas settlement and the assurance of “as if born in England” status. In 1517, Rastell obtained a letters patent from Henry VIII granting permission to travel overseas.<sup>148</sup> Historian David Beers Quinn considers Rastell the “first Englishman” to try “to bring out a colony to North America.”<sup>149</sup> Rastell, however, was forced to end the voyage in Ireland.<sup>150</sup> Nonetheless, after his return, his legal publications provided assurance that the issue of English parents born overseas would not be outside of English legal protections. In 1525,

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143. *Id.* at 153–55.

144. *Id.* at 159–75.

145. A Statute Made at Westminster on the First Day of May, in the Forty-Second Year of King Edward III 1368, 42 Edw. 3 c.10 (Eng.) (“[I]nfants born beyond the sea, within the seignories of Calais, and elsewhere, within the lands and seignories that pertain to our lord the King beyond the sea, be as able and inheritable of their heritage in England, as other infants born within the realm of England . . .”).

146. *Id.*

147. See KIM, *supra* note 141, at 142–43; Ross, *supra* note 135, at 6.

148. Patent from Henry VIII Granting Protection to John Rastell and Others (March 5, 1517), reprinted in 1 NEW AMERICAN WORLD: A DOCUMENTARY HISTORY OF NORTH AMERICA TO 1612, at 161, 161–62 (David B. Quinn ed., 1979) [hereinafter 1 NEW AMERICAN WORLD].

149. *Id.* at 161.

150. *Id.*; see also *Interlude of the Four Elements (1517–1519)*, reprinted in 1 NEW AMERICAN WORLD, *supra* note 148, at 168, 168.

Rastell published an influential book on the terms of law.<sup>151</sup> Under the term, “alyon” (alien), Rastell explained that English men overseas, under Crown license, were not aliens.<sup>152</sup> By the 1579 edition (printed in English), Rastell declared, “if an English man go over the seas with the Queen’s license, and there have issue this issue is no alien.”<sup>153</sup> This strong statement continued to occur, even in the 1607 edition just before *Calvin’s Case*.<sup>154</sup> In 1527, Rastell published an updated version of his statutory abridgment; he translated *de natis ultra mare* into English and placed it under the heading of “Englissshemen.”<sup>155</sup> The Rastell publications offered reassurance that those born overseas would be treated as if born in England.

A case from 1483 seemingly confirmed that the overseas issue of English parents could inherit as if born in England.<sup>156</sup> The case contained the sentence: “[H]e who is born overseas, and his father and mother were English, their issue inherit by the common law, but the statute makes clear.”<sup>157</sup> In the 1576 *La Graunde Abridgement*, the case appeared under the heading “Denizen & alien.”<sup>158</sup>

Statutes during the sixteenth century also addressed the status of overseas children. Thus, between 1541 and 1542, statutes made specific overseas children “free” and “in the nature of mere

151. JOHN RASTELL, EXPOSICIONES T[ER]MINO[RUM] LEGU[M] ANGLO[RUM] [AN EXPOSITION OF ENGLISH LEGAL TERMS] (1525), [152. RASTELL, \*supra\* note 151, illus. 10 \(“\[A\]lso if an englysh ma\[n\] go over the se\[a\] wyth y\[e\] kings lyce\[n\]s & ther\[e\] hath issu\[e\] thys issu\[e\] is not alyon.”\).](http://eebo.chadwyck.com/search/full_rec?source=pgimages.cfg&action=byid&id=99837930&file=&searchscreen=param(searchscreen)&vid=2277&pageno=2&zoom=fit&viewport=&searchconfig=config.cfg&display=param(display)&highlight_keyword=param(highlight_keyword)[https://perma.cc/V9SS-4FCZ]”; see KIM, <i>supra</i> note 141, at 155–59 (discussing Rastell).</p>
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153. JOHN RASTELL & WILLIAM RASTELL, AN EXPOSITION OF CERTAINE DIFFICULT AND OBSCURE WORDS, AND TERMES OF THE LAWES OF THIS REALME 17–18 (1579) (spelling modernized) (“[I]f an English man go over the Seas with the Queenes license, & there hath issue, this issue is noe alien.”).

154. *Id.* at 19 (“So if an English man go over the Seas w[ith] the Kings License and there hath issue, this issue is no alien.”).

155. JOHN RASTELL, THE STATUTES PROHEMIUM IOANNIS RASTELL [AN INTRODUCTION TO THE STATUTES BY JOHN RASTELL], at lxix (1527) (“And all children which for hens forth shal be born owt of the legeaunce of the kyng of whom the fader and moder at the tyme of the byrth be of the feyth and legeaunce of the king of englod shall haue and inioy the same benefitis and aduauntage to haue inheritaunce within this same legeance as other heirs beforeseid in tyme to come so that the moders of the same infants go ouer the see by the assent and wyll . . .”).

156. Mich. 1 Ric. 3, pl. 7, fol. 4a (King’s Bench 1483), <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=21057> [https://perma.cc/BY9V-P44Z] (listed under reference number “Seipp 1483.039”).

157. *Id.*

158. ROBERT BROOKE, LA GRAUNDE ABRIDGEMENT 214 (1576).

Englishmen.”<sup>159</sup> In each statutorily specified instance, an Englishman (usually a merchant or in the king’s service) had married and had a child with a non-English woman. The statutes declared the children to be the king’s “Naturall Subjects” and as “lawfull p[er]sons borne” within England.<sup>160</sup> They were given the rights to sue, to inherit, and all other rights as if “naturally borne” within England.<sup>161</sup>

Further, throughout the sixteenth century, individual children born overseas had their status affirmed by parliamentary statute or letters patent. The reasons were varied. Some instances involved the children of English parents who had fled during the reign of Mary.<sup>162</sup> Other cases seem to relate to uncertainty regarding the effect of marriage to a particular woman for reasons of her origin or religion.<sup>163</sup> In some cases, it may have been the desire for absolute certainty or even unnecessary certainty. Clive Parry suggested that some parents took such steps even where none were legally required.<sup>164</sup>

Members of the Merchant Adventurers were particularly concerned about the status of overseas children. In 1576, various merchants obtained a parliamentary act naturalizing their children: “for the manumising of the children of diverse English men borne beyond the seas.”<sup>165</sup> In 1581, another “bill concerning straungers’

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159. An Act for Making Free Certain Children Born, Beyond the Sea, and to Put the Same Children in the Nature of Mere Englishmen 1541–1542, 33 Hen. 8 c.25 (Eng.) (spelling modernized).

160. *Id.*

161. *Id.*

162. *See, e.g.*, Will of John Stafford, of Marlwood, esq. (1596), in 1 THE TOPOGRAPHER AND GENEALOGIST 142, 142 (John Gough Nichols ed., 1846) (noting that Stafford was born in Geneva, “whither his family went into exile on the accession of Queen Mary”).

163. *See* Barbara J. Todd, *Written in Her Heart: Married Women’s Separate Allegiance in English Law*, in MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 163, 169 (Tim Stretton & Krista J. Kesselring eds., 2013) (noting that, if a mother’s alien status led to the child’s lack of inheritance, it would “obliterate the father’s Englishness”). In *Rex v. Eaton* (1627), the polled judges concluded that the issue of an English merchant father and Polish mother born in Poland was a denizen and could inherit in England. *See id.* at 169–73. Some of the judges felt that “De Natis” should be read as fathers or mothers. *Id.* at 174. In *Bacon v. Bacon* (1640), the daughter of an English merchant and Polish wife born in Poland was again a “‘natural born subject’ or ‘denizen’ because her father was English ‘living beyond the seas for merchandising.’” *Id.* at 175–76. Both cases involved Eastland merchants. *See id.*

164. PARRY, *supra* note 133, at 40 (“There is a suggestion that in many cases these [private acts of naturalization] are strictly unnecessary.”).

165. 1 PROCEEDINGS IN THE PARLIAMENTS OF ELIZABETH I, at 482 (T.E. Hartley ed., 1981) (listing the date of the act as February 21, 1576). At the same time a bill for “naturalizing” the children of James Harvy (Harvy) and others was read. *Id.* at 483–84. Merchants appear repeatedly. For example, in 1576, the sons of Richard Molde, officer of the Merchant Adventurers in England, and Margaret Peppercorne of Antwerp were given

children and denizens” passed after various changes.<sup>166</sup> Whether or not necessary, parents wanted to ensure that overseas children suffered no legal disabilities.

In this period before *Calvin’s Case*, a variety of words were used to describe the status of as if born in England. Parry explained that, during the Elizabethan reign, “private acts of naturalization . . . provide quite indifferently for the ‘naturalizing’ or for the ‘making a free denizen’ of the beneficiary.”<sup>167</sup> The “distinction was at all times imprecise.”<sup>168</sup> During Queen Elizabeth’s reign, Parliament passed bills making “free denizens” of people born beyond the seas—outside of England during the reign of Queen Mary. For example, in 1566, a parliamentary bill made “free Denizen John Stafforde born beyond the Seas.”<sup>169</sup> Stafford had been born in Geneva after his family “went into exile on the accession of Queen Mary.”<sup>170</sup> In 1571, another parliamentary act used the phrase “to make free Denizen Peregrine Bertie borne beyond the Seas.”<sup>171</sup> The term “free denizen” was used by Parliament to signal what would later become naturalization by statute. As Parry concludes, “the

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letters of denization. See LETTERS OF DENIZATION AND ACTS OF NATURALIZATION FOR ALIENS IN ENGLAND AND IRELAND, 1509–1603, at 172 (listing the children of Richard Mole among the list of those who received denization letters).

166. 1 PROCEEDINGS IN THE PARLIAMENTS OF ELIZABETH I, *supra* note 165, at 537 (listing the date of the act as February 16, 1581). In March 1581 another bill “for denization of certaine persons” passed. *Id.* at 541.

167. PARRY, *supra* note 133, at 39.

168. PARRY, *supra* note 133, at 38; see LETTERS OF DENIZATION, *supra* note 136, at vi–vii. The contrary interpretation comes from Holdsworth. He interpreted Coke’s opinion in *Calvin’s Case* as an accurate description of prior existing distinctions between natural subject (created only by Parliamentary naturalization and possessing all liberties) and free denizen (created only by crown endenization through letters patent and possessing more limited liberties). HOLDSWORTH, *supra* note 132, at 76–79. According to this approach, endenization was prospective so that the denizen could not inherit and a child born to the denizen prior to the parent’s denization could not inherit. See YUNGBLUT, *supra* note 136, at 78. Naturalization was thought to be a matter of parliamentary act and acted retrospectively so as to permit a naturalized subject to inherit. See LETTERS OF DENIZATION, *supra* note 136, at iii (“The question as to the remainder who were not so born was remitted to the succeeding parliament for maturer consideration.”).

169. An Act to Make Free Denizen John Stafforde Born Beyond the Seas, 8 Eliz. 1 (Eng.) (1819) (spelling modernized), *reprinted in* 4 STATUTES OF THE REALM, at xxviii, xxviii; LETTERS OF DENIZATION, *supra* note 136, at 224 (spelling modernized).

170. Will of John Stafford, of Marlwood, Esq., *supra* note 162, at 142.

171. An Act to Make Free Denizen Peregrine Bertie Born Beyond the Seas, 13 Eliz. 1 (Eng.) (spelling modernized), *reprinted in* 4 STATUTES OF THE REALM, at xxx, xxx (1810); see also RETURNS OF ALIENS DWELLING IN THE CITY AND SUBURBS OF LONDON 388, 445 (R. E. G. Kirk & Ernest F. Kirk eds., 1907) (showing the phrase “free denyzen” used in 1568 and the phrase “free denizen” used in 1593).

choice between enactment and letters patent is dictated solely by chance and convenience.”<sup>172</sup>

Elizabethan letters patent of denization used language that resemble the language eventually used in the liberties assurance. The linguistic trope of treating children born overseas as those born within England appeared in the 1368 statute.<sup>173</sup> By the early sixteenth century, typical language in letters patent of denization declared the person to “have and possess all and all manner of liberties, franchises, and privileges of this our realm of England freely, quietly, and peacefully, and may use and enjoy them as our liege born within our said realm of England . . . .”<sup>174</sup> The Elizabethan letters patent were similar.<sup>175</sup> The formula to provide reassurance that overseas children would have the same liberties, franchises, and privileges as those born in England was thus framed long before English settlement.

During the Elizabethan years, the significant concern for overseas children turned on the presence or absence of Crown license, not the later subject-denizen distinction. This restriction became apparent in a 1582 case, *Hyde v. Hill*.<sup>176</sup> A husband and wife had gone abroad without license of the Crown or, perhaps, had stayed beyond the license.<sup>177</sup> Attorney General John Popham and Solicitor General Thomas Egerton (later Lord Ellesmere) argued the case.<sup>178</sup> The Queen’s Bench judges concluded that, because of the absence of the Crown license, the issue were “alien . . . and not inheritable.”<sup>179</sup> The printed report emphasized that the absence of Crown license distinguished the case from the earlier cases confirming overseas children’s status.<sup>180</sup> Although *Calvin’s Case* would shift attention to distinctions between Crown and Parliament, at the time of the earliest patents, Crown license appeared to be the relevant concern. Indeed,

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172. CLIVE PARRY, BRITISH NATIONALITY LAW AND THE HISTORY OF NATURALISATION 41 (1954), [http://www.uniset.ca/naty/parry.htm#\\_ftnref212](http://www.uniset.ca/naty/parry.htm#_ftnref212) [<http://perma.cc/8X9V-LPL7>].

173. See 42 Edw. 3, c. 10 (Eng.), reprinted in 1 STATUTES OF THE REALM 389, 389.

174. LETTERS OF DENIZATION, *supra* note 136, at ii–iii (providing an English translation of letters patent of denization from the first year of Henry VIII). By the Elizabethan period, the language appears to have been relatively consistent. *Id.* at iv. For the different forms used, including those of other nations, see PARRY, *supra* note 133, at 22–27.

175. LETTERS OF DENIZATION, *supra* note 136, at iv.

176. *Valentine Hyde v. Hill* (1582), 78 Eng. 270 (Q.B.).

177. *Id.*

178. *Id.* at 267 (listing personnel for Hilary Term).

179. *Id.* at 270.

180. *Id.*; HORACE BINNEY, THE ALIENIGENAE OF THE UNITED STATES UNDER THE PRESENT NATURALIZATION LAWS 8–9 (1853).



as Parry notes, “there was less uncertainty at this time as to the status of the overseas dominions of the Crown than there appear from *Calvin’s Case* to have existed immediately after the accession of James I.”<sup>181</sup>

As English settlement overseas became a possibility in the sixteenth century, available legal sources provided reassurance about the status of children born overseas. If the Crown declared the lands in allegiance and if the parents were abroad pursuant to Crown license and in allegiance to the Crown, then children would be granted the same status as if born in England.<sup>182</sup> The legal sources did not focus on whether the status acquired by such overseas children should be described as that of free denizens and natural subjects. They did not worry about defining a specific set of defined and circumscribed privileges and liberties. Instead the term, “*as if born in England*” promised a legal status defined by those who did not have to question at all their status.<sup>183</sup> The inchoate group of liberties, franchises, and privileges belonging to those born in England would also belong to those born overseas.

This account also may bear some relevance to the contemporary debate over the “natural born citizen” clause in the Constitution.<sup>184</sup> The status of overseas children in early English law is frequently a point of reference.<sup>185</sup> This Article does not address this debate directly. Nonetheless, this Article’s discussion of overseas children implicitly cautions against over-interpretation of linguistic changes and over-reliance on Coke’s opinion.

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181. PARRY, *supra* note 133, at 39.

182. *See supra* notes 145–55 and accompanying text.

183. *See supra* notes 156–61 and accompanying text.

184. U.S. CONST. art. II, § 1, cl. 5.

185. *See, e.g.*, Neal Katyal & Paul Clement, *On the Meaning of “Natural Born Citizen”*, 128 HARV. L. REV. F. 161, 161–62 (2015) (“As to British practice, laws in force in the 1700s recognized that children born outside of the British Empire to subjects of the Crown were subjects themselves and explicitly used ‘natural born’ to encompass such children.”); Christina S. Lohman, *Presidential-Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 364–66 (2000–2001) (discussing *Calvin’s Case*); Mary Bridgid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317, 320–25 (2015) (discussing the 1350 statute and naturalization practices); Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 27–28 (2008) (discussing *Calvin’s Case* and the English conception); Michael D. Ramsey, *The Original Meaning of “Natural Born”* (Jan. 7, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2712485> [<https://perma.cc/SF5W-JCJS>] (discussing the 1350 statute applying to children born beyond the sea).

C. *The Liberties Assurance*

The liberties assurance dates from the early letters patent to Humphrey Gilbert and Walter Raleigh. Although the words subtly changed among the various documents, the underlying purpose of the language did not alter. The concept was transmitted through the community and print publication. The specific language of the 1606 Virginia charter was simply one of many versions of the liberties assurance.

The liberties assurance first appeared in the letters patent to Humphrey Gilbert in 1578 by Queen Elizabeth.<sup>186</sup> Earlier letters patent relating to overseas settlement did not contain such language.<sup>187</sup> In 1578, the plans undertaken by Gilbert were the first to significantly address the legal issues raised by possible settlement. The men accompanying Gilbert contemplated bringing their “families” with the possibility of remaining there or returning when they wanted.<sup>188</sup> They noted that “special privileges” would need to be established “to encourage women to go on the voyage.”<sup>189</sup> The possibility of children born to English parents needed to be addressed.

The Gilbert patent embraced the general legal framework within which overseas children would be treated as if born in England. All lands inhabited were to “bee of the allegiance” to the Queen and her heirs and successors.<sup>190</sup> The people were to be “of our allegiance,” and “their heirs” would be born in England or Ireland or “within any

186. Patent Granted to Sir Humphrey Gilbert by Elizabeth I (June 11, 1578), *reprinted in* 3 NEW AMERICAN WORLD: A DOCUMENTARY HISTORY OF NORTH AMERICA TO 1612, at 186, 186 (David B. Quinn ed., 1979) [hereinafter 3 NEW AMERICAN WORLD].

187. *See, e.g.*, Grant to Several Merchants to be Called the Merchant Adventures of England (Feb. 26, 1555), *in* 2 CALENDAR OF THE PATENT ROLLS, 1554–1555, at 1, 55–59 (1936). Although the 1502 patent to Hugh Elyot and others allowed “men and women” to dwell in the new lands, it did not address the status of overseas children. *See* Licence for Hugh Elyot et al. (Dec. 9, 1502) (authorizing rules for the “punishment of persons committing . . . rapine and rape of the women of the newly discovered lands against their will”), *in* 2 CALENDAR OF THE PATENT ROLLS, 1494–1509, at 1, 320–21 (1916); *see also* J.H. BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND 623 (discussing Company of Adventurers to the New Found Lands’ patent).

188. Petition of Sir George Peckham, and Sir Thomas Gerrard to Sir Francis Walsingham (June 1582), *in* 3 NEW AMERICAN WORLD, *supra* note 186, at 215, 215.

189. *Id.* at 217.

190. Patent Granted to Sir Humphrey Gilbert by Elizabeth I, *supra* note 186, at 186–87. Bancroft described the Gilbert patent: “To the people who might belong to his colony, the rights of Englishmen were promised.” 1 GEORGE BANCROFT, HISTORY OF THE COLONIZATION OF THE UNITED STATES 88 (15th ed. 1855).

other place within our allegiance.”<sup>191</sup> In addition to allegiance, the people would inhabit under a Crown license. These persons then “shall, and may have, and enjoy all the privileges of free denizens and persons native of England, and within our allegiance.”<sup>192</sup> The word “privileges” suggested the breadth of the acquired status. The phrase “free denizens and persons native of England” indicated that the letters patent confirmed privileges that were guaranteed by birth in England or by being made a free denizen, whether by Parliament or the Crown. The letters patent described the existing legal understanding of English liberties.

Linguistic ambiguity was likely deliberate. In an effort involving settlement in Munster in Ireland, Gilbert and associates had favored semantic ambiguity.<sup>193</sup> Originally in plans in 1569, disputes arose over “the definition of the people to be settled.”<sup>194</sup> The future settlers wanted to be able to sell land to those in Ireland who were descended from Englishmen. As Michael MacCarthy-Morrogh notes, “[i]n the mid-sixteenth century ‘Englishmen’ often referred to any English-speaking person, in Ireland as well as England.”<sup>195</sup> He explains, “[t]he intention of the 1569 settlers had not been to extend justice to the local old English, but to give themselves the freedom to return to England, should they so choose, by leaving their lands in the hands of responsible men in Ireland.”<sup>196</sup> In the 1580s, when the scheme to settle Munster was revived, the various drafts of the articles considered different descriptions. The Privy Council wanted the language to state that “the inhabitants of every family shall be of the birth of England”; the Irish Council preferred “all such as are descendants of Engl[ish] [name].”<sup>197</sup> The “minute changes” and even a “clumsy alteration” were designed to satisfy various constituencies with varying objectives “without stating this harsh truth too plainly.”<sup>198</sup> Thus linguistic ambiguity served contemporary purposes.

Although the Gilbert letters patent did not include the phrase “as if born in England,” that language almost immediately appeared

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191. Patent Granted to Sir Humphrey Gilbert by Elizabeth I, *supra* note 186, at 187–88.

192. *Id.* at 188.

193. See S.J. CONNOLLY, CONTESTED ISLAND: IRELAND, 1460–1630, at 263–64 (2007); MACCARTHY-MORROGH, *supra* note 114, at 20–21, 33.

194. MACCARTHY-MORROGH, *supra* note 114, at 33.

195. *Id.*

196. *Id.*

197. *Id.* at 33–34. They wanted to make sure that “new English, born in Ireland” would be able to participate. *Id.* at 34.

198. *Id.*

in a 1582 grant of Gilbert's authority under the letters patent to another group.<sup>199</sup> These settlers, some of whom were Catholic, contemplated bringing families with children.<sup>200</sup> Although in theory the grant could only convey authority in Gilbert's original patent, slightly different language was used. They "should and might have and enjoy all the privileges of free denizens and persons native of England and within her Majesty's allegiance the such like ample manner and form as if they were borne and personally resiant within her highness's said realm of England."<sup>201</sup> The phrase "ample manner and form" was new but added emphasis. The "as if born and personally resiant"—meaning *abiding*—was also new.<sup>202</sup> Once again the phrase provided emphasis. If one were given the privileges of a person native to England, it had the same ultimate legal effect as being born and "resiant" in England. The new words—none of which changed the underlying concept save for adding emphasis—may have arisen from the particular concerns of the Catholic settlers.

Despite providing reassurance about the status of overseas children, none of the ventures under Gilbert's letters patent resulted in a settlement with children. In 1583, Gilbert made it as far as Newfoundland, but vanished in a storm on the return voyage.<sup>203</sup> The language of the liberties assurance in the letters patent nonetheless became more widely known. Peckham printed an account of Gilbert's voyages, *A true reporte of the late discoveries by Sir Humfrey Gilbert*.<sup>204</sup> The account described Gilbert's reading of the patent; Gilbert "signified unto the company both strangers and others, that from thence forth, they were to live in that land, as the Territories appertaining to the Crowne of England."<sup>205</sup> Peckham's account implied that any children born in the settlements would have had

199. Grant of Authority by Sir Humphrey Gilbert, of His Rights in America, to Sir John Gilbert, Sir George Peckham, and William Aucher (July 8, 1582), in 3 *NEW AMERICAN WORLD*, *supra* note 186, at 220, 220–23.

200. See KENNETH R. ANDREWS, *TRADE, PLUNDER, AND SETTLEMENT* 191 (1984) ("[The Catholic people] were expected to bring dependants who would take up farms of six-score acres . . .").

201. Grant of Authority by Sir Humphrey Gilbert, of His Rights in America, to Sir John Gilbert, Sir George Peckham, and William Aucher, *supra* note 199, at 222.

202. *Resiant*, *THE OXFORD ENGLISH DICTIONARY* 706 (2d ed. 1989) (only later becoming "resident").

203. See QUINN, *supra* note 93, at 8.

204. George Peckham, *A True Report of the Late Discoveries* (1583), in 12 *THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFIQUES, AND DISCOVERIES OF THE ENGLISH NATION* 367, 367–73 (Edmund Goldsmid ed., 1889) (1589) [hereinafter 12 *PRINCIPAL NAVIGATIONS*].

205. *Id.* at 367–68.

status as if born in England.<sup>206</sup> In 1589, Richard Hakluyt printed the Gilbert patent in his book detailing the English voyages, *The Principal Navigations*.<sup>207</sup> The Gilbert patent appeared to stand for the proposition that overseas children had English privileges and liberties.

In 1584, Walter Raleigh's letters patent contained a similar liberties assurance.<sup>208</sup> Once again, the liberties phrase followed a declaration that the area was in allegiance to the crown. And once again, the people needed to be in allegiance and under license from the crown. The liberties assurance adopted the language of Gilbert's grant to Peckham:

Whether born in England, Ireland or any other place within our allegiance . . . they shall and may have all the privileges of free Denizens and persons native of England, and within our allegiance in such like ample manner and form as if they were born and personally resident with our said Realm of England.<sup>209</sup>

The Raleigh patent was reviewed in draft by John Popham, then attorney general.<sup>210</sup> Nothing essential was altered in the liberties assurance language.<sup>211</sup> The patent's language achieved wider

206. *Id.*

207. The Letters Patents Graunted by her Majesty to Sir Humfrey Gilbert (1578), reprinted in 12 PRINCIPAL NAVIGATIONS, *supra* note 204, at 306, 306–07. For an analysis of the author of *Principal Navigations*, see generally PETER C. MANCALL, HAKLUYT'S PROMISE: AN ELIZABETHAN'S OBSESSION FOR AN ENGLISH AMERICA (2007) (exploring Hakluyt's life including his role in establishing colonies in the English Americas).

208. Letters Patent to Walter Raleigh (Mar. 25, 1584), reprinted in 3 NEW AMERICAN WORLD, *supra* note 186, at 268, 268–69.

209. *Id.* at 268–69 (spelling modernized).

210. See Letters Patent to Walter Raleigh, The National Archives, United Kingdom, PRO 30/34 (showing occasional textual alterations by Popham). The liberties assurance in the draft is the same as in the final letters patent in the Chancery Rolls.

211. Compare *id.* (stating “[a]nd we do grant to the said Sir R his heires and assignes and to all and evre of them and to all and evre other person or persons beinge of our alleageance whose names shall be noted or entered in some of our courtes of records within this our realme of England, and that with the assent of the said Sir R his heires or assignes shall [illegible word] in his iorneyes for discoverye or in the second iorneyes for conquest hereafter travel to such lands countryes or terrtoryes as aforesaid, and to their and evre of their heires, that they and everye or any of them, beinge ether borne within our said realmes of England, or Ireland, or in any other place within our alleageance and wch hereafter shall be inhabiting within any the lands countries and terortories with such lycence as aforesaid shall and mae have and enioye all the priviledges of free denizens, and persons native of England, and within our alleageance, in such ample manner and forme as yf they were borne and personallie restyant within our said realem of England any lawe custome or usage to the contrarye not withstandinge”), with Letters Patent to Walter Raleigh, reprinted in 3 NEW AMERICAN WORLD, *supra* note 186, at 268–69 (“And wee doe graunt to the syd Walter Ralegh, his heires, and assignes, and to all, and every of them, and to all, and every other person and persons, being of our allegiance, whose

circulation when Raleigh tried but failed to have the patent confirmed by parliamentary bill.<sup>212</sup>

The birth of children in the Roanoke settlement made the liberties assurance meaningful.<sup>213</sup> In August 1587, Virginia Dare was born to English parents, the grandchild of settlement leader, John White.<sup>214</sup> She was not alone. An account of Roanoke published in *Principal Navigations* in 1589, listed “Children borne in Virginia.”<sup>215</sup> The two names listed, Virginia Dare and Haruye, testified to the vesting of the liberties assurance.<sup>216</sup> In 1587, White left 114 settlers, including the children, behind when he sailed to England for supplies.<sup>217</sup> Tragically, when he returned to Roanoke in 1590, the settlers had vanished.<sup>218</sup> In 1602 and 1603, Raleigh sent expeditions to look for the settlers.<sup>219</sup> Even as the Jamestown venture was being organized in 1606, the possibility existed that the first overseas children with English liberties remained alive.<sup>220</sup>

The disappearance of Virginia Dare did not alter the belief that those born in the settlements had privileges as if born in England. White’s account was printed with a margin note describing Dare as

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names shall be noted or entred in some of our Courts of recorde within our Realme of England, that with the assent of the sayd Walter Raleigh, his heires or assignes, shall in his journeis for discoverie, or in the journeis for conquest hereafter travaile to such lands, countreis and territories, as aforesaid, and to their, and to every of their heires, and they, and every or any of them, being eyther borne within our sayde Realmes of England or Irelande, or in any other place within our allegiance, and which hereafter shall be inhabiting within any the Lands, Countryes, and Territories, with such licence, (as aforesaid) shall and may have all the priviledges of free Denizens, and persons native of England, and within our allegiance in such like ample manner and forme, as if they were borne and personally resident within our said Realme of England, any law, custome, or usage to the contrary notwithstanding.”). My appreciation to Frank Herrmann for help in reading the draft.

212. See 3 NEW AMERICAN WORLD, *supra* note 186, at 270 (listing three committee readings where the bill to confirm Raleigh’s patent was passed, and where the bill was ultimately rejected in the House of Lords).

213. See, e.g., BANCROFT, *supra* note 190, at 105 (describing the birth of Eleanor Dare’s child as “the first offspring of English parents on the soil of the United States”).

214. *Id.* at 105–06.

215. See The Fourth Voyage Made to Virginia (1587), in 13 THE PRINCIPAL NAVIGATIONS, VOYAGES, TRAFFICS, AND DISCOVERIES OF THE ENGLISH NATION 373, 373 (Edmund Goldsmid ed., 1889) (1589) [hereinafter 13 PRINCIPAL NAVIGATIONS].

216. See *id.* at 373.

217. QUINN, *supra* note 93, at 344–45.

218. *Id.* at 350.

219. *Id.* at 353–55.

220. *Id.* at 358–68, 373–75.

the “first Christian born in Virginia.”<sup>221</sup> As described in the popular play, *Eastward Ho!* (1605), “[t]he Virginia venture is central.”<sup>222</sup> In the play, English status is conferred on the children of English settlers marrying members of tribes.<sup>223</sup> One character asks whether Virginia is “inhabited already with any English?”<sup>224</sup> The other man responds, “[a] whole country of English is there, man, bred of those that were left there in ‘79. They have married with the Indians, and make ‘em bring forth as beautiful faces as any we have in England.”<sup>225</sup>

Further, as previously mentioned, the Raleigh patent with its emphatic liberties assurance was printed by Hakluyt in *Principal Navigations*.<sup>226</sup> The language of the patent, reprinted by Hakluyt, promised that those born abroad would not face any problem in retaining rights as English people. Historian MacMillan notes, “[a]lthough neither Gilbert nor Raleigh were successful . . . these passages requiring allegiance, natural liberties, and legal systems not contrary to those in England would appear, with minor variation, in all of the Stuart patents as well.”<sup>227</sup> These Elizabethan letters patent embedded the liberties assurance into the practice of settlement.

Although the 1606 Virginia charter did not create the liberties assurance, it demonstrates how its drafters altered language to avoid difficulties without altering the underlying guarantee. James VI of Scotland’s accession to the English throne as James I at the end of March 1603 made words such as “subject” and “denizen” freighted with complicated meanings.<sup>228</sup> The desirable status was that which came with birth in England. An unanswered question was whether the Scots would have such equivalent status confirmed.

221. To the Aduenturers, Fauourers, and Welwillers of the Enterprise for the Inhabiting and Planting in Virginia, in 13 PRINCIPAL NAVIGATIONS, *supra* note 215, at 367.

222. GEORGE CHAPMAN, BEN JOHNSON & JOHN MARSTON, *EASTWARD HO!* 17–18 (R.W. Van Fossen ed., 1999); see L.H. ROPER, *THE ENGLISH EMPIRE IN AMERICA, 1602–1658: BEYOND JAMESTOWN* 39–43 (2009) (examining *Eastward Ho!* as a critique of English colonization).

223. CHAPMAN ET AL., *EASTWARD HO!*, *supra* note 222, at 138.

224. *Id.*

225. *Id.*

226. The Letters Patent, Granted by the Queen Majesty to M. Walter Raleigh, reprinted in 13 PRINCIPAL NAVIGATIONS, *supra* note 215, at 276, 276.

227. MACMILLAN, *SOVEREIGNTY AND POSSESSION*, *supra* note 58, at 93. In contrast, although the 1603 French grant for La Cadia (Acadia) resembled in many respects the early English patents, it contained no provision similar to the liberties assurance. See Commission of Henry IV to De Monts (La Cadia), reprinted in 1 CHARLES W. BAIRD, *THE HISTORY OF THE HUGUENOT EMIGRATION TO AMERICA* 341, 341–44 (1885).

228. J. MERVYN JONES, *BRITISH NATIONALITY LAW AND PRACTICE* 28–29 (1947).

Initially, commissioners proposed that subjects born in either nation would be “mutually naturalized.”<sup>229</sup> From 1604 on, the debate continued in Parliament, among judges and civil and common lawyers, and “throughout the country.”<sup>230</sup> Various theories were proposed over the “relation between king and subject.”<sup>231</sup> Chancellor Ellesmere explained in his published opinion in *Calvin’s Case*, “[t]here have been alleged many definitions, descriptions, distinctions, differences, divisions, subdivisions, allusion of words, extension of words, construction of words; and nothing left unsearched to find what is *ligeantia*, *allegiantia*, *fides*, *obedientia*, *subjuectio*, *subdit*; and who be *aborigines*, *indigenae*, *alienigena*, *advneticij*, *denizati* &c.”<sup>232</sup> In addition to the James I accession, other contemporary debates brought scrutiny on particular words used to describe preferred status. For example, during these same years, the London court of Common Council restricted apprenticeships available to children of persons designated as “denizens.”<sup>233</sup> The debate remained contentious through 1606.

Drafted against the background of the debate, the 1606 Virginia charter subtly altered the liberties assurance of the Raleigh letters patent.<sup>234</sup> The reference to persons in allegiance became the more contemporary “persons being our subjects.”<sup>235</sup> With the Roanoke settlers possibly still alive, “lands, countries, and territories” became “several Colonies and plantations.”<sup>236</sup> Privileges “in such like ample manner and form” was rewritten as the broad “Liberties, Franchises and Immunities.”<sup>237</sup> “Born and personally resiant” was updated as “abiding and born.”<sup>238</sup> None of these changes were substantive but together they adapted the liberties assurance to the demands of contemporary politics.

229. *Id.* at 29 (quoting Commissioners).

230. KNAFLA, *supra* note 83, at 184.

231. JONES, *supra* note 228, at 53.

232. *Calvin’s Case*, or the Case of the *Postnati* (1608) (language modernized), 77 Eng. Rep. 377; 7 Co. Rep. 1 b, *reprinted in* 2 STATE TRIALS, *supra* note 82, at 678.

233. SELWOOD, *supra* note 89, at 91–93.

234. The Charter that Created the Virginia Companies (Apr. 10, 1606), *in* 5 NEW AMERICAN WORLD, *supra* note 126, at 191, 191, 195.

235. *Compare* Letters Patent to Walter Raleigh, *supra* note 208, at 268, *with infra* text accompanying notes 290–92.

236. *Compare* Letters Patent to Walter Raleigh, *supra* note 208, at 268, *with infra* text accompanying note 290 (spelling modernized).

237. *Compare* Letters Patent to Walter Raleigh, *supra* note 208, at 268, *with infra* text accompanying notes 290–92 (spelling modernized).

238. *Compare* Letters Patent to Walter Raleigh, *supra* note 208, at 268, *with infra* text accompanying notes 290–92 (spelling modernized).



The most troubling phrase in light of the Scots debate, “free denizens, and persons native of England,” was simply omitted.<sup>239</sup> Read literally, the 1606 charter was somewhat incoherent. The desired liberties had usually been described under the terms of the fourteenth century statutes and forms used in denization letters patent. Those particular words, however, inconveniently overlapped with the contentious legal issue—would persons not “native of England” or “free denizens” have the liberties of the English? Deletion of the phrase sidestepped the awkwardness. This excision again adapted the liberties assurance to the new world under James I.

The man—or men—responsible for these drafting changes is unknown. There is no known evidence to attribute it to Coke. The changes could have been made in the initial draft presented by the Company. It could have been the other legal luminary more involved with the Virginia project, John Popham. In fact, fifty years after Popham’s death, contemporary Ferdinando Gorges stated that: “[H]is Lordship [Sir John Popham, Lord Chief Justice] failed not to interest many of the lords and others to be [p]etitioners” on the patent.”<sup>240</sup> Popham’s commitment to the Virginia settlement led an early American historian to describe the 1606 Virginia charter as given “[u]nder the management, it seems, of Sir John Popham.”<sup>241</sup> Popham seems to have been aware of the issues raised by the Scots question and, to the extent that anyone wanted the charter to avoid any difficulties, he might have suggested the linguistic changes. The changes could have been the product of a discussion among Coke and Popham. The changes could have been the suggestion of someone completely lost to history. But nothing about the omission indicates a predetermination of the issues in *Calvin’s Case*.

#### D. *The Influence of Calvin’s Case*

The legal debates over the status of the Scots occurred, and developed rapidly, after the Virginia charter’s spring 1606 issuance. *Calvin’s Case* had an influence on the liberties assurance, but a different one than has been implied in the traditional account. The case seems to have influenced the 1609 Virginia charter ironically by

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239. Compare Letters Patent to Walter Raleigh, *supra* note 208, at 268, with *infra* text accompanying notes 290–92 (spelling modernized).

240. Sir Ferdinando Gorges, *A Description of New-England* (1658), in 2 SIR FERDINANDO GORGES AND HIS PROVINCE OF MAINE 12, 12 (James Phinney Baxter ed., 1890).

241. BROWN, *supra* note 56, at 46. Brown also noted that he thought it might have been “drawn” by Popham before being inspected and revised by others. *Id.* at vi.

reassuring the community that it could return to the original “free denizens” phrase. It would be the 1609 charter that became a model for later charters.

*Calvin’s Case* was initiated only after the Virginia charter was issued. Indeed, Robert Calvin was not born until after November 3, 1606.<sup>242</sup> That November, Parliament debated at length the question of the *postnati*.<sup>243</sup> Then, Coke became Chief Justice of Common Pleas in June 1606.<sup>244</sup> As Sir John Baker notes, Coke’s notebooks during this time contained “numerous notes of things Popham had told him.”<sup>245</sup> Thus, disentangling Coke’s thoughts from Popham’s influence is difficult when studying this period.

In any event, the judges issued advisory opinions in February 1607; despite almost unanimous reasoning by the judges about the legal status of the *postnati* as subjects of James I, pressures from the House of Commons made it politically preferable to have a definitive decision from the various law courts.<sup>246</sup> A case was brought to decide the issue, and Francis Bacon argued for Calvin.<sup>247</sup> Almost a year later, the case was decided in favor of Calvin and the *postnati*,<sup>248</sup> with Coke publishing his opinion soon afterwards.<sup>249</sup> Ultimately, *Calvin’s Case* and the subsequent Coke and Ellesmere publications removed concerns about the liberties assurance.

In 1609, a second Virginia charter was issued with a slightly more modern liberties assurance.<sup>250</sup> This second charter adopted some of the 1606 charter’s alterations. It similarly substituted “Liberties, Franchises, and Immunities” for the earlier description of privileges

242. JONES, *supra* note 228, at 30.

243. THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1604–1629, at xxxviii (Andrew Thrush & John P. Ferris eds., 2010).

244. 1 SELECTED WRITINGS OF EDWARD COKE, *supra* note 54, at xlvi.

245. Sir John Baker, *Coke’s Notes-Books and the Sources of His Reports*, in LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE, *supra* note 64, at 357, 366 (Allen D. Boyer ed., 2004).

246. See Prince, *supra* note 46, at 81–84 (describing the early events that occurred prior to the determination in *Calvin’s Case*).

247. JONES, *supra* note 229, at 53.

248. *Calvin’s Case*, or the Case of the *Postnati* (1608), 77 Eng. Rep. 377; 7 Co. Rep. 1 b, reprinted in 2 STATE TRIALS, *supra* note 82, at 559. On *Calvin’s Case*, see David Martin Jones, *Sir Edward Coke and the Interpretation of Lawful Allegiance in Seventeenth-Century England*, in LAW, LIBERTY, AND PARLIAMENT SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE, *supra* note 64, at 86, 86–106.

249. Theodore F.T. Plucknett, *Genesis of Coke’s Reports*, 27 CORNELL L. REV. 190, 208–09 (1942).

250. Second Virginia Charter, the First to the London Company Alone (May 23, 1609), reprinted in 5 NEW AMERICAN WORLD, *supra* note 126, at 205.

in an ample manner and form.<sup>251</sup> It retained the term “[s]ubject” for persons in allegiance.<sup>252</sup> It used “as if they had been abiding and born” instead of the older “born and personally resident.”<sup>253</sup> And the 1609 charter made a small new alteration. Where the 1606 charter had referred to persons “and every of their children[,]” the 1609 charter now clarified the infiniteness of the guarantee by stating that it extended to “every [of] their Children and Posterity.”<sup>254</sup> These changes modernized the earlier phrases, but again did so without changing the underlying commitment.

Most importantly, the 1609 charter returned to the earlier linguistic phrase, *free denizens*. Instead of copying the most significant omission in the 1606 charter—the one that created the illusion that the charter represented a foreshadowing of *Calvin’s Case*—the 1609 charter adopted pre-1606 language. The Raleigh patent had described “free Denizens and persons native of England.”<sup>255</sup> The 1609 charter employed “free denizens and natural-subjects,” substituting “natural-subjects” in place of “persons native to England.”<sup>256</sup> The emphasis on “subjects” was a sensible adaptation in the wake of the entire political debate over the Scots and *Calvin’s Case*. However the other phrase, “free denizens,” made little sense if Coke’s opinion in *Calvin’s Case* had restated existing legal differences between free denizens and natural subjects.<sup>257</sup> Instead, the 1609 charter suggested the distinction, so prominent in that case, did not matter. Indeed, a prior provision in the charter described “subjects” as “[s]ubjects, naturally born, or [d]enizens, or others.”<sup>258</sup> Thus, the charter ignored the Cokean distinctions.

#### E. *The Liberties Assurance in Later Charters*

After the 1609 Virginia charter, this approach to language in the liberties assurance continued. Words occasionally changed to update the provision to contemporary circumstances but the concept remained the same. The letters patent and charters that followed

251. Compare *infra* note 292, with *infra* note 293.

252. Compare *infra* note 292, with *infra* note 293.

253. Compare *infra* note 292, with *infra* note 293.

254. Compare *infra* note 292, with *infra* note 293.

255. Letters Patent to Walter Raleigh (Mar. 25, 1584), reprinted in 3 NEW AMERICAN WORLD, *supra* note 186, at 267, 268–69.

256. See Second Virginia Charter, the First to the London Company Alone (May 23, 1609), reprinted in 5 NEW AMERICAN WORLD, *supra* note 126, at 210.

257. See JONES, *supra* note 228, at 54–58.

258. The Second Charter of Virginia (1609), reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 65, at 3790, 2796.

from 1610 to 1620 retained the odd “free denizen and natural subject” modifier. The 1615 Somers Island (Bermuda) letters patent and 1620 New England letters patent were identical to the 1609 second charter.<sup>259</sup> The 1610 Newfoundland letters patent had “liberties” as well as “franchises and immunities.”<sup>260</sup> Not surprisingly, given the history of *Calvin’s Case*, the term “denizen” may have been too troubling to the Scots. The 1621 Latin charter to Sir William Alexander for New Scotland altered the phrase, converting it to “free and native subjects of our kingdom of Scotland.”<sup>261</sup> Elsewhere, however, free denizen retained coherence as a category. The 1623 Charter of Avalon to George Calvert conferred “all the priviledges of England as if they were born in England” as the marginalia termed the lengthy list.<sup>262</sup> The charter described those born as “Denizens and Lieges”; the marginalia used the term “Denizens.”<sup>263</sup> As in the earliest Gilbert letters patent, the charter first declared the land in allegiance.<sup>264</sup> The lengthy list gave rights to own and inherit land and all property, and “libertyes franchises priviledges.”<sup>265</sup>

Not until 1629 did “denizen” vanish from the liberties assurance. The omissions may relate to the influential 1628 publication of Coke

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259. See *infra* notes 297–98. For petition and warrant for New England, see THE FARNHAM PAPERS, 1603–1688, at 15, 18–19 (Mary Frances Farnham ed., 1901) (The warrant referred to “a Patent of Incorporation be granted to the Adventurers of the Northern colony in Virginia to contain the like liberties privileges, power, authorities, lands, and all other things.”) (spelling modernized).

260. Charter by King James I to the Newfoundland Company (May 2, 1610), reprinted in 4 NEW AMERICAN WORLD: A DOCUMENTARY HISTORY OF NORTH AMERICA 133, 137 (David B. Quinn ed., 1979) [hereinafter 4 NEW AMERICAN WORLD].

261. Royal Charter of New Scotland in Favor of Sir William Alexander by James I (1621) (English translation), reprinted in SIR WILLIAM ALEXANDER AND AMERICAN COLONIZATION 127, 143 (Edmund F. Slafter ed., Carlos Slafter trans., 1873); Carta Domini Willelmi Alexandri Equitis Domini et Baroniae Novae Scotiae in America (1621), reprinted in ROYAL LETTERS, CHARTERS, AND TRACTS RELATING TO THE COLONIZATION OF NEW SCOTLAND, AND THE INSTITUTION OF THE ORDER OF KNIGHT BARONETS OF NOVA SCOTIA 3, 12 (David Laing ed., 1867) (Latin translation) (“[Q]uod omnes nostri subditi qui ad dictam Novam Scotiam proficiscentur aut cam incolent eorumque omnes liberi et posteritas qui [quos] ibi nasci contigerit aliique omnes ibidem periclitantes habebunt et possidebunt omnes libertates immunitates et privilegia liberorum et naturalium subditorum regni nostri Scotiae aut aliorum nostrorum dominiorum sicuti ibidem nati fuissent.”).

262. COLLECTION AND COMMENTARY ON THE CONSTITUTIONAL LAWS OF SEVENTEENTH CENTURY NEWFOUNDLAND 39–40 (Keith Matthews ed., 1975) (the marginalia included “[a]ll persons transported to/ or borne in Newfoundland/ shall be Denizens/ And enjoy all the priviledges of England as if they were borne in England”).

263. *Id.*

264. *Id.* at 50.

265. *Id.* at 50.

on Littleton.<sup>266</sup> In the section on aliens, Coke acknowledged that “denizen” could refer to one born “within the king’s allegiance.”<sup>267</sup> However, he then went on to add, “[b]ut many times in acts of parliament, *denizen* is taken for an alien born, that is enfranchised or denized by letters patent.”<sup>268</sup> The last sentence of the section prominently emphasized the difference for overseas children. Coke wrote, “[s]o if an issue of an *Englishman* be born beyond sea if the issue be naturalized by act of parliament, he shall inherit his father’s lands; but if he be made denizen by letters patent, he shall not; and many other differences there be between them.”<sup>269</sup> The popular treatise’s explicit statement that denizen was a lesser status likely rendered the word unusable.

One of the earliest examples of this new trend appeared in the Massachusetts Bay charter. While the drafters deleted “denizen,” they left “free.”<sup>270</sup> With that change, the phrase became the modern “free and natural subjects.”<sup>271</sup> “Free” now modified subjects; it no longer was a description of denizens. The Maryland (1632), Connecticut (1662), and Rhode Island (1663) charters followed suit.<sup>272</sup> These charters also followed the 1629 Massachusetts Bay charter’s approach of “liberties and immunities.”<sup>273</sup> The approach remained throughout the seventeenth century. The 1691 Massachusetts Bay royal charter provided that those subjects born in Massachusetts would have the “liberties and immunities of free and natural subjects” as if “born within this our realm of England.”<sup>274</sup>

The liberties assurance had acquired a cultural valence: free liberties, free subjects, and free born. The assurance appeared even where there was no charter granted by the crown. In 1636, the settlers in Plymouth, Massachusetts (commonly referred to as “the Pilgrims”) drafted a legal code known as “The General Fundamentals.”<sup>275</sup> They described themselves as “coming hither as free born Subjects of the Kingdom of England, Endowed with all and singular the Privileges

266. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1628). The remaining volumes, including the volume on Magna Charta and statutes, were not published in Coke’s lifetime. See BARNES, *supra* note 64, at 27.

267. COKE, *supra* note 266, at § 198(129a) (spelling modernized).

268. *Id.* (spelling modernized).

269. *Id.* (spelling modernized).

270. See *infra* text accompanying note 301.

271. See *infra* text accompanying note 301 (spelling modernized).

272. See *infra* text accompanying notes 303, 305–06.

273. See *infra* text accompanying notes 303–06.

274. See *infra* text accompanying note 301 (spelling modernized).

275. The General Fundamentals (1636), reprinted in THE BOOK OF THE GENERAL LAWS OF THE INHABITANTS OF THE JURISDICTION OF NEW-PLIMOUTH 1 (1685).

belonging to such . . . .”<sup>276</sup> The text of the General Fundamentals then proceeded with privileges based on Magna Carta, with the first law declaring that laws were to be passed by freemen lawfully assembled.<sup>277</sup> The practice was “according to the free Liberties of the free born People of *England*.”<sup>278</sup> Governing officers were to be elected by the freemen, justice was to be equally and impartially administered, and there would be due process and trial by jury.<sup>279</sup> The liberties assurance seemed increasingly to have been considered inherent in the very concept of an English colony. William Penn’s 1681 charter for Pennsylvania contained no such explicit assurance.<sup>280</sup> Penn was a proponent of Magna Carta’s relevance to the colonies and responsible for the first American printing of Magna Carta.<sup>281</sup> Thus, it seems Penn assumed that Pennsylvanians inherently possessed English liberties.

By the early eighteenth century, the written liberties assurance had become a mere placeholder for the constitutional concept. The drafters of the last of the colonial charters—the 1732 Georgia charter—returned to older language of “free denizen.”<sup>282</sup> The charter declared that all persons born in Georgia and their children and posterity would “have and enjoy all liberties, franchises and immunities of free denizens and natural born subjects . . . as if abiding and born within this our kingdom of Great-Britain or any other of our

276. *Id.* (spelling modernized).

277. *Id.*

278. *Id.*

279. *See id.* at 1–3.

280. *Pennsylvania Charter to William Penn—March 4, 1681*, PENNSYLVANIA HISTORICAL & MUSEUM COMM’N, <http://www.phmc.state.pa.us/portal/communities/documents/1681-1776/pennsylvania-charter.html> [perma.cc/D8MY-7E9V] (“[A]ll the Liege people and Subjects of vs, our heires and successors, doe observe and keepe the same inviolable in those partes, soe farr as they concerne them, vnder the paine therein expressed, or to bee expressed. Provided; Nevertheles, that the said Lawes bee consonant to reason, and bee not repugnant or contrarie, but as neere as conveniently may bee agreeable to the Lawes, statutes and rights of this our Kingdome of England, and saveing and reserving to vs, our heires and successors, the receiving, heareing and determining of the appeale and appeales, of all or any person or persons, of, in or belonging to the territories aforesaid, or touching any Judgement to bee there made or given.”).

281. *See id.*; William Penn, *The Excellent Priviledge of Liberty and Property* (1689), <http://www.bl.uk/collection-items/william-penns-the-excellent-priviledge-of-liberty-and-property> [https://perma.cc/ZV2P-TQJE].

282. *Charter of Georgia (1732)*, reprinted in 2 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 765, 773 (Francis Newton Thorpe ed., 1909) [hereinafter 2 *FEDERAL AND STATE CONSTITUTIONS*].

dominions.”<sup>283</sup> Although “free denizen” had vanished almost a century earlier from colonial charters, it appears drafters did not worry that its absence or reaffirmance would be taken seriously. The liberties assurance had become inherent in the legal framework of the English colonies, and in the colonists themselves.

#### IV. CHARTER CONSTITUTIONALISM

What do we make of the history of the most important clause in the colonial charters—the one that reassured generations of those settling in the colonies that they possessed the same liberties as English people? Over the years, the precise words of the liberties assurance changed to comply with contemporary sensibilities. Yet, as this essay suggests, the underlying concept remained constant. In these charters, words mattered, and yet, they also did not matter.

The underlying concept was simple and simultaneously hard to express. The desire was to ensure that those born in the colonies would have the same liberties as if born in England. If the letters patent and charters had not included such words, perhaps the same liberties would have existed. However, at the outset of English settlement, how the legal arguments would have played out is not clear. It was simply practical to make sure that no one would have to request Parliament or the Privy Council to confer status on a child.

Repeatedly at this symposium, scholars touched on the mythic notion of Magna Carta—the sense that the spirit of Magna Carta as understood by Americans differed from its history and text. Even within the legal history of Magna Carta, as Richard Helmholz and Charles Donahue noted, Magna Carta was interpreted with respect to an underlying principle, equity, or concept, rather than limited by the text of the words.<sup>284</sup> As the English settlements expanded and as seventeenth-century political disputes gave new meaning to Magna Carta, the Great Charter stood as an example of the possibility that words represented principles, but that the principles were not defined and limited entirely by the words. Charter constitutionalism was perhaps reinforced by this growing cultural sensibility.

The liberties assurance reflected a broad cultural acceptance of this approach to constitutional text. It also reveals the limits of the modern constitutional interpretive framework in understanding early

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283. *Id.*

284. See generally Charles Donahue, *The Whole of the Constitutional History of England is a Commentary on this Charter*, 94 N.C. L. REV. 1521, 1540–43 (2016); R. H. Helmholz, *The Myth of the Magna Carta Revisited*, 94 N.C. L. REV. 1475, 1492–93 (2016).

constitutionalism. Various scholars have suggested that the interpretive rules that governed early American constitutionalism differed from those rules in vogue at the turn of the twenty-first century.<sup>285</sup> Using different rhetorical labels, this scholarship has indicated that early American constitutionalism read text in a looser manner. As the liberties assurance indicates, modern American constitutionalism developed out of this approach.

In the end, Edward Coke did not single handedly transfer Magna Carta across the Atlantic in the 1606 Virginia charter. It is appealing to believe that American constitutionalism began with a first framer and therefore the narrative surrounding that mythical framer allows us to tell a seamless story of 800 years of Magna Carta. The reality is less straightforward, and yet more important. Americans acquire the liberties associated with English subjects, among them Magna Carta, because a legal and political community repeatedly wrote documents that insisted on that assurance. They believed in liberties as a birthright. For them, the words were mere placeholders for the concept. The charters in which they inscribed these concepts became the progenitors of written state constitutions and eventually the U.S. Constitution. Somewhere lurking inside modern American constitutionalism, perhaps in the liberties provisions, is a remnant of charter constitutionalism. By reclaiming this most early history, the legitimate interpretive possibilities of American constitutionalism become more expansive.

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285. See generally JAMES R. STONER JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* (2003) (arguing that modern jurists have redefined the original meaning of the “common law”); David Thomas Konig, *James Madison and Common-Law Constitutionalism*, 28 L. & HIST. REV. 507, 510 (2010) (describing how the founders understood the “common law” to be “a way of thinking,” rather than merely judge-made law); Bernadette A. Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 552–54 (2006) (arguing that the “Common Law” was not used by judges at the time of the Founding to provide “determinate answers that fix[ed] the meaning of particular constitutional clauses”). Recent scholarship on the history of privileges and immunities similarly has argued that broad words were used. As a recent *Harvard Law Review* note states, “[a]s a term of art, the phrase *liberties and immunities* was purposefully capacious, as it incorporated all of English common and statutory law and transferred it across the Atlantic Ocean.” Note, *Congress’s Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1209 (2015).



Appendix: Liberties Assurances in Letters Patent and Charters<sup>286</sup>

1578 Gilbert<sup>287</sup>: to all and every other person and persons, being of our allegiance . . . and to their and every of their heires: that they and every or any of them being either borne within our sayd Realmes of England or Ireland, or within any other place within our allegiance, and which hereafter shall be inhabiting within any the lands, countreys and territories, with such licence as aforesaid, shall and may have, and enjoy *all the priveleges of free denizens and persons native of England, and within our allegiance . . . .*

1582 Gilbert's grant to John Gilbert, George Peckham, and others<sup>288</sup>: all and every other persone and persones beinge of her highnes allegeaunce . . . and their and every of their heires that they and every of them beinge either borne within her Majesties said realmes of England or Ireland or in any other place within her highnes allegeaunces and which thereafter should be inhabiting within anye the landes countries and territories with such licence as aforesaid should and myghte have and enjoye *all the priveleges of free denizens and persones native of England and within her Majesties allegeaunce the such like ample manner and forme as yf they were borne and personallie resiant within her hyghnes said realme of England any lawe custome or usage to the contrarie not with standinge . . . .*

1584 Raleigh<sup>289</sup>: all and euery other person, and persons being of our allegiance . . . and to their, and to euery of their heires, that they, and every or any of them, being either borne within our saide Realmes of Englande, or Irelande, or in any other place within our allegiance, and which hereafter shall be inhabiting within any the lands, Countreis, and territories, with such licence (as aforesaide)

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286. Various spelling, capitalization, and punctuation of these clauses are found depending on the published edition used. Collections by Thorpe and Quinn have been primarily relied on here as they are the most easily available, common scholarly editions. For ease of comparison, the core language has been underlined.

287. Letters Patent to Sir Humfrey Gylberte (June 11, 1578), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 69, at 49, 51 (emphasis added).

288. Grant of Authority by Sir Humphrey Gilbert, of His Rights in America, to Sir John Gilbert, Sir George Peckham, and William Aucher (July 8, 1582), *reprinted in* 3 NEW AMERICAN WORLD: A DOCUMENTARY HISTORY OF NORTH AMERICA TO 1612, at 220–22 (David B. Quinn ed., 1979) (emphasis added).

289. Charter to Sir Walter Raleigh (1584), *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 69, at 55 (emphasis added).

shall and may haue *all the priuiledges of free Denizens, and persons natiue of England, and within our allegiance in such like ample maner and fourme, as if they were borne and personally resident within our saide Realme of England . . . .*

1606 Virginia<sup>290</sup>: all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy *all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.*

1609 Virginia<sup>291</sup>: all and every the Persons being our Subjects, which shall go and inhabit within the said Colony and Plantation, and every their Children and Posterity, which shall happen to be borne within any of the Limits thereof, shall HAVE and ENJOY *all Liberties, Franchizes, and Immunities of Free Denizens and natural Subjects within any of our other Dominions to all Intents and Purposes, as if they had been abiding and born within this our Realm of England, or in any other of our Dominions.*

1610 Newfoundland<sup>292</sup>: all and every the persons being our subjects which shall go and inhabit within any colony . . . and every of their children and posterity which that shall happen to be born within the limits thereof shall enjoy . . . *all liberties . . . of free denizens and natural subjects within any of our other dominions to all intents and purposes as if they had been abiding and born within this our Realm of England . . . .*

1615 Bermuda<sup>293</sup>: [nearly identical to 1609 Virginia].

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290. The First Charter of Virginia (1606), *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 65, at 3788 (emphasis added).

291. The Second Charter of Virginia (1609), *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 65, at 3800 (emphasis added).

292. Charter by King James I to the Newfoundland Company, *supra* note 260, at 133, 137.

293. Letters Patent of James I for Somers Islands (1615), *reprinted in* 1 MEMORIALS OF THE DISCOVERY AND EARLY SETTLEMENT OF THE BERMUDAS OR SOMERS ISLANDS 1515–1687, at 83, 94 (J.H. Lefroy ed., 1877).

1620 New England<sup>294</sup>: [nearly identical to 1609 Virginia].

1621 William Alexander<sup>295</sup>: declare, decree, and ordain that all our subjects, going to the said New Scotland, or living in it, and all their children and posterity born there, and all adventuring, there shall have and enjoy *all the liberties, rights, and privileges of free and native subjects of our kingdom of Scotland, or of our other dominions, as if they had been born there.*

1623 Avalon<sup>296</sup>: that the said Province shall be of our allegiance. And that all, and singular the subjects and liege people of us our Heires and Successors transported into the said Province and their Children there already borne or hereafter to be borne Be and shall be Denizens and Leiges of us our heires and Successors, and be in all things held treated, reputed and esteemed as Liege and Faithfull people of us, our heires and successors borne within our Kingdome of England And likewise any Lands, Tenements, Revenue, Services, and other Hereditaments whatsoever within our Kingdome of England or other our Dominions, may purchase, receive, take, have, hold, buy and possesse, and them to occupy and enjoye, give, sell, alien and bequeath. As likewise *all Liberties, Franchises and priviledges of this our Kingdom of England, freely, quietly, and peaceably have and possess, occupy and enjoy as our Liege people, borne or to be borne within our said Kingdome of England, without the Lett Molestacon, vexation, trouble or offence of us our heires and successors whomsoever Any statute, Act, Ordinance or Provision to the contrary hereof notwithstanding.*

1629 Mass Bay<sup>297</sup>: all and every the Subjects of Us, our Heires or Successors, which shall goe to and inhabite within the saide Landes

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294. The Charter of New England (1620), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1827, 1839 (Francis Newton Thorpe ed., 1909) [hereinafter 3 FEDERAL AND STATE CONSTITUTIONS].

295. Royal Charter of New Scotland in Favor of Sir William Alexander by James I (1621), *reprinted in* SIR WILLIAM ALEXANDER AND AMERICAN COLONIZATION 127, 143 (Edmund F. Slafter ed., Carlos Slafter trans., 1873) (emphasis added) (English translation).

296. COLLECTION AND COMMENTARY ON THE CONSTITUTIONAL LAWS OF SEVENTEENTH CENTURY NEWFOUNDLAND, *supra* note 262, at 50–51 (emphasis added).

297. The Charter of Massachusetts Bay (1629), *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 294, at 1856 (emphasis added).

and Premises hereby men[cio]ed to be graunted, and every of their Children which shall happen to be borne there, or on the Seas in goeing thither, or returning from thence, shall have and enjoy *all liberties and Immunities of free and naturall Subjects within any of the Domynions of Vs, our Heires or Successors, to all Intents, Construc[cio]ns, and Purposes whatsoever, as yf they and everie of them were borne within the Realme of England.*

1629 Heath (Carolina)<sup>298</sup>: the said Province be in our Allegiance & that all & every our subjects . . . brought or to be brought into the said Province, their children either their already borne or hereafter to be borne are & shall be Naturall and leiges to us our Heires & successors & in all things shall be held, treated reputed & accounted as faithfull leiges of us, our heires & successors borne in our Kingdom of England. And alsoe that they shall possesse lands, tenements, rents services & Hereditaments whatsoever with our Kingdome of England & other our Dominions to purchase, receive, take, have, hold, buy and possesse & them to use & enjoy & alsoe then to give sell alienate & bequeath & alsoe *all libertyes, franchises & privileges of this our Realme, to have & possess freely quietly & peaceably & that they may use & enjoy them as our leiges borne or to be borne within our Kingdom of England . . . .*

1632 Maryland<sup>299</sup>: that the said Province be of our Allegiance; and that all and singular the Subjects and Liege-Men of Us, our Heirs and Successors, transplanted, or hereafter to be transplanted into the Province aforesaid, and the Children of them, and of others their Descendants, whether already born there, or hereafter to be born, be and shall be Natives and Liege-Men of Us, our Heirs and Successors, of our Kingdom of England and Ireland; and in all Things shall be held, *treated, reputed, and esteemed as the faithful Liege-Men of Us, and our Heirs and Successors, born within our Kingdom of England; also Lands, Tenements, Revenues, Services, and other Hereditaments whatsoever, within our Kingdom of England, freely, quietly, and peaceably to have and possess, and the same may use and enjoy in the same manner as our Liege-Men born, or to be born within our said*

298. Sir Robert Heath's Patent 5 Charles 1st (Oct. 30, 1629) (emphasis added), reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 69, at 69, 72–73.

299. The Charter of Maryland (1632) (emphasis added), reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 294, at 1681.

*Kingdom of England*, without Impediment, Molestation, Vexation, Impeachment, or Grievance . . . .

1639 Maine<sup>300</sup>: all and every the persons being the subjects of us our heires and successors which shall goe or inhabite within the said Province and Premisses or any of them and all and everie the children and posteritie discending of English Scottish or Irish Parents which shall happen to be borne within the same or uppon the seas in passing thither or from thence from henceforth ought to bee and shalbee taken and reputed to bee of the alleagiance of us our heires and successors and shalbee and soe shalbee forever hereafter esteemed to bee the naturall borne subjects of us our heires and successors and shall bee able to pleade and bee ympleaded and shall have power and bee able to take by discent purchase or otherwise Landes Tenements and Hereditaments and shall have and injoy *all Liberties Franchises and Immunityes of or belonging to any the naturall borne subjects of this our Kingdome of England within this our Kingdome and within all other of our Domyinions to all intents and purposes as if they had bene abydeing and borne within this our Kingdome or any other of our Dominions . . . .*

1662 Connecticut<sup>301</sup>: [nearly identical to 1629 Mass Bay].

1663 Rhode Island<sup>302</sup>: [nearly identical to 1629 Mass Bay].

1663 Carolina<sup>303</sup>: the said province of Carolina, shall be of our allegiance, and that all and singular the subjects and liege people of us, our heirs and successors, transported or to be transported into the said province, and the children of them and of such as shall descend from them, there born or hereafter to be born, be and *shall be denizons and lieges of us*, our heirs and successors of this our kingdom

300. Grant of the Province of Maine (1639) (emphasis added), *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 294, at 1625, 1635.

301. Charter of Connecticut (1662) (emphasis added), *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 69, at 529, 533.

302. Charter of Rhode Island and Providence Plantations (1663), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3211, 3220 (Francis Newton Thorpe ed., 1909).

303. Charter of Carolina (1663) (emphasis added), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2743, 2747 (Francis Newton Thorpe ed., 1909).

of England, and be in all things held, treated, and reputed as the liege faithful people of us, our heirs and successors, born within this our said kingdom, or any other of our dominions, and may inherit or otherwise purchase and receive, take, hold, buy and possess any lands, tenements or hereditaments within the same places, and them may occupy, possess and enjoy, give, sell, aliene and bequeathe; as likewise *all liberties, franchises and priviledges of this our kingdom of England, and of other our dominions* aforesaid, and may freely and quietly have, possess and enjoy, as our liege people born within the same, without the least molestation, vexation, trouble or grievance of us, our heirs and successors . . . .

1691 Massachusetts Bay<sup>304</sup>: [nearly identical to 1629 Mass Bay]

1732 Georgia<sup>305</sup>: all and every the persons which shall happen to be born within the said province, and every of their children and posterity, shall have and enjoy *all liberties, franchises and immunities of free denizens and natural born subjects, within any of our dominions, to all intents and purposes, as if abiding and born within this our kingdom of Great-Britain, or any other of our dominions*. . . .

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304. The Charter of Massachusetts Bay (1691) (emphasis added), *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 294, at 1625, 1870, 1880–81.

305. Charter of Georgia (1732), *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 282, at 765, 773.

