A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution

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Commentators often advocate that the privileges and immunities language found in the United States Constitution represents authority for some right along the spectrum of natural law, the Bill of Rights, or fundamental law in general.1 This Article provides contextual background for the argument by examining medieval royal privileges and immunities and tracing the crown’s charter to the American colonies and the United States Constitution. This Article goes beyond merely providing a short background for the use of the language in revolutionary pamphlets and the U.S. Constitution; rather, this Article discusses the concept of royal privileges and immunities and traces its growth in England and influence on the colonies. Along the way, useful comparisons are made between English institutions and American institutions.

During the medieval period, landholders owed customs and services to the state, and from these burdens, the crown, by charter, granted privileges and immunities.2 Royal privileges and immunities to municipalities and merchant associations gave authority, for example, to have markets and

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2. See infra Part II.A–B.
fairs, to trade, and to exercise self-government. In Part II, following a brief introduction of feudal tenure and royal immunities, the Article examines the development of mercantile institutions and borough governance.

Part III discusses adventuring merchants and the extension of municipal institutions overseas. When Europe expanded its boundaries in the late fifteenth century, royal charters permitted explorers such as Christopher Columbus and John Cabot to load ships, travel from England, and discover foreign lands. After discovery and exploration, explorers received privileges to establish trading colonies. In this Part, charter privileges and immunities to early American proprietors are introduced and discussed. Unlike charters to trading associations, grants to proprietors in the latter part of the sixteenth century focused on colonization as well as commercial interests.

In Part IV, the Article discusses the influence of English institutions in colonial America. Under royal charters, three types of colonies and a variety of English institutions took root in America. Among other topics, this Part discusses tenure, colonial governance, and the colonial assembly. The colonial assembly was an instrumental force in colonial development as colonists sought to free themselves from royal and proprietary control.

Part V examines the emergence of the “privileges and immunities of Englishmen” concept and traces its influence in the colonies. The seventeenth century was a period of revolution and transformation. In the first part of the seventeenth century, Englishmen invoked the “liberty of the subject” to combat royal monopolies. Once introduced, the concept served advocates and pamphleteers in a variety of ways. Revolutionaries felt their rights as natural-born Englishmen entitled them to the benefit of ancient statutes and fundamental law. When this concept, supported by similar but distinct clauses in colonial charters, reached the colonies, col-

3. See infra Part II.C–G.
4. See infra Part III.A.
5. See infra Part III.B–D.
6. See infra Part III.B–D.
7. See infra Part IV.A–C.
8. See infra Part IV.D.
9. See infra Part V.A.
10. See infra Part V.A.
11. See infra Part V.A (discussing grievances against royal monopolies, pleas for liberty of the subject, debates on Petition of Right, and Leveller writings).
12. See infra note 503 and accompanying text.
13. Colonial and explorer charters typically contained clauses that subjects traveling to the colony were to enjoy the privileges and immunities of Englishmen. See infra notes 306–11 and accompanying text.
onists argued that they too enjoyed the privileges and immunities of English subjects and thus enjoyed the same rights and law as subjects resident in England enjoyed, including the right to be free from taxation without consent.14

English taxation without colonial representation was a major cause of the American Revolution.15 Following Independence, the colonies no longer needed to reference the privileges of Englishmen. Nonetheless, the privileges and immunities concept made it into the text of the Articles of Confederation16 and the United States Constitution.17 After the Civil War, similar language found its way into the Fourteenth Amendment.18 When drafting these documents, the Framers provided little comment on what “privileges and immunities” meant or how the language should be used. Commentators and courts have argued that these provisions are self-executing grants of natural law, confer specific rights such as the right to travel and the Bill of Rights, or protect fundamental law in general.19 Summarizing the history and concept of the phrase, this article concludes by offering a contrary interpretation of the language.

II. ROYAL PRIVILEGES AND IMMUNITIES

A. Land, Burdens, and Immunities

14. See infra Parts IV.D, V.B. For example, the Colonists stated
\[\text{that the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.}
\]
October 14, 1774 Declarations and Resolves, in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 68 (Worthington Chauncey Ford ed., 1904) [hereinafter JOURNALS].

15. See infra notes 502–09 and accompanying text.

16. ARTICLES OF CONFEDERATION of 1781, art. IV (“[F]ree inhabitants . . . shall be entitled to all privileges and immunities of free citizens in the several States . . . .”).

17. U.S. CONST. art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); see also infra Part V.D.

18. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”); see also infra Part V.E.

19. See infra notes 530–33, 543–44.
Following the fall of the Roman provinces, the Anglo-Saxon king, as a supreme landholder, granted or gifted large tracts of lands to spiritual leaders for remission of sins. Distinct from other lands and methods of transfer, the conveyance of these privileged lands occurred by written charter (boc, freols-boc, or privilegium). This land, sanctioned by church and state, was known as bookland (bocland). Most grants of bookland went to churches, but later kings booked lands to important individuals without a spiritual purpose.

A grant or gift of land by the king was a two-way street. In addition to giving land, the king as a donor was also receiving some degree of revenue and services from the donee. From an early time, predial burdens attached to the occupancy of land. Landholders might owe customs such as rents, royal fines, building services, military services, or agricultural ser-


21. The diploma was the land book (land boc) or charter preceding the use of the Anglo-Norman writ. F. E. Harmer, Anglo-Saxon Writs 34–35, 129–30, 432 (1952); 2 William S. Holdsworth, A History of English Law 24, 68–72 (photo. reprint 1966) (4th ed. 1936); 3 id. at 73 (bookland and alienation); id. at 103 (powers of book); id. at 225–26 (book, charter, and royal writ); Maitland, Domesday, supra note 20, at 226, 230, 257; Jolliffe, supra note 20, at 10, 13, 15 (superiority, heritability, and mobility of bookland considered privileged, _libera terra_). The land book, of ecclesiastic origin, carried a threat of excommunication and received the consent or witness of the witan, a type of Anglo-Saxon council consulted on significant affairs. Maitland, Domesday, supra note 20, at 230, 247–52.

22. 1 Frederick Pollock & Frederic W. Maitland, The History of English Law Before the Time of Edward I, at 60 (2d ed., Boston, Little Brown & Co. 1899). Bookland contrasted with other types of land such as folkland and laenland. Folkland was land held by private persons according to the folk or customary law without written book of the grant and subject to common royal burdens. Maitland, Domesday, supra note 20, at 257; Frederick Pollock, The Land Laws 20–24 (3d ed., London, MacMillan and Co. 1896) (noting differences between bookland and other types of land); 1 Pollock & Maitland, supra, at 61–62; Frank M. Stenton, Anglo-Saxon England 311–12 (3d ed. 1971) (defining folkland as subject to royal burdens of king’s farm). Laenland or loanland was a temporary gift of land, perhaps to common men, in which the grantee may return services or rent. 2 Holdsworth, supra note 21, at 70–71; Maitland, Domesday, supra note 20, at 313–16.

23. 2 Holdsworth, supra note 21, at 74; Maitland, Domesday, supra note 20, at 226, 229–30, 241–43.

24. Maitland, Domesday, supra note 20, at 241–43 (bookland granted in exchange for spiritual services); see also infra note 28 (few reserved fundamental burdens on bookland but additional common burdens on other non-immune lands such as folkland).
vices.25 From these burdens, the king granted immunities.26 During the Middle Ages, several types of immunities were granted to lords, their men, and their lands.27 In generalized terms, to grant an immunity was to create a privilege from a burden otherwise due. Before the Norman Conquest, several grants of bookland to lords and churches allowed the holder to be free or immune from all earthly or secular burdens—excepting a few reserved burdens including military service, repairing bridges, and repairing borough walls.28 As a recipient of the king’s grant, the privileged church or lord stood in place of the king for all that the king would have received from the occupants of the land.29 If a holder of bookland neglected his responsibility, he could lose possession of the land.30

With the Norman Conquest, William the Conqueror claimed to inherit the kingdom from his predecessors and thus inherited Anglo-Saxon laws in

25. WILLIAM CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE DURING THE EARLY AND MIDDLE AGES 148–56 (3d ed., Cambridge, Univ. Press 1896) [hereinafter CUNNINGHAM, ENGLISH INDUSTRY] (identifying sources of royal revenue); MAITLAND, DOMESDAY, supra note 20, at 234–40 (king’s royal farm included fiscal payments and other dues: profits of justice, agricultural obligations, and structural and military services); PAUL VINOGRADOFF, ENGLISH SOCIETY IN THE ELEVENTH CENTURY 141–42 (1908) [hereinafter VINOGRADOFF, ENGLISH SOCIETY] (public revenue included both indirect income from tolls, market dues, and forfeitures as well as direct income from customary payments in kind and in money, ordinary land taxes, and extraordinary impositions).

26. See, e.g., 1 POLLOCK & MAITLAND, supra note 22, at 60 (describing king’s alienation of royal profits by book to grantee and suggesting that inhabitants owing their customary dues to new grantee might not notice change).

27. See MAITLAND, DOMESDAY, supra note 20, at 269–83 (discussing book’s immunity (liberty, freols) from all secular obligations with reservation of three fundamental duties); 1 POLLOCK & MAITLAND, supra note 22, at 571–94 (discussing various fiscal and judicial immunities).

28. Three frequent exceptions to the immunity, which some label the trinoda or trimoda necessitas, were bridge building, wall building, and military service. MAITLAND, DOMESDAY, supra note 20, at 186–87 (repairing bridge and borough walls); id. at 236, 240 (grants of bookland contained immunity from all burdens except military service and building or repairing bridge and borough walls); id. at 270–71, 273 (discussing the term trinoda necessitas); STENTON, supra note 22, at 289–90 (criticizing the label trinoda necessitas); see also ADOLPHUS BALLARD, THE DOMESDAY BOROUGHS 106 (1904) [hereinafter BALLARD, DOMESDAY BOROUGHS]. See generally W.H. Stevenson, Trinoda Necessitas, 29 ENG. HIST. REV. 689 (1914).

29. STENTON, supra note 22, at 307 (suggesting king’s only concern in grant of bookland was reservation of fundamental burden (military service, borough and bridge repair), leaving grantee free by unwritten custom to collect remaining royal farm and services in place of king).

30. MAITLAND, DOMESDAY, supra note 20, at 295 (loss of bookland if grantee failed military duty or committed high crime).
place of the former king.\textsuperscript{31} As the lawful king and proprietary owner of land, he too could give it away and demand services in return.\textsuperscript{32} To punish those who rebelled against his inheritance, William installed Norman barons in military service as feudal lords of English estates with jurisdiction over the occupants of the land.\textsuperscript{33} Bookland and other Anglo-Saxon lands merged into feudal tenures after the Conquest.\textsuperscript{34}

The feudal concept was a relationship between lord and vassal.\textsuperscript{35} The tenant received defense, warranty, and heritable possession of land from the lord.\textsuperscript{36} The lord in turn received homage or fealty, and a combination of rents, aids, services, marriage and wardship, escheats, and reliefs from the tenant.\textsuperscript{37} The lord owed gelds and services, especially military service,
to the king, and when the lord was burdened or taxed, he passed the obligation to his tenants.\(^{38}\) Lords receiving land and privileges could in turn, perhaps with license from the king, grant land to other lords and individuals, passing some or all of the burdens and services in the exchange.\(^{39}\) As the well-known English legal historians Frederick Pollock and Frederic Maitland noted, the feudal ladder might have many rungs—a tenant may hold of a more powerful lord, who in turn may hold of another or of the king directly.\(^{40}\)

### B. Franchises and Seignorial Jurisdiction

Wardship and marriage, often described as the most burdensome feudal obligations, were common in military tenures but not in socage, fee farm, or burgage tenures discussed infra. 3 HOLDSWORTH, supra note 33, at 64–65; NORTON, supra note 33, at 48 (explaining that wardship and marriage served a military function and thus were not claimed by the lord on socage lands). Escheat was the loss of the estate to the lord for felony or failure of heirs or loss to the king for treason. 3 HOLDSWORTH, supra note 33, at 67–73.

38. 1 POLLOCK & MAITLAND, supra note 22, at 232–33, 236–38, 277. Geld was a land tax. MAITLAND, DOMESDAY, supra note 20, at 120–24. The king typically received geld from most, but not all. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 59, 67; id. at 68–69 (explaining that full geld was due even if portions of borough became wasteland; some French were exempt from geld); VINogradoff, ENGLISH SOCIETY, supra note 25, at 182–84 (listing examples of classes immune from geld); id. at 326 (finding that tenants of ancient demesne did not pay geld).

39. 1 POLLOCK & MAITLAND, supra note 22, at 232–40. Though a matter of controversy prior to the statute of Quia Emptores Terrarum, a high lord enjoying feudal incidents from his immediate grantees could suffer a loss in estate quality when his immediate grantees subinfeudated to others with few or none of the original incidents. See id. With common reduction of estate by subinfeudation, the statute of Quia Emptores Terrarum was passed in 1290. Quia Emptores Terrarum allowed alienation but provided the subgrantee was to hold the same tenure as the grantor, i.e., the subgrantee became a tenant of the high lord of whom the grantor originally held. Quia Emptores Terrarum, 1290, 18 Edw. 1, c. 1, § 1 (Eng.); 3 HOLDSWORTH, supra note 33, at 80–81 (describing effect of statute); 1 POLLOCK & MAITLAND, supra note 22, at 337. For a discussion of Quia Emptores Terrarum in the colonies, see infra Part IV.E (discussing colonial charters and subinfeudation in proprietorships) and B.H. McPherson, Revisiting the Manor of East Greenwich, 42 AM. J. LEGAL HIST. 35, 44 (1998).

40. 1 POLLOCK & MAITLAND, supra note 22, at 233. For lands held of the king directly (\textit{in capite}), the king restricted alienation to those with his license and imposed a reasonable fine for unlicensed alienation. 3 HOLDSWORTH, supra note 33, at 83–85; see also infra notes 439–49 and accompanying text (discussing charter clauses to colonial promoters that expressly avoided tenure \textit{in capite}).
Feudal tenure provided revenue and services to the king.\textsuperscript{41} The increase in the needs of the state translated to a greater need of revenue and services from the land.\textsuperscript{42} The king, unable to govern the realm by his own hand, often sold immunities and franchises to raise revenue for various causes.\textsuperscript{43} A “franchise” can be defined “as a portion of royal power in the hands of a subject.”\textsuperscript{44} Royal privileges granted to individuals and entities included financial and personal immunities as well as jurisdictional immunities from the national system of justice.\textsuperscript{45}

Common fiscal immunities included exemptions from national and local taxation, from fines and assessments, and from various types of tolls.\textsuperscript{46} Entities and lords also received royal grants of immunity from military service, various personal services, and from the burden of attending communal courts.\textsuperscript{47}

Feudal tenure and the management of immunities required a judicial relationship between lord and tenant. Pollock and Maitland described the private or seignorial jurisdiction of lord over tenant as composed of two strands: the jurisdictional relationship between the lord and tenant arising from the relationship itself and a jurisdictional relationship by express grant of franchise.\textsuperscript{48} A lord might have held a court with simple pleas over his

\begin{itemize}
  \item \textsuperscript{41} 1 Pollock & Maitland, \textit{supra} note 22, at 232–40.
  \item \textsuperscript{42} Maitland, \textit{Domesday}, \textit{supra} note 20, at 240.
  \item \textsuperscript{43} Vinogradoff, \textit{English Society}, \textit{supra} note 25, at 108. Throughout English borough history, see \textit{infra} Part II.C–G, the controversies of the realm resulted in increased liberties and charter confirmations for burgesses as they bargained for liberties in exchange for their support of the king. 1 Alice S. Green, \textit{Town Life in the Fifteenth Century} 237–38 (New York, MacMillan & Co. 1894) [hereinafter Green, \textit{Town Life}].
  \item \textsuperscript{44} 1 Pollock & Maitland, \textit{supra} note 22, at 384.
  \item \textsuperscript{45} \textit{id.} at 574–94.
  \item \textsuperscript{46} \textit{id.} at 574.
  \item \textsuperscript{47} \textit{id.} at 537, 540–42, 544, 574. Unless exempted, men of the township and county had to serve as suitors in the hundreds and county courts. Vinogradoff, \textit{English Society}, \textit{supra} note 25, at 97–99, 104 (explaining that the hundred was a territorial unit of townships and estates and that free owners and estate representatives served as suitors); \textit{id.} at 103 (commenting that the hundred was more than a court, it also served as an administrative and police unit); \textit{see also} 1 Pollock & Maitland, \textit{supra} note 22, at 529 (“England is divided into counties; the county is divided into hundreds; the hundred is divided into vills or townships.”); \textit{id.} at 529–30, 544, 557 (noting that county court was more important than hundred and met less frequently than hundred court); \textit{id.} at 548–53 (suitors of communal courts). Many hundreds were in private hands. Helen Cam, \textit{Law-Finders and Law-Makers in Medieval England} 59–70 (1962) (discussing the prevalence of private hundreds before the Conquest); Vinogradoff, \textit{English Society}, \textit{supra} note 25, at 105 (noting that feudalism alienated native jurisdiction in hundred courts to private subjects).
  \item \textsuperscript{48} 1 Pollock & Maitland, \textit{supra} note 22, at 43, 531–32, 571–72 (distinguishing common feudal courts from franchise courts).
\end{itemize}
tenants by the relationship itself. Other privileges and franchises, above and beyond simple aspects of feudal jurisdiction, varied from those of the petty manor, which may have held view of frankpledge and associated police powers, to those of the palatine earl.49

The king, before and to a lesser extent after the Conquest, granted or confirmed jurisdictional immunities or franchises by granting sake and soke to the grantee.50 The full formula often consisted of sake, soke, toll, team, infangenetheof, and occasionally utfangenetheof.51 The grant of sake


50. DAWN M. HADLEY, THE NORTHERN DANELAW: ITS SOCIAL STRUCTURE, C.800–1100, at 168–69 (2000) (comparing bookland and grants of sake and soke; “bookright,” or sake and soke, enjoyed by recipient of bookland); 1 POLLOCK & MAITLAND, supra note 22, at 576 (finding sake and soke granted minor criminal jurisdiction); STENTON, supra note 22, at 494–95 (noting supplementation of Anglo-Saxon bookland with express jurisdictional privilege of sake and soke for grantee to manage immunities in place of crown). A grant of immunity, sake and soke, relieved the grantee of, or confirmed the grantee’s privileges from, certain obligations to the king but also expressly enabled the grantee to collect the profits of justice and the royal farm in place of the king. Roffe, supra note 34, at 164–66 (comparing grants of sake and soke to bookland and associated immunities and privileges); see also infra notes 59–60 and accompanying text (discussing grant of immunity as an opportunity for the immunized to collect penalties or forfeitures in place of the king). Grants of sake and soke were often judicial references for the collection of the profits of justice, but sake and soke might also cover the customs running on land. C.A. Joy, Sokeright 21–23, 25, 66, 70, 72, 77, 223–25 (1975) (unpublished Ph.D. dissertation, University of Leeds), available at http://etheses.whiterose.ac.uk/820/ (discussing non-judicial components of sokeright and commenting that sokeright might resemble a grant to collect burdens running on folkland); see also CAM, HUNDRED ROLLS, supra note 49, at 161–63 (describing collection of hundredal profits by private lords with various privileges); R.H.C. DAVIS, THE KALENDAR OF ABBOT SAMSON OF BURY ST. EDMUNDS AND RELATED DOCUMENTS xiv (1954) (listing regalia revenues); id. at xxxi–xxxii (suitor fines for failure to render suit or to purchase exemption); id. at xxxii–xlvi (identifying several components of hundredal profits that might be collected by an immunized grantee); HADLEY, supra, at 183–85 (noting the Abbot’s hundredal jurisdiction).

51. HARMER, supra note 21, at 73–76 (commenting that the first known use of this formula occurred during the reign of Edward the Confessor); 1 POLLOCK & MAITLAND, supra note 22, at 576.
and soke, perhaps surplusage to the inherent rights of a lord by the thirteenth century, was a judicial right over a man or land. Sake was the cause or right to hold a plea over an individual, and soke was the right to seek or collect the fines and profits of that justice. Toll was the right to collect a toll from those not exempt from toll. Team allowed the grantee to hear warrants in which the person suspected of theft may prove his honesty by providing a witness to the transaction. Infangnetheof was the right to summarily punish thieves caught in the act within the grantee’s jurisdiction, and if a grantee had utfangnetheof, the grantee could punish those caught outside his territory. A grant of jurisdiction to lords, however, might be limited by the king’s reservation to protect the peace for cer-

52. 1 POLLOCK & MAITLAND, supra note 22, at 576–77 (finding that twelfth-century developments in the national criminal justice system altered the significance of the sake and soke formula and that subsequent requests for criminal franchises likely resulted in more specific charter language); id. at 579 (noting that by the thirteenth century, the grant of sake and soke had lost much of its earlier significance). In later years, lords held court baron and court leet. Court baron was the right to hear feudal claims; court leet covered minor criminal claims, similar to the franchise of view of frankpledge. See supra note 49 and accompanying text. Though the sake and soke formula may have meant more during earlier periods, by the late thirteenth-century sake and soke meant court baron and not view of frankpledge. 1 F.W. MAITLAND, SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS xix, xxii–xxiii (London, Bernard Quaritch 1889).

53. HADLEY, supra note 50, at 167–68, 183–86 (listing multiple definitions of “soke” (soon) and discussing characteristics of sokemen); HARMER, supra note 21, at 74; MAITLAND, DOMESDAY, supra note 20, at 84–88, 259–60; VINOGRADOFF, ENGLISH SOCIETY, supra note 25, at 115–16 (explaining that sake and soke concern the men, the claim, and the court involved in deciding cases; those under sake and soke had to attend the lord’s tribunal and render suitors’ services); id. at 128 (commenting that persons under sake and soke were generally removed from the ordinary jurisdiction of the hundred and county and placed under the grantee’s jurisdiction); id. at 131, 133 (describing soke as the jurisdictional unit encircling a territory, such as a manor); id. at 322 (soke was a portion of the king’s public administration granted to private lord). The crown’s grant of soke might extend over freemen, sokemen, villeins, and other lesser status persons. Id. at 125, 133 (some sokemen might have sokemen in majority with lesser status persons as their tenants). One of the most important duties of sokemen was rendering suit as a suitor to the forum court of the soke. HADLEY, supra note 50, at 185.

54. ADOLPHUS BALLARD, BRITISH BOROUGH CHARTERS 1042–1216, at liv, lxvi–lxv (1913) [hereinafter BALLARD, B.B.C.]; 1 POLLOCK & MAITLAND, supra note 22, at 578.

55. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 115 (commenting on the importance of witnesses for market transactions); HARMER, supra note 21, at 76–77 (toll and team involved the testimony of a witness who witnessed a toll paid at the purchase of the disputed chattel; witnesses were required for certain market transactions; grant of team allowed collection of pledges if the accused failed to produce the warrantor); STENTON, supra note 22, at 498; FRANK M. STENTON, THE FIRST CENTURY OF ENGLISH FEUDALISM 1066–1166, at 101 (2d ed. 1961).

56. 1 POLLOCK & MAITLAND, supra note 22, at 577.
tain crimes.57

When the king granted a jurisdictional immunity with a charter stating that the land was free of the national system of justice for several crimes, the grantee, as a result of the immunity, collected or developed the private jurisdiction or court58 to collect the profits of justice from which the grantee received immunity.59 To give land free of national justice was not to say that the lord could not punish crimes in that land. Freedom from national justice meant that the penalties or forfeitures of criminous tenants would not go to the king but rather to the lord with the franchise.60


58. The theory that pre-Conquest grants of sake and soke included the right for the grantee to have a court to collect the profits of justice has been questioned. Julius Goebel, Jr., Felony and Misdemeanor 371, 374, 377 (Edward Peters ed., Univ. of Pa. Press 1976) (1937); Patrick Wormald, Legal Culture in the Early Medieval West: Law as Text, Image and Experience 318, 325 (1999) (challenging the evidence supporting pre-Conquest private jurisdiction).

59. Maitland, Domesday, supra note 20, at 80–82, 277–79; Stenton, supra note 22, at 306–07 (bookland gave immunity; grantee, by unwritten custom, free to collect profits in place of the king); id. at 492–95 (discussing the likelihood of a court for a privileged lord to handle disputes concerning the collection of customs and profits of justice that the lord collected as part of his bookland immunity). Granting sake and soke to a lord broke off a piece of the king’s native jurisdiction or soke in the hundred court. 1 Pollock & Maitland, supra note 22, at 576. A lord’s soke might overlap with the king’s jurisdiction in the hundred court. Cam, Hundred Rolls, supra note 49, at 161–63 (describing collection of hundredal profits by private lords with various privileges); Maitland, Domesday, supra note 20, at 90–97 (discussing hundred jurisdiction and manorial soke and overlapping collection of forfeitures). The lord with sake and soke might not need a court; lords with soke over criminals or land might collect their forfeiture profits in the hundred court. Id. at 95, 102, 259; see also supra note 58 and accompanying text.

60. 1 Pollock & Maitland, supra note 22, at 576–78.
Far above the basic privileges granted to lords, the crown enfranchised the palatine earl with jura regalia.\textsuperscript{61} Palatine lords, as supreme landholders, held privileges and immunities in their district similar to those of the king.\textsuperscript{62} The Bishop of Durham, for example, with his own assembly and council, had the ability to appoint officers, protect the peace of the palatinate, create fairs and markets, pardon convicts for most crimes, and hear all pleas and collect the profits of justice in his jurisdiction.\textsuperscript{63} The bishop’s council had equitable, common law, appellate, and admiralty jurisdiction.\textsuperscript{64} Generally, the royal writ did not run in the palatinate and royal officials were excluded.\textsuperscript{65} Grieved inhabitants of the liberty of Durham needed to petition the bishop and council similar to the manner in which subjects petitioned the king.\textsuperscript{66} Before the reforms of Henry II were applied to the palatinate,\textsuperscript{67} the palatine courts heard all pleas except for perhaps the rare case

\begin{itemize}
  \item\textsuperscript{61} The palatinate was a privileged district governed by a palatine earl who enjoyed royal rights (\textit{jura regalia}) similar to the king. See \textit{infra} note 62. Both “palatine” and “palatinate” trace back to ancient Rome’s Palatine Hill. According to Roman mythology, the Palatine Hill was central to the founding of Rome. Encyclopaedia Britannica, \textit{Palatine Hill}, BRITANNICA ONLINE ENCYCLOPAEDIA, http://www.britannica.com/EBchecked/topic/439237/Palatine-Hill (last visited Oct. 28, 2011).
  
  
  \item\textsuperscript{63} LAPSLEY, \textit{supra} note 62, at 32–33 (bishop’s peace); \textit{id.} at 33–34 (jail and capital punishment); \textit{id.} at 34 (delegation and appointment powers); \textit{id.} at 35 (creation of corporations; Durham had five boroughs which generally received their privileges and immunities from the bishop); \textit{id.} at 40–41, app. II (admiralty jurisdiction); \textit{id.} at 41, 47–48 (escheat for felony and, for a long time, escheat for treason—an unusual franchise typically reserved for the king); \textit{id.} at 58 (grant of mines, wrecks, and treasure-trove); \textit{id.} at 62 (right to create fairs and markets); \textit{id.} at 68–69 (right to pardon); \textit{id.} at 71–72 (prerogative to suspend laws); \textit{id.} at 74, 168, 173, 215 (pleas of crown); \textit{id.} at 106, 114, 136, 149 (assembly and council). However, the bishop did not have foreign treaty powers. \textit{Id.} at 36, 40.
  
  \item\textsuperscript{64} \textit{Id.} at 149, 180 (commenting on the functions and powers of the bishop’s council); \textit{id.} at 186–90 (discussing the bishop’s chancery and its powers).
  
  \item\textsuperscript{65} \textit{Id.} at 68, 74–75, 162–64, 166–68, 173, 226. \textit{But see} Jean Scammell, \textit{The Origin and Limitations of the Liberty of Durham}, 81 ENG. HIST. REV. 449, 455–56 (1966) (describing the proposition that royal writs did not run in palatinate as a “half-truth”).
  
  \item\textsuperscript{66} LAPSLEY, \textit{supra} note 62, at 68.
  
  \item\textsuperscript{67} The tenants of the liberty obtained a royal charter extending Henry II’s judicial reforms to them notwithstanding the bishop’s liberty. \textit{Id.} at 166–68, app. I (noting the Geoffrey Fitz Geoffrey case and the controversy concerning the effect of Henry II’s grand assize in the palatinate); Scammell, \textit{supra} note 65, at 459–61. After the royal reclaim, the bishop, absent a royal eyre, could hear only a limited number of pleas. \textit{Id.} at 461–70.
\end{itemize}
of a direct attack on the king’s person or property.68 By the fourteenth century, legislation of Parliament, unless otherwise indicated, applied to the palatinate.69

Above the feudal tenure of the lord, the king was the supreme landholder. Both the king and lord had manors.70 The manor, with its court, was a symbol of status and authority.71 Manors were estates of various sizes occupied by freeholders, by villeins performing services for the lord of

68. LAPSLEY, supra note 62, at 27. The king reserved jurisdiction for defects of justice or for matters affecting his person. Id. at 75, 162, 209, 211–12, 213–15; Scammell, supra note 65, at 457–58.

Before the sixteenth century, the extensive liberties of palatine lords presented obstacles to royal justice. In the process and execution of judgments, royal justice encountered a second layer of difficulty as courts struggled with summons, inquests, venue, vouching to warranty, and execution of judgments crossing the palatinate. LAPSLEY, supra note 62, at 216–55. When a royal court sought process against an inhabitant of the palatinate, the first step was to distress the inhabitant’s lands outside of the palatinate. Id. at 218. If unsuccessful, royal courts sought to compel the bishop to produce the individual. Id. at 218–20, 223. Royal courts could also outlaw the individual and direct the bishop to arrest him. Id. at 220–21, 225, 251–52. Because of its immunity, the palatinate served as a haven for criminals. Id. at 226, 255. In 1536, King Henry VIII and Parliament removed many of the privileges of territories such as Durham. Id. at 70, 196–97 (noting that many territories lost the powers of pardon and of appointing judicial officials and that all royal writs ran in king’s name rather than bishop’s); 2 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 5–7 (1904) (discussing the effect of the 1536 legislation on the palatine lord’s powers).

69. LAPSLEY, supra note 62, at 125–26, 189, 256–57. When the crown or Parliament sought revenue, however, the objection was raised that the assembly of the liberty did not consent to the tax. See id. at 117–18, 297–300. Eventually, the palatinate sent representatives to Parliament. Id. at 299.

70. VINOGRADOFF, ENGLISH SOCIETY, supra note 25, at 323–24, 326 (describing characteristics of royal manors in Domesday Book). Tenants of the royal manor on ancient demesne might enjoy qualified immunities from toll, freedom from rendering suit at the communal courts, freedom from the sheriff’s interference, and immunities from many common fines and taxes. 3 HOLDSWORTH, supra note 33, at 264. Tenants of the ancient demesne did not pay taxes and fines that others paid but were burdened with heavy food-rents for the king’s household. VINOGRADOFF, ENGLISH SOCIETY, supra note 25, at 326–28, 350.

71. 1 E. LIPSON, THE ECONOMIC HISTORY OF ENGLAND 1–3 (12th ed. 1959) (discussing literature on the origin of the manor); id. at 22–25, 27 (describing military, political, administrative, and jurisdictional features surrounding the manor); VINOGRADOFF, ENGLISH SOCIETY, supra note 25, at 305, 311, 316–17, 320–21 (providing definitions, functions, and characteristics of English manors); id. at 340–43 (defining the Conquest manor as a function of, among other things, a grant of soke in the context of preexisting bookland enfranchising lords with privileged lands); id. at 363–64 (commenting on the function of the manor’s court).
the manor, and by lower classes in unfree tenure. Although villeins were often landholders, they held an unfree tenure because of the level and character of the services they performed. The villein after the Conquest was the aggregate of the slave and the dependent farmer. Villeins of a private baron did not have access to the king’s courts and were forced to abide by the customs of the manor and the lord’s customary court.

Common before the Conquest, a third manorial class, sokemen, existed between the freeholder and the villein. Economic and other post-

72. Freemen on the manor were far less common than burdened classes and enjoyed a sharply privileged status over the villein and lesser classes. Lipson, supra note 71, at 50 (noting that, by the thirteenth century, freemen were protected by the king’s courts); id. at 45–49 (describing classes of unfree below villein); 1 Pollock & Maitland, supra note 22, at 363 (finding freeholders of manor in socage or military service and villeins in unfree tenure).

Lipson summarized that several fiscal, economic, and governmental forces imposed the manor system, with its dependent farming, on free villages. Lipson, supra note 71, at 12–13, 15–23, 28 (burden of dangeld tax created divisions among classes on farms; economic forces and harsh conditions surrounding laenland; jurisdictional forces of commendation and required suretyship of a lord; bookland with seigniorial jurisdiction and the imposition of immunized manorial lord collecting royal dues or farm in place of king; and military obligations fostering division among the classes with property being the currency for political status). “Thus either by a royal grant placing a district under a feudal lordship, or by the submission of individuals, village after village acquired a lord and could no longer boast itself a free village community.” Id. at 22.

73. Villeins were neither slaves nor serfs. One common test of villeinage was the level and character of services performed. Lipson, supra note 71, at 39–40; 1 Pollock & Maitland, supra note 22, at 372–75. Villeins performed undefined services at the will of the lord. Those with defined services were of a higher status. The manorial incidents of unfree tenure included amercements at will, merchet, heriot, manuring duties, and miscellaneous personal services throughout the week (week-work). 1 Pollock & Maitland, supra note 22, at 366–72; see also 3 Holdsworth, supra note 33, at 200.

74. 3 Holdsworth, supra note 33, at 491, 493 (explaining the difficulty of imposing the Roman classification of unfree on the complex nature of Anglo-Saxon classes). The villein of the Domesday Survey had a better status than the serf he would become a century later. See infra note 75.

75. 3 Holdsworth, supra note 33, at 30 (examining limitations on the use of courts for the unfree); id. at 491 (noting a lord’s absolute power over the bodies and goods of his villeins); id. at 492–93 (observing that a villein’s protection was limited to the customs of manor); id. at 495 (finding a villein’s legal disabilities applied to contests between lord and villein but not necessarily villein against others). Villeins of the eleventh century were freer and had more access to the national courts than the corresponding rank in the thirteenth century. KeeChang Kim, Aliens in Medieval Law: The Origins of Modern Citizenship 6 (2000) (discussing the legal disabilities of post-Conquest villeins); Lipson, supra note 71, at 28–29, 38–39 (noting the change in villeins’ status from the time of the Domesday Book to Bracton).

76. Maitland, Domesday, supra note 20, at 66–107 (describing characteristics of sokemen and sake and soke generally); Vinogradoff, English Society, supra note 25, at
Conquest forces depressed many sokemen into villeinage.\textsuperscript{77} The sokemen on the ancient demesne, protected to a degree from such forces, performed services for the crown and held land in privileged villeinage.\textsuperscript{78}

Eventually a strong central government and the rise of trade and commerce transformed the agricultural characteristics of medieval England.\textsuperscript{79} With economic forces making commutation of services for mone-

\textsuperscript{77} The status of sokemen \textit{tempore regis Edwardi} (T.R.E.) was reduced considerably after the Conquest. \textsc{1 Lipson}, supra note 71, at 27–28 (describing the reduction of the sokemen population in Cambridgeshire after Conquest). Sokemen who might have been mostly free before the Conquest could be dragged into villeinage. \textsc{Hadley}, supra note 50, at 108–09, 167, 188 (noting oversimplification of Domesday records); \textsc{Vinogradoff}, \textit{English Society}, supra note 25, at 432–33, 435 (commenting that within the category of sokemen there might have been free sokemen with greater alienation rights and unfree sokemen without such rights).

\textsuperscript{78} Generally, tenure on the ancient demesne could be freehold and absolute villeinage at the ends with sokemen in privileged villeinage in between. \textsc{Pollock & Maitland}, supra note 22, at 406. Sokemen of the ancient demesne, distinguished from absolute freemen and absolute villeins, had some access to the royal courts and some rights of alienation. \textsc{3 Holdsworth}, supra note 33, at 264–67 (identifying the legal rights available to privileged villeins); \textsc{Pollock & Maitland}, supra note 22, at 385–96; \textsc{Vinogradoff}, \textit{English Society}, supra note 25, at 432–33, 435, 437 (comparing ordinary sokemen enduring restrictions on alienation with sokemen on ancient demesne enjoying greater rights of alienation). Even if privileged ancient demesne land (measured from the Conquest and recorded in the Domesday Survey) were alienated, the tenants theoretically preserved their privileged status vis-à-vis private conditions under the grantee. \textsc{Vinogradoff}, \textit{English Society}, supra note 25, at 429–30 (discussing the ancient demesne doctrine). However, this was not the case for outside land coming into the king’s hand post-Conquest to be granted away at a later time. \textsc{Pollock & Maitland}, supra note 22, at 384–85 (observing that ancient demesne was immunized and immunity ran with land after alienation); \textsc{Id.} at 385 (noting that non-ancient demesne land falling into crown’s hand did not enjoy immunity and was alienated by crown with full privileges available to grantee); \textsc{Cf. 1 Green}, \textit{Town Life}, supra note 43, at 253–55, 270–71, 299–303 (alienated royal towns advocated for privileged status under new private lords, though townsmen typically had to fight to retain or regain such privileges).

\textsuperscript{79} \textsc{3 Holdsworth}, supra note 33, at 202–06 (describing the transformation from an agricultural society to a commercial society and noting the effect of this transition on feudal services based on the agricultural and military model).
tary rents feasible, those outside of heavy feudal obligations, sokemen, especially sokemen on the ancient demesne, paid money rents in lieu of services.80 Landholders paying rent in exchange for most services held their land in what would later be termed socage tenure.81

Within or adjacent to the manor, a typical vill was a small organization of homes forming an agricultural village.82 The vill or township might have a lord from an adjacent manor and borrow its court.83 Medieval vills and townships across the realm were the fundamental units of rural organization and administration.84 The more organized and privileged vill or township with a court was known as a borough.85 Medieval England had royal boroughs and baronial boroughs, but most boroughs were under royal control.86

80. Paul Vinogradoff, Villainage in England 178–183 (Oxford, Clarendon Press 1892). The commutation of services was easier where labor service was not important. Vinogradoff, English Society, supra note 25, at 327–28 (noting that on ancient demesne there was more focus on farm-rent than typical manorial services). Forces like the plague also contributed to the commutation of services for money rents. 1 Lipson, supra note 71, at 101–07. Providing rent payments in exchange for services was not limited to sokemen of the ancient demesne. Id. at 88–91 (manorial lord commuted services and loaned his desme land to tenants paying rent); see also Richard H. Britnell, The Commercialisation of English Society, 1000–1500, at 36–52 (2d ed. 1996) (discussing commutation of services and importance of cash in medieval economy). Eventually, the heavy services of the villein were also commuted into money payments. 1 Pollock & Maitland, supra note 22, at 375 (commutation of villein’s week-work for money rents and emergence of copyhold tenure).

81. 3 Holdsworth, supra note 33, at 51–54 (describing socage tenure); see also infra Part IV.E.1 (discussing socage tenure and colonial charters).

82. Hadley, supra note 50, at 94–101 (examining the characteristics of the vill in medieval England); 1 Pollock & Maitland, supra note 22, at 531, 560–62; Vinogradoff, English Society, supra note 25, at 265–266 (discussing husbandry from homestead to village).

83. 1 Pollock & Maitland, supra note 22, at 605–08.

84. Vinogradoff, English Society, supra note 25, at 216, 390–91, 395, 475; 1 Pollock & Maitland, supra note 22, at 529 (noting that vills and townships formed hundreds, hundreds formed counties, and England was divided into counties).

85. 1 William S. Holdsworth, A History of English Law 139 (photo. reprint 1966) (7th ed., revised 1956). The attributes that distinguished a borough from other territories were changing by the Domesday Survey as the village tended to have access to a court and the king’s peace became commonplace. Maitland, Domesday, supra note 20, at 184–85, 217; 1 Pollock & Maitland, supra note 22, at 44–48; see also Lambert, supra note 57, at 149–61 (observing that national criminal legislation replaced Anglo-Saxon system of feud and its network of special protections for certain people and certain places).

86. 1 Lipson, supra note 71, at 202 (remarking that towns existed on ancient demesne, on lands of secular lord, and on church lands); Maitland, Domesday, supra note 20, at 218 (noting that most burgesses held of the king and the king was the only official lord of most
C. **Lords of the Borough**

Knowledge of royal privileges and immunities granted to boroughs and merchant institutions is essential to unlocking the development of American colonial institutions as many colonial institutions find their ancestry in the royal privileges and immunities of these entities. Moreover, borough privileges advanced principles of community and self-government and ultimately became a benchmark for common notions of the liberty of Englishmen—a concept with a long history in the American colonies. For these reasons, a detailed discussion of borough privileges and immunities is necessary.

Privileges and immunities to boroughs flowed readily as the walls, markets, and mints of the medieval borough, burh, or port were royal interests. Serving these interests, English boroughs developed as post-Roman fortifications and as administrative trading centers of the surrounding territory. The borough maintained a trading function under the king’s special protection. The crown protected traders entering and leaving the market or borough, and a crime committed in or directly outside the boroughs); STENTON, supra note 22, at 529–30 (same); JAMES TAIT, THE MEDIEVAL ENGLISH BOROUGH 141 (Manchester Univ. Press 1968) (1936) (discussing royal boroughs with royal reeves); id. at 343 (finding that the extinction of manorial lordship increased the king’s ownership of boroughs); see also BALLARD, DOMESDAY BOROUGHS, supra note 28, at 4–9 (classifying Domesday boroughs by organization rather than by lordship); M.W. BERESFORD & H.P.R. FINBERG, ENGLISH MEDIEVAL BOROUGHS: A HAND-LIST 40–47 (1973) (discussing data on borough lords). Royal boroughs enjoyed freedom from the sheriff’s oppressions and a privileged status vis-à-vis townsmen of the private borough under a lord. See infra note 148.

87. See infra note 486 (observing the influence of London’s liberties on Englishmen); see also infra Part V (discussing Englishmen’s liberty in American colonies).

88. 1 LIPSON, supra note 71, at 195 (describing royal mints); CARL STEPHENSON, BOROUGH AND TOWN: A STUDY OF URBAN ORIGINS IN ENGLAND 17, 66–67, 186–87 (1933); TAIT, supra note 86, at 27–29 (noting that boroughs served military and financial function).

89. COLIN PLATT, THE ENGLISH MEDIEVAL TOWN 19, 44 (1976) (illustrating the design and structure of medieval town walls).

90. MAITLAND, DOMESDAY, supra note 20, at 185–96 (discussing the borough’s military purpose but also its more permanent characteristic as a center of trade); STEPHENSON, supra note 88, at 52–54, 70, 187–88, 207; TAIT, supra note 86, at 11–14, 26–29, 65–66; CHARLES R. YOUNG, THE ENGLISH BOROUGH AND ROYAL ADMINISTRATION, 1130–1307, at 91–121 (1961) (noting the military function of medieval boroughs).

91. After the fall of the Roman Empire, the local markets were poor and in need of special protection by the king. 5 WILLIAM S. HOLDEN, A HISTORY OF ENGLISH LAW 86–87 (photo. reprint 1966) (3d ed. 1945). Burgesses were attracted to the borough for the market and the king’s peace. MAITLAND, DOMESDAY, supra note 20, at 99 (observing that borough peace was similar to house peace); id. at 184–85, 190 (noting that the king’s house peace extended to borough); id. at 192–93 (finding that borough peace facilitated trade).
ough was a breach of the king’s peace.92

Like other individuals and entities, medieval English boroughs were burdened with obligations and privileged with immunities.93 During this period, burgesses’ tenements were assessed various customs. Domesday borough customs might include house and land rents, royal dues, court fines, tolls, heriots, merchet, as well as light personal, military, and agricultural services.94

As a center of trade, markets and fairs authorized by the crown were often held in the borough, market town, and village.95 From ancient times, the king charged tolls for the benefit of his markets and the peace of the borough.96 Most burgesses of the Domesday borough paid tolls, but some

92. KIM, supra note 75, at 25–29 (noting that the king granted safe passage to foreign merchants as if they were king’s men); MAITLAND, DOMESDAY, supra note 20, at 184–85, 192–93; 1 POLLOCK & MAITLAND, supra note 22, at 44–46 (describing the king’s peace over house, highways, and special lands); TAIT, supra note 86, at 36 (observing that breach of borough peace was six times the cost of other breaches).

93. 1 LIPSON, supra note 71, at 287. Many of the privileges enjoyed by boroughs were also held by other subjects, entities, and territories. BALLARD, B.B.C., supra note 54, at lxxxviii–lxxxix.

94. TAIT, supra note 86, at 86–100, 107 (defining and tracing receipt of or exemption from borough customs typically rendered to the king and earl before the Conquest; defining burgess as one paying borough customs); see also BALLARD, DOMESDAY BOROUGHS, supra note 28, at 28, 63–91 (discussing and listing examples of borough customs and other burdens). Merchet was a fine paid upon the marriage of a daughter or son. 1 LIPSON, supra note 71, at 42; 1 POLLOCK & MAITLAND, supra note 22, at 368, 372–73. The ancient heriot, a form of a relief paid upon the death of a tenant, consisted of giving the arms or best beast of the dead man to his lord. MORLEY DE WOLF HEMMEON, BURGAGE TENURE IN MEDIAEVAL ENGLAND 22–24 (1914); 1 POLLOCK & MAITLAND, supra note 22, at 312–13, 316–17. Over time, a monetary payment was substituted for most borough customs. 1 LIPSON, supra note 71, at 201; supra notes 79–80 (discussing the commutation of services for rents).

95. The king granted the privilege of holding a market or fair to boroughs, to individuals, and frequently, to churches. 1 LIPSON, supra note 71, at 225 (safety of boroughs for markets and fairs); id. at 227 (noting that the crown granted markets to boroughs, private individuals, and churches); id. at 235–37, 238 (commenting that the duration of a fair was limited by charter to protect townsmen’s mercantile privileges); EDWARD MILLER & JOHN HATCHER, MEDIEVAL ENGLAND: TOWNS, COMMERCE AND CRAFTS 1086–1348, at 159–60 (1995) (formation of markets in twelfth and thirteenth centuries); see also 2 GREEN, TOWN LIFE, supra note 43, at 26–27 (discussing market privileges). The king might seize a lord’s market and tolls if the lord violated the king’s charter authorizing the market. 1 LIPSON, supra note 71, at 236–237. On markets and England’s medieval commerce, see generally BRITNELL, supra note 80.

96. MAITLAND, DOMESDAY, supra note 20, at 194, 203. A large portion of borough revenue came from tolls. Tolls were collected on transactions and from strangers entering and leaving the town. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 73–74 (describing customs and tolls); MAURICE BERESFORD, NEW TOWNS OF THE MIDDLE AGES: TOWN
burgesses enjoyed the privilege of freedom from toll. Only the king could grant freedom from toll throughout the realm, but lords who themselves were granted such immunities might extend the freedom to the extent of their immunity. The crown’s grant of privileges to have a fair or market included jurisdiction for a merchant court (piepowder court) in which merchant law applied. Merchant courts were light on technical procedure as local merchants assembled ad hoc to decide controversies in commerce by the customs of merchants.

Because of the king’s peace, many boroughs attracted a diverse group of traders and military personnel with different statuses and different obligations. Some traders held burgage tenements of the king adjacent to other traders who held burgages of various lords. Maitland articulated that the “heterogeneity” of many Domesday boroughs explained the differ-

PLANTATION IN ENGLAND, WALES, AND GASCONY 63–64 (1967) (observing that towns had market privileges and lords of towns collected tolls from markets). Burgesses’ collection of tolls and the town’s judicial system were slightly different when the lord collected tolls during a market or fair on town land; the former was suspended during the latter. KIM, supra note 75, at 24–25; 1 LIPSON, supra note 71, at 247 & n.7, 248, 284–86 (describing the struggle between a lord’s collection of market tolls and claims of immunities by tenants of ancient demesne, Cinque Ports, municipalities, and religious houses).

97. TAIT, supra note 86, at 117, 127. Gildsmen were also privileged from toll. See infra note 176.

98. BALLARD, B.B.C., supra note 54, at lxix; 1 GREEN, TOWN LIFE, supra note 43, at 263 n.2; 1 LIPSON, supra note 71, at 279–86 (noting that entities, towns, and lords were often free from tolls).

99. 5 HOLDSWORTH, supra note 91, at 106; 1 LIPSON, supra note 71, at 250–57 (observing that a piepowder court usually outranked other authorities on matters concerning market affairs); Charles Gross, The Court of Piepowder, 20 Q. J. ECON. 231, 233–34, 237–38 (1906) (commenting that merchants had a separate court or part of borough court).

100. Many merchant courts did not follow common law procedures. 5 HOLDSWORTH, supra note 91, at 106–07. Common law courts eventually absorbed merchant customs. Id. at 115–16, 145–47.

101. A majority of burgesses held of the king, but the king typically shared lordship with other lords. MAITLAND, DOMESDAY, supra note 20, at 182, 217–18 (noting that older boroughs were typically more diverse but, as a whole, were controlled by the crown). New boroughs, those planted or elevated from vills, were more likely to be fully under a lord or the king, thus homogenous rather than heterogeneous. Id.; see also infra notes 102–03.

102. MAITLAND, DOMESDAY, supra note 20, at 178–82, 191, 217–18 (discussing and coining the phrase “tenurial heterogeneity”); 1 LIPSON, supra note 71, at 191–93; see also BALLARD, DOMESDAY BOROUGHS, supra note 28, at 6, 8–9 (noting heterogeneity in composite boroughs not held fully of either king or lord and contrasting homogeneity of simple boroughs).
ent jurisdictions and different levels of privileges of borough inhabitants. Before the Conquest, borough land was somewhere between custom-land liable to the king and land wholly exempt. As noted above, one who had sake and soke over a house received jurisdiction and the profits of justice from the tenants over specified crimes committed therein. The king might have retained sake and soke over men in the borough who provided services and paid rent and customs; alongside the king’s men, a lord may have held sake and soke over burgesses and received some or all of the rent, customs, and forfeitures of the land. Some burgesses, in return for performing special services, received sake and soke and freedom from customs of the borough for themselves. Other burgesses may have lost privileges or burgess status where they were too poor to pay the customs or rent due on their burgage tenement.

Maitland commented that the heterogeneous characteristics of many boroughs marginalized the intermediary lordship standing between the king and the burgess for those burgesses holding of an intermediary lord. The

103. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 58–59 (describing the varying privileges of burgesses); STEPHENSON, supra note 88, at 107–08, 110, 114, 118; see also supra note 102 (discussing tenurial heterogeneity).

104. TAIT, supra note 86, at 91–95; see also BALLARD, DOMESDAY BOROUGHS, supra note 28, at 41–43 (observing that before the Conquest, the earl might have received a third of borough receipts from some boroughs; after the Conquest, the king might have alienated or retained the earl’s third); STENTON, supra note 22, at 530–31 (finding that the king might allow a high lord to receive all borough customs or retain part or all for himself); STEPHENSON, supra note 88, at 107–08.

105. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 48–50 (noting that forfeitures for offences go to the holder of sake and soke over land or men); see also supra notes 50–60 and accompanying text (discussing grant of sake and soke).

106. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 36–37, 48–50, 51–52, 58–59, 81; MAITLAND, DOMESDAY, supra note 20, at 210; TAIT, supra note 86, at 93–94 (commenting that king’s customs might be granted to lord or church).

107. BALLARD, DOMESDAY BOROUGHS, supra note 28, at 81 (discussing exchange of shipbuilding services for profits of justice for certain crimes); STEPHENSON, supra note 88, at 118–19, 156 (exemption from toll and custom); TAIT, supra note 86, at 93, 125–27 (noting that the burgesses of Dover and other towns received sake and soke but performed the additional services of shipbuilding); VINOGRAFLOFF, ENGLISH SOCIETY, supra note 25, at 128–29 (describing grants of soke privileges to townships, manors, and lords).

108. TAIT, supra note 86, at 87–88; see also BALLARD, DOMESDAY BOROUGHS, supra note 28, at 55, 112 (commenting that some burgesses were too poor to pay customs); 1 GREEN, TOWN LIFE, supra note 43, at 248 n.3 (noting cases where towns lost privileges for arrearages and other reasons); 1 LIPSON, supra note 71, at 197–98 (describing the effect of Norman castlebuilding on burgesses).

109. FREDERIC W. MAITLAND, TOWNSHIP AND BOROUGH 72 (New York, Macmillan Co. 1898) [hereinafter MAITLAND, TOWNSHIP & BOROUGH].
lord never developed a stronghold in such a borough and was not able to establish his court because of his inability to form a critical mass.\textsuperscript{110} The powers of the intermediary lord were further reduced by the high mobility of burgage tenements and the ability of burgesses to devise tenements freely, making escheat to a lord a distant possibility.\textsuperscript{111} Reliefs, marriage and wardship, and heriots owed to the lord upon the death of the tenant were abandoned and the intermediary lord was left with a small money rent, which eventually became insignificant.\textsuperscript{112}

D. Borough Charters

The crown’s development of borough institutions took place through the royal charter. From the Middle Ages through the Anglo-American period, the royal charter authorized much of England’s government—and the institutions of the American colonies were no exception. Charter privileges and immunities to boroughs and gilds provided a distant foundation for the charters and institutions of the American colonies.\textsuperscript{113}

The period covering the twelfth and thirteenth centuries was the age of borough charters.\textsuperscript{114} The borough charter was a valuable possession, and burgesses paid significant sums for charter franchises, privileges, and immunities.\textsuperscript{115} As noted above, most burgesses held land of the king, and the

\textsuperscript{110} Id.; Maitland, \textsc{Domestacy}, supra note 20, at 210 (noting an example in which a lord might have held enough houses to form a seignorial court to compete with a borough court); Tait, supra note 86, at 207 (commenting on competition between a manorial court and a borough court in mesne boroughs with a court).

\textsuperscript{111} Id.; Maitland, \textsc{Townsip & Borough}, supra note 109, at 71–72.

\textsuperscript{112} Id.; Tait, supra note 86, at 102–03 (describing heritable burgage tenure with fixed rent as an essential feature of the borough, though occasionally obscured by presence of additional personal services); cf. supra notes 79–80 and accompanying text (commenting on the commutation of services for money rents); infra notes 136–39 and accompanying text (discussing burgage tenure).

\textsuperscript{113} See infra Part IV.

\textsuperscript{114} Tait, supra note 86, at 154 (noting that the age of borough charters began with Henry I); see also 1 Lipson, supra note 71, at 215 (noting King John was known as “charter-monger”); Susan Reynolds, \textsc{An Introduction to the History of English Medieval Towns} 105–08 (1977).

\textsuperscript{115} Cunningham, \textsc{English Industry}, supra note 25, at 211–12 (remarking on the importance of borough’s charter to claim, protect, and confirm immunities); 1 Holdsworth, supra note 85, at 87–89, 90 & n.5, 139; 3 id. at 476 (noting that a community needed a charter to possess or claim a franchise); Paul P. Harbrecht & Joseph A. McCallin, \textsc{The Corporation and the State in Anglo-American Law and Politics}, 10 J. of \textsc{PUB. L.} 1, 7 (1961). Eventually, lords and entities were successful in claiming privileges by prescription if held from time immemorial.
king frequently granted charters to boroughs.\textsuperscript{116} After the Conquest, the crown took a more direct role in granting liberties and franchises to townsmen. William the Conqueror saw the borough as crown land and developed boroughs with liberties in exchange for rents and services.\textsuperscript{117}

In many cases, borough charters were merely confirming privileges the town already possessed. Norman and Angevin kings proclaimed that no previously granted immunities and privileges were valid unless confirmed and confirmation required purchase.\textsuperscript{118} When granting or confirming privileges, kings often promised the burgesses that they would have their liberties as they had in Edward the Confessor’s day, or in later periods, as they had in Henry I’s day.\textsuperscript{119} The royal franchises the king granted were the king’s to give and safeguard.\textsuperscript{120} The king, as owner, was liable to revoke or seize liberties that had not been confirmed by him or that had been abused or abandoned.\textsuperscript{121} Borough charters revoked for abuse or for other reasons had to be repurchased.\textsuperscript{122}

At some point in the life of a borough, by prescription or charter, burgesses received immunities and privileges. As noted above, privileges were typically the immunities granted to the individual or community that removed common burdens and provided liberty or freedom to the recipient.\textsuperscript{123} The privileges section of particular charters varied on factors such as who was granting or confirming the privileges, who was receiving the

\textsuperscript{116} See \textit{supra} note 86; \textit{infra} note 117.

\textsuperscript{117} STELLA KRAMER, THE ENGLISH CRAFT GILDS AND THE GOVERNMENT 13–14 (1905) (noting Conqueror’s policy toward boroughs); 1 POLLOCK & MAITLAND, \textit{supra} note 22, at 638 (burgesses collected liberties from king).

\textsuperscript{118} ADOLPHUS BALLARD & JAMES TAIT, BRITISH BOROUGH CHARTERS 1216–1307, at xvii–xviii (1923) (observing that the crown’s inspeximus became common in the thirteenth century); 1 GREEN, TOWN LIFE, \textit{supra} note 43, at 211 & n.1 (noting that new reigns meant burgesses had to buy confirmations); 1 POLLOCK & MAITLAND, \textit{supra} note 22, at 574 (remarking that the king granted liberties and resumed privileges for abuse or non-use).

\textsuperscript{119} BALLARD, B.B.C., \textit{supra} note 54, at xlii–xliii, 7–14 (discussing charter confirmations).

\textsuperscript{120} BALLARD & TAIT, \textit{supra} note 118, at lxxii, lxxiv; 1 POLLOCK & MAITLAND, \textit{supra} note 22, at 571–72, 574. Liberties and privileges belonged to the king, and if seized, restoration became a matter of grace.


\textsuperscript{122} 1 POLLOCK & MAITLAND, \textit{supra} note 22, at 574; see also 1 GREEN, TOWN LIFE, \textit{supra} note 43, at 211.

\textsuperscript{123} MAITLAND, DOMESDAY, \textit{supra} note 20, at 43, 49–50, 270, 272.
privileges, and what privileges had been purchased. 124

Privileges to burgesses, like those to other entities, often included fiscal privileges, jurisdictional privileges, mercantile privileges, and privileges from various personal services. 125 Many boroughs received some variation of the generic charter language granting sake and soke, toll, team, and infangenenetheof. 126 The grant of sake and soke to a borough has been described as the right to form a borough court if it did not already have one. 127 The borough court exercised administrative and judicial functions. 128 Borough courts were sheltered somewhat from developments in the royal courts such as the royal jury system. 129 Burgesses also received judicial immunities to be free from pleas outside the borough walls. 130 Some bor-


125. BALLARD, B.B.C., supra note 54, at xix, xlv–lxxi; 1 POLLOCK & MAITLAND, supra note 22, at 642–52.

126. BALLARD, B.B.C., supra note 54, at liv; see supra notes 50–57 and accompanying text (sake and soke formula).

127. BALLARD, B.B.C., supra note 54, at lii–liv, lvi–lx (grant of sake and soke to borough creates court; grant of sake and soke to individuals or entity within borough creates soken: a jurisdictional oasis within larger borough jurisdictional oasis); 1 LIPSON, supra note 71, at 195 (borough court’s importance). But see BALLARD, DOMESDAY BOROUGHS, supra note 28, at 50 (commenting that not all holders of sake and soke had courts; instead, some grantees might merely collect owed forfeitures from another tribunal). Grants of sake and soke began to disappear as the town developed a community status. 3 WILLIAM STUBBS, CONSTITUTIONAL HISTORY OF ENGLAND 580 (5th ed. 1903); see also supra note 52 (disappearance of sake and soke grant).

128. 1 LIPSON, supra note 71, at 275 (describing the important functions of borough court in collection of revenue, administration of justice, and election of borough officers); YOUNG, supra note 90, at 69–91; see also 1 HOLDSWORTH, supra note 85, at 148–49; 2 id. at 386 (civil and criminal jurisdiction of borough court); MAITLAND, TOWNSHIP & BOROUGH, supra note 109, at 75.

129. 1 POLLOCK & MAITLAND, supra note 22, at 295–96, 643–45; STEPHENSON, supra note 88, at 134, 137. The preferred method of proof in the borough was compurgation, a form of an oath of character. BALLARD, B.B.C., supra note 54, at lx; 2 MARY BATESON, BOROUGH CUSTOMS xxvii (1906). In most boroughs, the administration of trial by battle was prohibited. BALLARD, B.B.C., supra note 54, at lx; 2 HOLDSWORTH, supra note 21, at 386, 389–90, 397–400 (examining the influence of common law in boroughs).

130. BALLARD, B.B.C., supra note 54, at lv–lvi (jurisdictional immunities); BALLARD & TAIT, supra note 118, at lx–lxii (noting, with few exceptions, boroughs could not try pleas of the crown); id. at lx (observing the merchant law exception to pleading within borough’s walls); 1 LIPSON, supra note 71, at 217 (discussing reasons for immunity from external justice); id. at 256 (stating immunity did not extend to piepowder court during fairs); 1 POLLOCK & MAITLAND, supra note 22, at 643, 676 (burgesses privileged from foreign courts; procedure for obtaining jurisdiction of claims involving burgesses in king’s courts);
oughs had the privileges of return of writ and non-intromittant, in which cases the burgesses were generally free from the sheriff and royal officers.\textsuperscript{131} Many charters also provided that burgesses were immune from suit in the general hundred and shire courts.\textsuperscript{132}

As boroughs evolved, similarities developed between borough privileges and immunities. The crown’s twelfth-century charter accelerated this uniformity by granting boroughs the generic liberties and free customs pertaining to a free borough.\textsuperscript{133} In the early part of the twelfth century, new boroughs were created with grants of burghal privileges in “liberum burgagium” (free burgage).\textsuperscript{134} Toward the end of the twelfth century, crown charters used the equivalent term “liber burgus” (free borough) to denote the general liberties and free customs of a free borough.\textsuperscript{135}

The free customs of a free borough contrasted with heavy labor services of villein tenure. The basic and most important aspect of a free borough was holding land by borough or burgage tenure.\textsuperscript{136} Burgage tenure meant holding heritable land and a house in the borough free of most services in exchange for burgage money rents, similar to the tenurial characteristics of socage tenure.\textsuperscript{137} Though aspects of burgage tenure appear be-
fore the Domesday Book, this tenure became more common in the twelfth century. Both free burgage and free borough grants were generic and variable concepts that might extend beyond simple burgage tenure. The concept of free borough status for private boroughs might be basic burgage tenure—a lord could enfranchise a manor, abolish villein customs, charge money rents, and allow tenants to form a borough court and collect profits. A free borough for established boroughs may take simple burgage tenure for granted and its application of free borough status might include greater franchises.

In addition to the basic grant of free borough status, charters to mesne lords or boroughs facilitated the incorporation of the liberties and free customs of another borough. Many lords and boroughs crafted their requests for charters by expressly referencing a mother charter, or a well-known borough with whom the burgesses wanted to associate as the definition of their liberties and free customs. Other charters might empower a mesne

138. The Domesday Book was a type of medieval census book collecting demographic, economic, and other data for the King in 1086. The primary purpose of the book was to assist the king in collecting taxes. MAITLAND, DOMESDAY, supra note 20, at 1, 3–5.

139. TAIT, supra note 86, at 100–03, 106–07, 214–15, 219 (finding burgage tenure represented a whole body of burghal privileges).

140. TAIT, supra note 86, at 211–12, 214–17 (summarizing that free borough status might clumsily vary from the privileges of London to the lowly privileges of a seignorial borough).

141. 1 POLLOCK & MAITLAND, supra note 22, at 295, 639–40 (abolishing villein customs such as heriot and merchet in exchange for money rent).

142. TAIT, supra note 86, at 195–97, 206 (observing that burgage tenure was taken for granted in more advanced boroughs); id. at 211–17 (summarizing various definitions and applications of free borough grants ranging from mere burgage tenure to specified liberties above simple burgage tenure). The free borough clause, though generic and variable, likely did not include privileges to have a market or fair, the gild merchant, or exemption from tolls throughout the realm which must be specifically granted by charter. Id. at 195–96, 198, 209–11, 215 (finding that liberties beyond the concept of free borough status were usually specified). But see 1 CHARLES GROSS, THE GILD MERCHANT 5–6 (London, Oxford Press 1890) (listing set of privileges which might be associated with free borough including independent judiciary, firma burgi, commutation of tolls, markets, self-election of officers, judicial privileges, and gild merchant).

143. 1 GROSS, supra note 142, at 88, app. E at 242–43; see also BALLARD, B.B.C., supra note 54, at xli–xlii (characteristics of affiliation); id. at cviii (describing frequency of borough affiliation); 1 HOLDSWORTH, supra note 85, at 140.
lord as grantee to choose the reference borough. The mother borough became more than a town with a reference charter and often served as counsel and support for the child borough. In some cases, the child town served as the parent of another town.

Direct association and free borough status were powerful tools assisting many private boroughs as the liberties of both royal and mesne boroughs converged in favor of the protections of free boroughs. Cities sought to gain from the struggles of other cities by associating with their underlying liberties or with their charters directly and thereby obtaining the benefits they had achieved. With association and charter, boroughs of the twelfth and thirteenth centuries achieved a level of uniformity not present in earlier times.

144. TAIT, supra note 86, at 197–208. The grantee might have discretion to choose between royal and other boroughs, but burgesses of a private borough might prefer association with a royal borough for greater judicial privileges. Id. at 199–200, 200 & n.5; see also infra note 148 (recognizing conditions under the king were better). A mesne lord would be restricted from granting some privileges without the crown’s authorization. BALLARD, B.B.C., supra note 54, at xcii; BALLARD & TAIT, supra note 118, at xlx.

145. 1 GROSS, supra note 142, at app. E at 254–57. The Ipswich charter at the turn of the thirteenth century also served as a model for English boroughs. TAIT, supra note 86, at 270–72.

146. 1 GROSS, supra note 142, at app. E at 242, 259–64 (illustrating procedure and practice of association with examples); see also BALLARD, B.B.C., supra note 54, at xlii.

147. 1 GROSS, supra note 142, at app. E at 243–44.

148. See supra notes 134–47 and accompanying text (discussing grants of free borough status to mesne (lords) and royal boroughs). The liberties and free customs of royal towns often became the standard for a free town. 1 GREEN, TOWN LIFE, supra note 43, at 197–98 (observing that private lords imposed heavy burdens, taxes, and imprisonment; controlled membership and burgesses’ travel); id. at 227–49 (noting king had more important concerns and was less worried about his towns’ privileges and thus was willing to grant privileges to royal towns in return for support or revenue); id. at 250–51 (finding private burgesses’ privileges were obtained through weakness of overlord rather than through his goodwill); id. at 250–55, 270–76 (hardships for townsmen under private lord); id. at 277–308 (comparing stark contrast between royal town with ample privileges and oppressed town under ecclesiastic control); 1 LIPSON, supra note 71, at 202–03 (royal town’s superior status); STEPHENSON, supra note 88, at 140–41; see also infra note 486 and accompanying text (noting towns’ liberties, especially London’s, not only a reference for other boroughs but also a benchmark for liberty of Englishmen).

149. 1 GROSS, supra note 142, at app. E at 241–67. Boroughs under royal control obtained liberties more quickly than those under private rule. See supra note 148 (contrasting free and private towns); infra notes 223–24 (influence of free towns and royal privileges on private towns under lord or church).

150. BALLARD & TAIT, supra note 118, at xviii–xix (discussing uniformity of borough charters while recognizing greater variety of privileges in grants to private boroughs under
Borough uniformity was further developed by the crown’s community privilege of farming the borough. The farm of the borough (firma burgi) was the lump sum paid from the court fines, market tolls, mints, and other sources of royal revenue for which the borough was responsible.151 By the compilation of the Domesday Book, the sheriff was farming the revenue of the borough and paying a fixed sum to the crown.152 In royal boroughs, a royal officer collected the income and accounted to the sheriff for the farm, sometimes directly to the king.153 In a private borough, the collection was handled by the lord’s officers.154

The sheriff sometimes leased the borough to a speculator who paid the fixed sum and gained what he could from the farm beyond the amount of the lease due to the king.155 To acquire independence, burgesses desired to pay for their own farming right.156 In exchange for large fees, by the end of the twelfth century, kings granted to boroughs the privilege to farm the borough perpetually in fee and the right to elect an officer to pay the rent to the royal treasury directly.157 Many boroughs were willing to pay oppressive amounts—above the fixed amount for which the sheriff was responsible—to be free of the sheriff as the financial agent of the borough’s farm.158 The grant of firma burgi provided a sense of community, reduced the extor-

mesne lords); 1 GROSS, supra note 142, at app. E at 243, 257 (pointing out that affiliated boroughs shared many features but also retained differences).

151. HEMMEON, supra note 94, at 154; 1 LIPSON, supra note 71, at 215 (observing that firma burgi did not cover all royal income); MAITLAND, DOMESDAY, supra note 20, at 204; TAIT, supra note 86, at 141, 146–47.

152. TAIT, supra note 86, at 140.

153. BALLARD, B.B.C., supra note 54, at lxxxv–lxxxvi.

154. Id. at lxxv; cf. CAM, HUNDRED ROLLS, supra note 49, at 93–95, 142–45, 161–64 (discussing characteristics of and collection procedures for both royal and private hundred farms).

155. BALLARD, B.B.C., supra note 54, at lxxv; BALLARD, DOMESDAY BOROUGHS, supra note 28, at 91–92.

156. BALLARD, B.B.C., supra note 54, at lxxvi.

157. TAIT, supra note 86, at 123, 139–93, 345–46; see also BALLARD, B.B.C., supra note 54, at lxxvii, lxxxv–lxxxvii (describing office of elected reeve or bailiff to collect farm); YOUNG, supra note 90, at 16–30 (borought officers and firma burgi). The bailiffs collected the fees, and the officers and burgesses of the borough were liable jointly and severally for the fixed rent due to the king. BALLARD & TAIT, supra note 118, at lxxi–lxxii (noting full corporate characteristics not yet developed); MAITLAND, TOWNSHIP & BOROUGH, supra note 109, at 76–77.

158. BALLARD, B.B.C., supra note 54, at lxxvi, lxxvii.
tion of the sheriff, and helped emancipate the borough.\textsuperscript{159} The privilege of \textit{firma burgi}, like other privileges, might be seized by the king if a town violated or abused a privilege or failed to make its payment.\textsuperscript{160}

With various privileges, franchises, and freedoms, burgesses began to develop a community status free of the sheriff and royal management.\textsuperscript{161} Because farming the borough treated burgesses as an entity, commentators note that the grant of \textit{firma burgi}, along with the collective influences of the gild and borough court, was a leading step in the formation of the municipal corporation of the late Middle Ages.\textsuperscript{162}

\textbf{F. Gilds and Gild Merchant}

One of the borough’s most important features for students of American history is the formation and development of the gild.\textsuperscript{163} After the Conquest, burgesses received mercantile privileges to establish a gild merchant, a monopolistic union of traders within the borough.\textsuperscript{164} The gild’s main possessions were mercantile and fiscal immunities to buy and sell retail and

\begin{itemize}
\item \textsuperscript{159} Tait, supra note 86, at 157–58; see also 1 Lipson, supra note 71, at 215–17; cf. CAM, HUNDRED ROLLS, supra note 49, at 93, 143–44, 163 (similar accounts of oppression occurring with collection of hundred farms). By the beginning of Henry III’s reign, most larger towns had farming privileges. Ballard & Tait, supra note 118, at lvi. Burgesses also desired the privileges of non-intromittant and return of writ to rid themselves of the sheriff’s judicial powers and royal officers. See supra note 131 and accompanying text.
\item \textsuperscript{160} Hemmeon, supra note 94, at 155; 1 Lipson, supra note 71, at 215 (noting occasional revocation of grant of \textit{firma burgi}). If the town abused its charter, the king might seize its liberties, and restoration became a matter of grace. See supra notes 120–22 and accompanying text.
\item \textsuperscript{161} Id., supra note 86, at 159, 234, 264, 345–46.
\item \textsuperscript{162} Id. (suggesting election of royal officers to collect \textit{firma burgi} was a step in formation of borough community); see also Maitland, Domesday, supra note 20, at 205–06; 1 Pollock & Maitland, supra note 22, at 651 (commenting on quasi-ownership with grant of \textit{firma burgi}, but noting town did not have full community status as escheats did not go to community); infra Part II.F illustrating gild’s influence in boroughs.
\item \textsuperscript{163} The grant of gild merchant typically required a royal charter. Ballard & Tait, supra note 118, at lxxxiii; 1 Gross, supra note 142, at 91; Tait, supra note 86, at 210. For a discussion of medieval gilds merchant, see Miller & Hatcher, supra note 95, at 290–98.
\item \textsuperscript{164} 1 Gross, supra note 142, at 4 (monopolistic union); id. at 25–26 (discussing Ipswich monopoly on buying and selling certain products). But see Reynolds, supra note 114, at 81–82 (noting presence of gild societies before Conquest); 1 William R. Scott, The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720, at 5–6 (1912) (describing gild merchant’s formation from earlier societies and discussing rationale behind exclusivity in medieval trade); Tait, supra note 86, at 120–21, 136 (commenting on gild’s presence before Conquest). For history on early family and religious gilds, see Joshua Toumin Smith & Lucy Toumin Smith, English Gilds (London, N. Trubner & Co. 1870).
\end{itemize}
wholesale without toll and free of other restrictions. 165

Before England saw the governor of the company or the mayor of the town, the gild had elected an alderman as its leader. 166 Gild aldermen were accompanied by assistants of various titles. 167 The gild’s business took place at a periodic meeting (morning-speech) where the gild admitted members, adopted bylaws, and carried out administrative duties. 168

To become a member of the gild, one paid admission to the gild and swore an oath to preserve the privileges of the fraternity. 169 Foreign merchants who were not members of the borough could join the gild. 170 The crown perceived the foreign merchant as a source of crown revenue. 171 The barons, too, felt merchants were useful as they lent money and lowered prices. 172 But burgesses felt foreign merchants were a threat. 173 Locals

165. 1 GROSS, supra note 142, at 39–52 (summarizing non-gildsmen’s restrictions on owning shops, on free trade of certain products, on trade of other products at certain times, and restrictions on non-gildsmen’s buying or selling retail); see also infra notes 173, 175 and accompanying text (noting discrimination against and regulation of aliens and non-gildsmen).

166. Lujo Brentano, Introduction to JOSHUA TOULMIN SMITH & LUCY TOULMIN SMITH, ENGLISH GILDS, at xxxviii (London, N. Trubner & Co. 1870); see also infra note 167.

167. 1 GROSS, supra note 142, at 24–28 (describing the election of gild alderman and assistants); id. at 78–79 (noting the distinction between gild aldermen and ward aldermen of town council). By the sixteenth century, the alderman might be known as “governor” presiding over the governance of the gild house. 1 SCOTT, supra note 164, at 7. Assistants typically came in multiples of twelve, e.g., twenty-four assistants to the alderman or governor. Id.; see also infra notes 193, 196–205 and accompanying text (commenting on borough councils of twelve and twenty-four).

168. 1 GROSS, supra note 142, at 32–33; Brentano, supra note 166, at xxxii–xxxiii. The gild recorded customary bylaws as the gild’s particular privileges were not specified in their charters. 1 SCOTT, supra note 164, at 7–8.

169. 1 GROSS, supra note 142, at 29, 38. To retain good standing, gildsmen had to be lot and scot with the burgesses, i.e., had to pay their town dues alongside burgesses. Id. at 53–57.

170. Id. at 66–68; 1 LIPSON, supra note 71, at 276.

171. 1 LIPSON, supra note 71, at 517, 537 (noting payment of higher alien duties and resource for loans). In the early part of the fourteenth century, the crown protected alien merchants’ trading privileges with the Carta Mercatoria in exchange for new alien customs. T.H. LLOYD, ALIEN MERCHANTS IN ENGLAND IN THE HIGH MIDDLE AGES 26–28 (1982).

172. 1 POLLOCK & MAILLAND, supra note 22, at 464.

173. WILLIAM CUNNINGHAM, ALIEN IMMIGRANTS TO ENGLAND 124–29, 203 (New York, Macmillan Co. 1897) [hereinafter CUNNINGHAM, ALIEN IMMIGRANTS] (examining animosity toward aliens in late medieval period); 2 GREEN, TOWN LIFE, supra note 43, at 94–95 (identifying conflict over job shortages and foreign merchants); 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 94–95 (photo. reprint 1966) (3d ed. 1944) (noting discrimination against aliens and protection of foreigners through national legislation); 1 id. at 540–41 (observing that burgesses suppressed foreign merchant’s ability to trade in town); 1 LIPSON,
complained that they could not compete with outside merchants who were free from local expenses but traded freely in the town alongside burdened locals. 174 Because of the tension, boroughs protected their mercantile privileges by regulating the ability of non-gild foreign merchants to trade, buy, sell, set up shop, and hold land in the borough. 175

One of the highly valued privileges of the gild was the grant of freedom from toll throughout the realm to members of the gild. 176 If a gildsman or burgess of a privileged borough went to another fair or market and was tolled despite presenting charters of exemption, the gild or borough could seek to recover the injury to its privilege by litigation or reprisal. 177 Many foreign merchants were also exempt from certain tolls by a provision in their home charter, and in these cases the towns had to sort out the conflicting privileges. 178

The privileged trading communities and markets were the driving force of the nation’s commerce. 179 For many towns, especially private towns under a mesne lord, the only town function was commerce through the gild. 180 Over time, specific craft gilds grew as offshoots to the general

supra note 71, at 499–501, 516–37 (discussing tension between alien merchants and locals); 1 Pollock & Maitland, supra note 22, at 464–65.

174. 1 Lipson, supra note 71, at 466–67 (noting presence of foreign weavers who enjoyed benefits but did not have to pay royal fees that local weavers had to pay); Cunningham, Alien Immigrants, supra note 173, at 98 (detailing change in policy so that aliens residing in city more than forty days had to contribute proportion of taxation that fell on denizens).

175. 1 Gross, supra note 142, at 41–42, 45, 46–48, 133, 134; see, e.g., 2 Green, Town Life, supra note 43, at 39–50 (explaining relations between foreign merchants and towns; burgess could lose citizenship for assisting foreign merchants in evading restrictions); 1 Lipson, supra note 71, at 265–69 (emphasizing restrictions placed on foreign competition); id. at 499–501, 516–35 (discussing conflict with aliens); see also supra note 173.

176. 1 Gross, supra note 142, at 43–44; 1 Lipson, supra note 71, at 279.

177. 1 Pollock & Maitland, supra note 22, at 666–67.

178. Ballard, B.B.C., supra note 54, at lxix (explaining that some towns were exempt in England and some were exempt throughout realm); 1 Lipson, supra note 71, at 284–86 (noting burgesses might carry charter with them to outside fair as proof of immunity). Many charters provided a clause saving London’s privileges so there would be no confusion in a conflict between privileges. See, e.g., Ballard, B.B.C., supra note 54, at 14, 15, 35; Ballard & Tait, supra note 118, at 29; cf. Norton, supra note 33, at 67–69.

179. 2 Green, Town Life, supra note 43, at 55–56 (finding that commercial community privileges of borough or gild were a “great engine” for abolishing restrictions and creating national commerce).

180. 1 Gross, supra note 142, at 90–92 (discussing gild’s presence in small mesne borough as only town function and contrasting gild’s lesser influence in royal boroughs with independent court). London never received the right to form a gild merchant, though crafts
mercantile interests of the gild merchant.181 Craft gilds included merchants of particular trades and those in various stages of production.182 The increase in craft gilds decreased the power of the gild merchant.183

G. Borough Governance and Municipal Incorporation

A second feature vital to the study of American history is the development of local government in the borough. Medieval borough and gild governance provided the seeds for self-government in merchant and adventurer societies, ultimately leading to similar features in colonial governments. By the time the American colonies had settled, there were three forms: the proprietary colony, the royal colony, and the corporate colony.184 In all three instances, colonies borrowed from medieval institutions, especially borough and gild governance.185

The gild was one of many dynamics influencing borough citizenship and governance. In some boroughs, craft gilds merged with the gild merchant; in other boroughs, the gild merged with the borough’s governing body—a characteristic explained by the fact that gild officers composed a

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181. 1 GROSS, supra note 142, at 114–16; 1 LIPSON, supra note 71, at 308 (observing that craft gild consisted of masters, journeymen, and apprentices); id. at 328 (concluding that the craft gild’s primary function was to control a segment of industry through a network of restrictions); id. at 337 (noting craft gilds regulated prices); id. at 349–50 (control of craft resided with assembly and wardens; wardens generally elected by assembly of company); id. at 364 (comparing craft gild with gild merchant). See generally KRAMER, supra note 117 (describing transition from gild merchant to craft gild). The craft gild might have a charter like the gild merchant but it was not necessary; adulterine craft gilds in twelfth-century London that did not purchase charters of association were stigmatized. 3 STUBBS, supra note 127, at 585. But see KRAMER, supra note 117, at 42–43 (observing that many crafts in Bristol did not have charter).

182. 1 GROSS, supra note 142, at 120–29 (distinguishing gild merchant from crafts and crafts from other crafts); 2 GREEN, TOWN LIFE, supra note 43, at 112–13 (describing types of crafts).

183. 1 GROSS, supra note 142, at 114–23. Over time, craft gilds merged with gilds merchant and together both merged with the governing body of the borough. Id. at 107, 115–26, 158–61; 1 LIPSON, supra note 71, at 371–75 (noting crafts’ submission to town authority and town’s removal of restrictions on crafts accelerated their growth and absorption of gild merchant); id. at 423–26 (amalgamation of crafts); 3 STUBBS, supra note 127, at 583, 584–85.

184.  See infra note 331, Part IV.A–C.

185.  See infra note 376, Part IV.D.
large proportion of the borough’s leading officials.186 After some time, the qualifications for membership or freedom of the town expanded beyond burgage tenure to include gild apprenticeship and purchase or inheritance.187 Freedom of a craft or gild became synonymous with freedom of the city.

Gild leadership and organization influenced town leadership and organization. Ancient communal features of the gild provided the borough with a community status—a characteristic further reinforced by the borough’s community farming privileges discussed above.188 Before the turn of the thirteenth century, the king had appointed the official town leader, the king’s reeve.189 The gild had elected its leader for some time, but the borough did not have an elected leader. Because of the overlap in the entities, Professor Tait suggested that the influence of an elected officer in the gild facilitated the development of a similar institution in the town.190 Shortly before the thirteenth century, London received the right to elect its

186. 2 GREEN, supra note 43, at 145–60 (finding heavy regulation of gild eventually generated town dependency on gild officers and resources); 1 LIPSON, supra note 71, at 277–78 (recognizing that borough governance and gild function merged); TAIT, supra note 86, at 226–27 (noting that borough and gild shared features and personnel); see also supra notes 182–83 and accompanying text (interrelationship between gild merchant and craft gilds). Though there often was overlap, the gild was not fully interchangeable with the town’s administration. 1 GROSS, supra note 142, at 61–63, 65–72, 75, 85, 92, 111–13, 126 (suggesting that crafts may have assisted town oligarchies but did not supplant them); 1 LIPSON, supra note 71, at 369 (explaining that crafts did not want to be absorbed into taxation and jurisdiction of town and gild merchant).

187. 1 FIRST REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE MUNICIPAL CORPORATIONS IN ENGLAND AND WALES 18–19 paras. 18–23 (1835) [hereinafter FIRST REPORT] (stating that, in some towns, gild membership was required for town membership); 1 GROSS, supra note 142, at 71 n.3, 123–26 (membership through birth, apprenticeship, inheritance, gift, or purchase); 1 LIPSON, supra note 71, at 385–86 (town membership through gild membership); 3 STUBBS, supra note 127, at 583–84, 585–87, 593, 596 (gilds’ growth and interaction with municipal governance and freemanship); TAIT, supra note 86, at 249 (gild membership occasionally required).

188. TAIT, supra note 86, at 234 (farming and associated privileges unified community); id. at 263–64 (gild gave semi-corporate status to borough community).

189. Id. at 225–28, 255.

190. Id. at 225–26 (gild influences enabled community growth); id. at 227 (noting double capacity of citizens who were members of both gild and borough). At times, the gild’s alderman, whose authority was generally limited to commercial matters, was considered the town leader even on matters outside of trade, as Tait noted “one body with two aspects.” Id. at 227, 231–32, 248. Burgesses, for example, might borrow gild institutions for town activity, promoting the eventual linkage between the two institutions. 1 GROSS, supra note 142, at 82–83, xviii–xix (borough open-air gatherings borrowed gild’s hall, which eventually became part of town).
Following London’s example, several boroughs, especially the larger, more advanced boroughs, provided for civic leaders. In the evolution of the English municipality, bodies of assistants, aldermen and common councilors, to a greater or lesser degree representative of the borough and often in multiples of twelve, grew alongside civic leaders. Membership in these councils was reserved to the more important, wise and discrete men of the borough (probi homines), from whom the councils were chosen or by whom councils were otherwise influenced. Gilds, too, played a role in influencing and providing membership to borough councils.

Accompanying the town’s civic leader, a formal town council of twelve or twenty-four good men assembled as a sworn body of aldermen to assist the mayor. By the thirteenth century, London’s mayor and aldermen were summoning an assembly from the community to help perform the work of the city as a second council assisting the mayor and town council. By the middle of the fourteenth century, gilds were included in the summons. As London had election privileges, summoned assemblies

192. 2 GREEN, TOWN LIFE, supra note 43, at 274–76 (election of mayor varied from town to town); MILLER & HATCHER, supra note 95, at 307–08; TAIT, supra note 86, at 291 (noting examples of boroughs following London’s mayor). The office of mayor did not always require a royal charter. BALLARD & TAIT, supra note 118, at lvi (finding presence of mayor without royal charter and observing mayor’s interaction with gild aldermen).
193. See infra notes 196–205 and accompanying text. In the early thirteenth century, to help carry the burden of governance or to curb abuse of taxation by the ruling class, London elected assemblies to assist in governance. TAIT, supra note 86, at 267–69.
195. See supra notes 183, 186–90 and accompanying text (shared officers and merger of institutions); infra notes 198–203 and accompanying text (gild influence in election assemblies and common council).
196. TAIT, supra note 86, at 264, 266–67, 270, 280–81, 284. London’s twenty-four aldermen were nominated by the citizens of their respective wards. Id. at 281; see also 2 GREEN, TOWN LIFE, supra note 43, at 277–78 (selection of town council in other towns). Aldermen had power ranging from co-management to mere advice. These elected aldermen or assistants, though subordinate to the mayor, grew in election, appointment, and judicial responsibilities. Aldermen at times were restricted to one-year terms but eventually this restriction was removed and aldermen were in office for life, removable for reasonable cause. TAIT, supra note 86, at 282–84, 311–12, 313.
197. TAIT, supra note 86, at 303–05.
198. Most of London’s work was done by the town council and aldermen, but if the commonalty was needed, the town might summon the crafts. PAMELA NIGHTINGALE, A MEDIEVAL MERCANTILE COMMUNITY: THE GROCERS’ COMPANY & THE POLITICS & TRADE OF
had to differentiate between functions—forming administrative assemblies for ordinary business and election assemblies for the election of the mayor and other officers. With London’s 1376 reforms and the amalgamation of the two types of assemblies, gilds were able to appoint assembly (common council) representatives. Some felt the gild was a better body than the ward for electing the common council because its influence was able to reduce the arbitrary rule of the ruling class. Gild representatives, at least initially, were seen as useful to the commoners to help break up the monopoly powers of the mayor and aldermen and promote free trade. Direct gild election also secured participation by minority gilds. Many of the 1376 reforms, however, were short lived, and election of the common


199. TAIT, supra note 86, at 305. Election of the mayor in London was initially entrusted to the aldermen and nobles. Later the mayor was elected by the aldermen assisted to some degree by an election assembly attended by ward or gild designees. Id. at 305–10; see also NORTON, supra note 33, at 115; WILLIAMS, supra note 194, at 27, 40–41, 43 (tension and transformation in procedure for electing mayor). Elected mayors and bailiffs might be presented to the king for approval. 3 STUBBS, supra note 127, at 587; TAIT, supra note 86, at 349. Until the mid-fourteenth century, men of the ward generally nominated representatives for the administrative assembly. TAIT, supra note 86, at 307–08 (tracing evolution of both assemblies and noting ward’s selection of administrative assembly); id. at 310, 311 (distinguishing election and administrative assemblies).

200. London’s 1376 reforms temporarily combined the election and ordinary assemblies, referred to as the “common council,” and required the body meet several times a year rather than be summoned. TAIT, supra note 86, at 309–10 (describing circumstances and gild influence before and after 1376 change); id. at 311 (merger of assemblies in 1376 reforms); UNWIN, supra note 198, at 130–31.

201. See infra notes 202–03 and accompanying text.

202. TAIT, supra note 86, at 309–10, 311; UNWIN, supra note 198, at 63–64, 130–131, 135 (abuse by aldermen led to gilds’ involvement in common council); see also 2 GREEN, TOWN LIFE, supra note 43, at 167–68 (commoners looked to gild resources to fight ruling party); id. at 170–77 (privileged gild in Exeter mobilized commonalty against arbitrary government and taxation by municipal authority until king revoked gild’s privileges in favor of municipality). Tait noted that confidence in the gild was further confirmed by the fact that legislation with only gild approval was acceptable but legislation of mayor and aldermen alone was void and needed further support. TAIT, supra note 86, at 310–11.

203. Gild representation might have also served lesser gilds seeking to gain a voice among the larger trading companies. CAROLINE M. BARRON, LONDON IN THE LATER MIDDLE AGES: GOVERNMENT AND PEOPLE, 1200–1500, at 130–31 (2004); NIGHTINGALE, supra note 198, at 245–46.
council returned to the wards.204 Following London’s example, many towns added a common council to their governing body.205

A brief review of medieval town governance highlights a few trends. On the one hand, arbitrary rule by a select ruling class during the fourteenth and fifteenth centuries, especially concerning taxation, resulted in the formation of councils, more or less representative of the wards, or at times, the gilds.206 On the other hand, there was a common perception that the com-

204. TAIT, supra note 86, at 312–13. During this period, election of the common council volleyed back and forth between men of the wards and the companies. Shortly after the reforms of 1376, other probi homines who were not members of the gild were added to the common council, a change that soon became a permanent substitution for gild designees. Id. at 313. Within a decade of the 1376 reforms, the assemblies again differentiated and the election of the common council (administrative assembly) returned to the wards. NIGHTINGALE, supra note 198, at 284; TAIT, supra note 86, at 313–14. With the separation, the election assembly became a larger body attended by the common council and the gilds. Id. at 313–14.

London’s representatives to Parliament were also selected by the larger election body. NORTON, supra note 33, at 114–15, 116; 3 STUBBS, supra note 127, at 596. The crown frequently sought burgesses’ support and input on the great affairs of the realm, and borough representatives became a regular part of Parliament by 1300. YOUNG, supra note 90, at 151–54. The idea behind the Model Parliament is captured in the famous phrase, “quod omnes tangit, ab omnibus aprobetur” (what touches all, shall be approved by all). GEORGE L. HASKINS, THE GROWTH OF ENGLISH REPRESENTATIVE GOVERNMENT 72 (1960). The related principle that no taxation should be raised without common consent became commonplace in England with the statutes Magna Carta (1215), De Tallagio Non Concedendo (1297), and subsequent taxation statutes of 1340. 2 STUBBS, supra note 127, at 148–49, 401–02; see also supra note 69 (palatinates and representation in Parliament). For criticisms of the authenticity of De Tallagio Non Concedendo, see J.H. Round, The House of Lords and the Model Parliament, 30 ENG. HIST. REV. 385, 396 (1915).

205. TAIT, supra note 86, at 315–16 (describing London’s influence on other towns adding common councils and noting that London remained representative while many other towns became closed oligarchies).

206. The community, as distinguished from the mayor, aldermen, and sometimes from the common council, fought with the ruling body. TAIT, supra note 86, at 241–47. Lack of participation was a frequent grievance concerning municipal taxation. BARRON, supra note 203, at 133–34 (by fifteenth century, London’s common council consented to taxation); JENNY KERMODE, MEDIEVAL MERCHANTS: YORK, BEVERLEY AND HULL IN THE LATER MIDDLE AGES 56–60 (1998) (noting rioting by discontented commoner seeking greater access to town governance in late medieval period); MILLER & HATCHER, supra note 95, at 358–61 (abuse of taxation by ruling class led to greater involvement by community); 3 STUBBS, supra note 127, at 588 (lack of participation and unfair assessments by governing class prompted rise in commons); TAIT, supra note 86, at 267, 303, 317, 319, 332–33 (detailing popular resentment against arbitrary taxation and explaining how perceptions of arbitrary rule by powerful individuals (potentiores) in various towns prompted creation of council); id. at 319 (burgesses and lesser inhabitants petitioned king over taxation without representation and as a result obtained a more representative committee including both
mony in many towns went too far, was of poor quality, and elected unsuitable officers to run the town. In response, Parliament and the crown limited participation to stifle the agitation and democracy of the multitude. Though gilds were once regarded as a liberating force in breaking up elite ruling classes, by the end of the medieval period, wealthy gilds were viewed as detrimental to the town’s general welfare and came under heavy regulation. Eventually the governing body, perhaps aided by

common and lesser inhabitants); Charles W. Colby, The Growth of Oligarchy in English Towns, 5 ENG. HIST. REV. 644–46 (1890) (arbitrary taxation and abuse of government by few burgesses roused greater borough community); see also supra note 204 (borough representation in Parliament and principle of no taxation without common consent); cf. BALLARD & TAIT, supra note 118, at lxxiii–lxxiv (commenting on examples of towns’ citation to Magna Carta against excessive amercements but also noting Magna Carta’s limited effect as crown granted privileges by grace and could resume privileges when burgesses abused them). Charter provisions requiring some degree of “common consent” and “better government” were common themes in borough and merchant charters in the fifteenth and sixteenth centuries. See infra notes 210, 243–47 and accompanying text.

207. TAIT, supra note 86, at 323–24. In the latter part of the fourteenth century, officers of Norwich were of the opinion that the commonalty had been disruptive, and they successfully petitioned the king to allow the bailiffs and twenty-four aldermen to make ordinances for the good of government as needed without the addition of the commonalty in the process. Id. at 317. In the first half of the fifteenth century, though, the commonalty to some degree was added back in the form of a common council. Id. at 317–18.

208. Id. at 322–24 (regulations closed council membership to oligarchical body of discrete and wise men); see supra note 194. Despite earlier victories for representative government, Lynn, by a 1524 charter, became closed in the hands of the mayor, twelve aldermen, and eighteen common councilors. TAIT, supra note 86, at 321; Stephen Rigby, Urban ‘Oligarchy’ in Late Medieval England, in TOWNS AND TOWNSPEOPLE IN THE FIFTEENTH CENTURY 68 (J.A.F. Thomson ed. 1988); Jennifer I. Kermode, Obvious Observations on the Formation of Oligarchies in Late Medieval English Towns, in TOWNS AND TOWNSPEOPLE IN THE FIFTEENTH CENTURY, supra, at 87–106. The crown chose Lynn aldermen for life in the first instance, but vacancies were filled by common councilors. The common council elected one of the aldermen to serve as mayor each year. From a pool of burgesses, councilors were chosen at will with full removal power by the mayor and aldermen. Burgesses were admitted by the closed body. TAIT, supra note 86, at 321.

209. See supra notes 200–03.

210. MILLER & HATCHER, supra note 95, at 365 (grievances against gilds’ price-fixing); id. at 365–66 (crown prohibited establishment of gilds detrimental to city in late thirteenth-century charters; gilds placed under city’s supervision in late thirteenth century; gilds and town bid against each other for royal support and charter); id. at 366 (fourteenth-century gilds operated for their own profit and to the detriment of the general community); id. at 367 (town complained of defective products); id. at 368–69 (by mid-fourteenth century, gilds were under town authority and the town approved gild ordinances and gild officers).

In 1437 and 1504, Parliament passed legislation restricting self-interested gilds from operating to the detriment of the common people. UNWIN, supra note 198, at 160–62, 170 (noting London procured parliamentary legislation to combat wealthy crafts enfran-
gilds, formed oligarchies in the boroughs, and the governance of most boroughs became closed to select bodies—often to the disadvantage of the rest of the town.211

chised by crown’s privileges of incorporation). The 1437 act strengthened municipal supervision of gilds. 1437, 15 Hen. 6, c. 6; KRAMER, supra note 117, at 29–37, 47–48 (gilds in Bristol and other towns presented their bylaws to municipal authorities for approval); id. at 41–59 (gild’s royal charter presented obstacle to municipal control of gilds, resulting in parliamentary legislation); 1 LIPSON, supra note 71, at 372–84 (town’s powers over gilds with submission of gild bylaws for approval; town’s nomination of gild officials; town’s control over gild assembly and ordinances); id. at 418–19 (noting that 1437 legislation did not create new conditions but merely addressed variance created by royal charters granted to certain gilds and not to others); see also 2 GREEN, TOWN LIFE, supra note 43, at 130–31 (relationship between gild oligarchies and town oligarchies); id. at 137–40 (regulation of merchants to control prices); id. at 142–60 (merchants subordinated to common benefit and supervision of town; gilds rose from public regulation to seize control of municipality).

The 1504 Act renewed earlier legislation and added a national element that approval of gild ordinances (ordinances not “unreasonable”) must be received favorably by a combination of the chancellor, treasurer, chief justices of either bench, or royal justices. 1504, 19 Hen. 7, c. 7; KRAMER, supra note 117, at 60–63 (1504 legislation enhanced earlier legislation regulating gilds); 1 LIPSON, supra note 71, at 338–39 (unreasonable ordinances involved price-fixing); id. at 420–21 (contrasting 1504 legislation with 1437 legislation). By the mid-seventeenth century, courts struck down gild ordinances even though they had been approved by the authorities under the 1504 act. 3 LIPSON, supra note 71, at 349–50.

211. TAIT, supra note 86, at 302–03, 316, 321, 323, 338; see also FIRST REPORT, supra note 187, at 17, 18 (exclusion of common freemen from corporation and governance); 2 GREEN, TOWN LIFE, supra note 43, at 118–19 (gild oligarchies taxed arbitrarily, deprived commoners of free trade, and used town finances for personal use); id. at 247–49 (general town assembly initially was no cure to town oligarchy); id. at 249–53 (town governance remained in few worthy men, sometimes in leading families from generation to generation); 1 GROSS, supra note 142, at 109–10 (oligarchies in boroughs); id. at 126 (craft oligarchies assisted town oligarchies; “burgess” status frequently restricted to members of select governing body); REYNOLDS, supra note 114, at 132–38 (discussing factions in medieval towns, noting influences of crafts in town governance, and describing town division into greater and lesser burgesses); UNWIN, supra note 198, at 217 (oligarchies of sixteenth-century companies); cf. infra notes 381–84 and accompanying text (describing restricted political systems in New England).

London’s leading gild companies, the twelve great livery companies, influenced the governance of English municipalities and overseas merchants. The “livery” denotes a particular piece of clothing or uniform bestowed upon liverymen—a select body of influential freemen within the greater company of freemen. W.J. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY, PART II, END OF THE MIDDLE AGES 126, 131 (2d ed., London, Longmans, Green, & Co. 1893). Senior wardens and a court of assistants governed the livery company. GEORGE UNWIN, INDUSTRIAL ORGANIZATION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 41–42 (1904). The court of assistants was itself a select ruling body within the livery and chose liverymen from freemen. ASHLEY, supra, at 131–32; UNWIN, INDUSTRIAL ORGANIZATION, supra, at 43. Unwin noted that the livery company’s oligarchy and the town’s oligarchy shared many similarities. UNWIN, INDUSTRIAL
Municipal incorporation further reinforced oligarchical forces in English towns. During the Middle Ages, there were various types of communities including counties, hundreds, villages, boroughs, gilds, churches, colleges, and hospitals. Some of these communities became formal corporations. Incorporation of the English borough was the concept of forming an entity separate from its burgesses where, when fully realized, the assets and obligations of the corporation belonged to the community of burgesses and not to individual citizens. In an oligarchical town, the corporation might refer to a select body of burgesses who incorporated and owned town property. In these towns, municipal incorporation formalized the select body at the expense of the original powers held by burgesses.

Generally, incorporation of a borough was the crown’s formal recognition of preexisting municipal privileges. In many cases, before the borough became recognized as a formal corporation, it had “a natural corporate existence” as all of the features of a corporation were enjoyed by

ORGANIZATION, supra, at 73–74; see also ASHLEY, supra, at 125. The burgess with voting rights resembled the livery member, the common council resembled the court of assistants, and the town’s aldermen shared similarities with the livery company’s governing wardens. UNWIN, INDUSTRIAL ORGANIZATION, supra, at 73.


213. 1 GROSS, supra note 142, at 98–101 (gild a “communitas” along with villages, counties, hundreds, and others); 3 HOLDSWORTH, supra note 33, at 469 (listing examples); 9 id. at 45–72 (creation, powers, limitations, and dissolution of corporations); 1 POLLOCK & MAITLAND, supra note 22, at 486, 494, 564, 620.

214. 1 POLLOCK & MAITLAND, supra note 22, at 495, 534.

215. 3 HOLDSWORTH, supra note 33, at 482–89 (discussing realization of corporate personality from individual liability); 1 POLLOCK & MAITLAND, supra note 22, at 488; TAIT, supra note 86, at 234 (beginning of municipal incorporation).

216. FIRST REPORT, supra note 187, at 17 para. 13 (observing that municipal incorporation took away from community’s power as governing class became independent of greater community); id. at 34 (ruling class of corporation might abuse its power by monopolizing privilege of electing borough representatives to Parliament); 1 GROSS, supra note 142, at 96 (by Tudor and Stuart period, “corporation” referred to select body); 3 STUBBS, supra note 127, at 606–07 (oligarchic corporations acquired property and town governance to the exclusion of burgheers); TAIT, supra note 86, at 240–41 (noting burgesses included in concept of incorporation but probably not borough-wide concept); id. at 323 (example of incorporation of small body of individuals in name of community (official “burgesses”), reducing rest of town to mere inhabitants). Conditions in English towns generally remained the same until the nineteenth century. Parliament overhauled borough governance in 1835. Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76.

217. 3 HOLDSWORTH, supra note 33, at 475–79 (describing creation of corporation by king, Parliament, church, and by implication).
Corporations in their full form elect a leader, have a seal, make bylaws, enjoy the power to sue and be sued, contract, and can own and transfer property. In the fifteenth century, the number of grants of incorporation to burgesses and other communities began to increase. Before the close of the Middle Ages, the borough had achieved an independent identity through the collective influences of the gild, firma burgi, and borough self-governance. While the crown frequently granted privileges and immunities to its boroughs, towns on private estates struggled for freedom. Nonetheless, through association and assimilation, gild and community forces helped liberate the private town from the restrictive forces of the lord and church. The late medieval period provided many examples of

218. 1 Gross, supra note 142, at 95; 3 Stubbs, supra note 127, at 596–97, 604–06; Tait, supra note 86, at 234–37, 263–64 (features of corporateness in firma burgi, gild, and commune).


220. 3 Stubbs, supra note 127, at 606. One likely explanation for the increase is the 1391 legislation extending the statute of mortmain to gilds and towns. Platt, supra note 89, at 143–44. Gilds sought royal incorporation and license to hold in mortmain, but selective incorporation led to petitions requesting that Parliament intervene with legislation regulating crafts in the fifteenth century. Barron, supra note 203, at 208–10; Unwin, supra note 198, at 158–63, 170–72; see also supra note 210 (discussing Parliament’s regulations of gilds in fifteenth and sixteenth centuries).

221. 1 Gross, supra note 142, at 96–97 (concept of incorporation served as substitute for variable concept of liber burgus); 3 Holdsworth, supra note 33, at 476–77 (communities incorporated to receive and protect franchises).

222. See supra note 148 (comparing freer royal towns with private towns).

223. See supra notes 143–50 (association of borough charters to leverage liberties of freer towns). Community forces freed the town from the restrictive forces of the baron and eventually from the church. In many cases, the gild was a powerful liberating force for boroughs under private lords. 1 Green, Town Life, supra note 43, at 251–53 (merchants stayed away from arbitrary baronial boroughs; observing gild’s influence upon private towns); id. at 286–87, 300 (gild’s influence on towns under churches); id. at 296–98 (efforts by members of gild to free town); id. at 302–03 (summarizing gild as only outlet and identity for burgesses under mesne lord); 1 Lipson, supra note 71, at 204–10 (baronial burgesses purchased charter privileges and liberties, converging toward a free or royal borough); id. at 278–79 (gild’s corporate unity felt more in mesne borough struggling for liberty and self-
the mesne town struggling to free itself from customs, rents, and arbitrary taxation of the lord. The privileges and immunities of neighboring free towns served as a leverage point for the task.224

An examination of medieval royal privileges and immunities reveals dependence on the crown for the basic institutions of government. Before the Conquest, the church and crown, by royal charter, created privileged lands superior to other lands in alienability and heritability.225 Throughout the period under review, the crown granted fiscal, mercantile, and jurisdictional privileges and immunities to lords and entities.226 The crown extended its peace to boroughs, clothed burgesses with rights of governance, and nurtured urban mercantile associations.227 As a cohesive unit, governmental and administrative privileges and immunities granted to gilds and boroughs provided a ready model for advancing mercantile activity outside of the borough walls. These English institutions, transplanted by royal charter to voyaging merchant associations and explorers, provided the germ for similar institutions in the American colonies.

III. MERCHANTS, EXPLORATION, AND COLONIZATION: THE BEGINNING OF THE AMERICAN COLONIES

By the late medieval period, mercantile activity of English towns had expanded beyond the borough and local market to include a thriving international trade between English merchants and neighboring countries.228
Charter privileges and immunities to boroughs and gilds provided a template for charters to merchant trading associations engaging in foreign trade and exploration. In many instances, the institutions of these overseas traders were mere extensions of those of the urban mercantile community.

Merchants forming a trading association might receive rights to form a gild-based company. Gilds trading beyond England’s natural boundaries were prevalent throughout the medieval, Tudor, and Stuart periods. A common type of gild was the regulated gild. The regulated gild, with its governor and assistants, was a descendant of the craft or gild merchant with its aldermen, wardens, and assistants. In the regulated gild, similar to the gild merchant, members enjoyed exclusive privileges and traded freely for their own profit subject to the regulations of the company.

The crown’s formation of the joint-stock company replaced the regu-

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COLONIAL PERIOD] (trading companies and merchant adventurers); infra note 230 (merchants trading overseas).

229. See infra notes 230, 240–42 and accompanying text (merchant associations following municipal and gild governance models); see also 1 Gross, supra note 142, at 155–57 (discussing gilds and merchant companies, noting contrasting characteristics). The term “merchant adventurer” came into use late in the fifteenth century and often refers to a formal company. Douglas R. Bisson, The Merchant Adventurers of England: The Company and Crown 1474–1564, at 2–3 (1993); Carus-Wilson, supra note 228, at xv–xvi, 143–45 (defining term “merchant adventurer”). For purposes of this Article, “merchant association” might refer to generic merchant adventurers, merchant societies and fellowships, or a formal body of incorporated adventurers.

230. Carus-Wilson, supra note 228, at xxx–iv (York, Bristol, London, and other cities had merchants trading overseas); id. at 147, 150, 151–56, 163–64 (role of London Mercers); id. at 175–76 (London’s influence regulating merchants overseas); 1 Lipson, supra note 71, at 573 (London Mercers and other merchants formed merchant adventurers company). By the close of the sixteenth century, several cities had branches of merchant adventurers. 2 id. at 254–58.


232. Cecil T. Carr, Select charters of trading companies A.D. 1530–1707, at xii (1913) (noting presence of municipal institutions in merchant charters); 1 Scott, supra note 164, at 7 (describing evolution of regulated company from gild merchant); id. at 152 (joint-stock and regulated companies share many of same governance features); see also infra notes 240–42 (describing governance functions shared by gild, regulated company, and joint-stock company).

233. Carus-Wilson, supra note 228, at 162–64 (merchant adventurers amalgamated into regulated gild with members trading individually); Cawston & Keane, supra note 231, at 10; 1 Lipson, supra note 71, at 574, 575–76 (merchant associations were regulated companies; restrictions against interlopers); 2 id. at 195–96.
lated gild.\textsuperscript{234} In the joint-stock company, subscribers bought and sold subscriptions to the company in exchange for a proportionate share of the company’s profits.\textsuperscript{235} As a shareholder of the corporation, the owner had limited liability and could transfer his shares more freely.\textsuperscript{236}

Whether a regulated gild or a joint-stock company, merchant associations traveling abroad needed privileges and jurisdictional rights as they left their home ports. Traveling merchants needed protection from interlopers infringing on their trade monopoly and some form of authority from the king to travel and trade in a foreign land.\textsuperscript{237} The crown clothed these entities with privileges in exchange for services.\textsuperscript{238} Under similar conditions, merchant associations also required and received privileges from the foreign state.\textsuperscript{239}

In the latter part of the thirteenth century, merchants were traveling abroad and receiving self-governance privileges similar to those received by gilds and boroughs.\textsuperscript{240} Charters allowed merchants to assemble, elect a

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\item CARR, supra note 232, at xx–xxi (noting distinction between regulated gild and joint-stock company); CAWSTON & KEANE, supra note 231, at 9–10, 13 (comparing and contrasting the two types of companies); 2 LIPSON, supra note 71, at lvi–lx (case for and against regulated companies). The Russia Company (Muscovy) founded in 1553 and chartered in 1555 was the first formal joint-stock company for English merchants. 1 SCOTT, supra note 164, at 17–18. The joint-stock model was thought to be more suitable to adventurers far from port. 2 \textit{id.} at 36 (discussing formation of Russia Company modeled on regulated company but with joint-stock rather than individual capital).
\item CAWSTON & KEANE, supra note 231, at 12.
\item Id. (full liability in regulated company but liability limited to amount of shares in joint-stock company). Joint-stock corporations may have been more difficult to establish, but succession was easier and transfer of ownership was free of alienation, division, and inheritance issues accompanying a gild company or proprietorship.
\item CARR, supra note 232, at xv (noting royal permission was required to travel, trade overseas, and take resources out of realm). The crown on occasion forbade merchants from traveling to certain countries. GEORGE LOUIS BEER, THE ORIGINS OF THE BRITISH COLONIAL SYSTEM 1578–1660, at 16–17, 43 n.2 (1908) (citing body of law prohibiting English from traveling without license and noting adventurers’ desire for charter); \textit{id.} at 328–29 (license required to migrate to colonies); CARUS-WILSON, supra note 228, at 137, 167.
\item CAWSTON & KEANE, supra note 231, at 2, 10–11; see also CARUS-WILSON, supra note 228, at xxvi (noting value of foreign merchants to crown); CUNNINGHAM, ALIEN IMMIGRANTS, supra note 173, at 197–98 (creation of civil status for merchant adventurers in foreign lands).
\item Characteristics of gild evolved into a form used by other merchant associations. 1 SCOTT, supra note 164, at 7–9; C.P. LUCAS, THE BEGINNINGS OF ENGLISH OVERSEAS
governor, and exercise jurisdiction over themselves with leave of the host
country.\footnote{In the late thirteenth century, a foreign host conceded to English merchants privi-
leges to associate, hold courts, and form assemblies. 1 Lipson, supra note 71, at 570–71. Shortly thereafter, overseas merchants received authority to elect a mayor. Carr, supra note 232, at xi–xii (discussing a group of charters granting governance rights to overseas merchants at the turn of the fifteenth century); Carus-Wilson, supra note 228, at xviii; 1 Lipson, supra note 71, at 571–72 (thirteenth- through fifteenth-century charters to mer-
chants allowing them to organize under mayor or governor). Merchant adventurers trading
in the Low Countries received a charter granting self-governance by common consent in
1407. Lucas, supra note 240, at 149–51, 184–87 (under charter merchants may freely and
lawfully assemble and elect among themselves fit governors and deputies to govern by
common consent and reasonable statutes with authority over all English merchants in those
parts); see also Carus-Wilson, supra note 228, at xx; 1 Lipson, supra note 71, at 571–72;
1 Scott, supra note 164, at 8–9. A subsequent 1505 charter placed governance of the me-
chants in the Low Countries in a fixed body, removing government by common consent.
See infra note 247.} Clothed with royal privileges and immunities, the governor and
court of assistants of the merchant association served as a legislative body
with the power to make statutes, ordinances, and customs.\footnote{See supra note 241.}

Whether reviewing domestic or overseas charters, concern for the wel-
fare of the greater body was a frequent theme of the era, and this concern manifested itself in merchant charters.\footnote{See supra notes 210, 243–44 and accompanying text.} Charters frequently added provi-
sions requiring merchants act “for better government.”\footnote{The phrase “for better government” (pro meliori gubernatione) was common in
merchant and municipal charters. Carr, supra note 232, at xi–xii (discussing charters se-
curing better governance for merchant associations traveling abroad). Such a phrase was
included in Richard II’s 1391 charter to the merchants of Prussia. 7 Thomas Rymer,
Foedera, Conventiones, Literae 693–94 (1709); 1 Scott, supra note 164, at 8–9 (de-
scribing king’s grant to Prussian merchants and noting grantee’s expanded authority for
governance of English merchants in jurisdiction but also highlighting restriction that ordi-
nances be “for better government”).} Many felt that monopolistic conduct by merchants and gilds was detrimental to the com-
mon welfare of Englishmen and violated principles of English law.\footnote{See supra notes 210, 243–44 and accompanying text.} The crown and Parliament responded with regulations requiring that gild by-

laws serve the common profit of the people and dominant adventurers open trade to other merchants. 246 A charter to merchant adventurers in 1505 provided that no merchant statute, custom, or ordinance “shall be or may be contrary to us our Crowne, Honor, Dignity Royall or Prerogative or to the diminution of the Commonweale of our Realme.” 247 These charter clauses for common welfare were representative of later colonial provisions requiring that enacted colonial laws be agreeable and not repugnant to the laws of England. 248

With thriving foreign trade, England expanded its boundaries. The fifteenth and sixteenth centuries were years of exploration as European investors and explorers were looking to new lands for new trade. 249 Merchants from Bristol and other ports frequently traded with Iceland and Greenland among other nations. 250 Many voyagers had their sights set on exploring new waters for better fishing. 251 Though uncertain of lands fur-

246. LUCAS, supra note 240, at 68–70 (discussing late fifteenth-century legislation addressing intergild conflict within merchant adventurers trading overseas); see also supra note 210 (describing regulations that required gilds submit bylaws to town authorities for approval).

247. CAWSTON & KEANE, supra note 231, at 253; 1 SCOTT, supra note 164, at 10 (noting significance of this charter in granting expanded authority to regulate conduct of its members). The 1505 charter placed governance in an elected governor and “Four and Twenty of the most sadd discreet and honest Persons of divers Fellowships of the said Merchants Adventurers” as assistants to rule for better government. CAWSTON & KEANE, supra note 231, at 250–51. While merchants’ 1407 charter established governance by common consent, the 1505 charter placed better governance with an elected governor and assistants. LUCAS, supra note 240, at 71–73; see also SUTTON & VISSE-R-FUCHS, supra note 239, at 178–79, 182–84 (discussing the king’s 1462 confirmation of merchants’ right to elect governors, rule the fellowship, and make regulations by common assent and for better governance—as long as such statutes and ordinances were not contrary, rebellious, or disobedient). The grievance that the company had fallen into neglect and disobedience because of non-attendance at assembly contributed to the change in government from common consent to the elected body. LUCAS, supra note 240, at 72–73; see also CAWSTON & KEANE, supra note 231, at 249–50, 252.

248. See infra notes 303, 312, 373 (providing examples of authority for colonial promotors to pass laws provided they were agreeable or not repugnant to English laws).

249. DAVID B. QUINN, NORTH AMERICA FROM EARIEST DISCOVERY TO FIRST SETTLEMENTS 41–70 (1977) [hereinafter QUINN, NORTH AMERICA].

250. CARUS-WILSON, supra note 228, at 98 (Iceland); CARR, supra note 232, at xxvii (discussing modification of traditional merchant model to include discovery, conquest, and colonization of foreign lands); see also infra notes 251–52.

251. QUINN, NORTH AMERICA, supra note 249, at 60–64 (discussing English expansion overseas for fishing and discovery); see also CARUS-WILSON, supra note 228, at 97 (remarking that Bristol merchants were pioneers of discovery; search for Isle of Brasile in 1480); JAMES A. WILLIAMSON, THE CABOT VOYAGES AND BRISTOL DISCOVERY UNDER HENRY VII, at 3 (1962).
ther west, explorers experimented with long-distance travel in search of resources and treasures.  

Exploring unknown lands was a mutually beneficial relationship between the explorer and the crown. Explorers, at great risk, sought riches in discovered lands and received extensive privileges modeled on medieval feudal institutions. The crown, in turn, received new lands, increased trade, and a direct kickback of the profits of the venture. In the search for the New World, Spain claimed first place; Christopher Columbus successfully discovered and documented his discovery of the West Indies in 1492. Based in part upon this discovery, Spain attempted to claim exclusive rights to a large portion of the Americas.

A. 1496 Charter to John Cabot

King Henry the VII was not far behind Spain and Columbus when he authorized John Cabot to voyage and discover new lands for England. Cabot, with the backing of Bristol merchants, received permission for exploration in the 1490s. The crown’s March 1496 charter to Cabot and

252. WILLIAMSON, supra note 251, at 3, 19, 29 (commenting on merchants from Bristol trading with Iceland and extending their voyages westward); see also CARR, supra note 232, at xxviii (western expansion of traditional merchant routes).


254. VERLINDEN, supra note 253, at 167–69, 189–90; see infra Part III.A–D.

255. QUINN, NORTH AMERICA, supra note 249, at 108–10.

256. Spain sought protection of its right with a papal donation. QUINN, NORTH AMERICA, supra note 249, at 105; see infra note 258 (English exploration despite papal bull); see also HARRIS, supra note 37, at 62–64 (discussing doctrine that land which country discovered belonged to it).

257. Typical of British bureaucracy, exploration, especially exploration involving settlement, required permission from the crown. See QUINN, NORTH AMERICA, supra note 249, at 104–05; supra note 237.

258. See CARUS-WILSON, supra note 228, at xv (observing that Bristol merchants sponsored Cabot); QUINN, NORTH AMERICA, supra note 249, at 114–15, 121.

Henry VII, in granting the charter to Cabot, minimized the papal bull and the treaty between Spain and Portugal concerning discovered land. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 13–15 (England sent explorers despite papal bull); QUINN, NORTH AMERICA, supra note 249, at 105, 110–11, 127; WILLIAMSON, supra note 251, at 51–52 (setting out for discovery of lands in North America despite Spain’s claim for exclusivity). England felt the papal bull did not prevent English colonization as colonization was authorized by the law of nations. Following Cabot’s discovery, England claimed possession of North America. E.G.R. TAYLOR, THE ORIGINAL WRITINGS AND CORRESPONDENCE OF THE TWO RICHARD HAKLUYS (1935); id. at 423–24 (Doc. No. 72. Notes of R. Hakluyt); id. at 487, 488 (Doc. No. 84, Richard Hakluyt’s 1603 note discussing right of English to explore
his sons, with the purpose of discovering land unknown to Christians, gave permission to travel from England with proper fittings and personnel.\textsuperscript{259} The Cabots were given license to set up in the towns and cities of discovered lands and to conquer their inhabitants.\textsuperscript{260} Cabot and his heirs would hold land as vassals and lieutenants—taking title, dominion, and jurisdiction for the king and paying the king one-fifth the profits gained when they returned to the port of Bristol and sold their goods.\textsuperscript{261} On pain of interlopers’ ships and provisions, Cabot, like typical merchant associations, had an exclusive monopoly of trade in the discovered lands.\textsuperscript{262}

Cabot found land in the New World and returned to England with the news. Given his success, he planned a second voyage. His second voyage, however, was unsuccessful, and he lost his life.\textsuperscript{263} Cabot’s son inherited his rights and continued exploration under the charter.\textsuperscript{264} Early explorer charters like Cabot’s did not provide significant means for internal governance, but subsequent charters addressed the defect and added the ability for merchants to establish laws for personnel and others.

B. 1501 Charter to Richard Warde and Others

Shortly after Cabot’s voyages, in March 1501, Henry VII granted to Richard Warde, Thomas Ashehurst, and John Thomas, of Bristol, and to John Fernandez, Francis Fernandez, and John Gonzales, of Portugal, unrestricted authority to sail with masters, mates, pages, and necessities to find and discover lands of heathens and infidels and to seize their castles, towns, and lands for the king.\textsuperscript{265} Warde and his group were to take and hold possession of the castles and towns, maintaining the lands for the king in peru-

\begin{itemize}
\item \textsuperscript{259} 1 Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 45–47 (1909) (reproducing 1496 Cabot charter).
\item Several statutes and royal proclamations forbade exporting specified items from England, but charters to explorers allowed travel with the necessary material and resources for colonization. Beer, supra note 237, at 105–06.
\item The fact that Cabot’s charter granted the right to conquer and subdue infidels reflects the general state of affairs during the fifteenth and sixteenth centuries. Williamson, supra note 251, at 53; 1 Andrews, Colonial Period, supra note 228, at 12–13 (discussing fifteenth-century papal authorization to conquer pagan countries).
\item 1 Thorpe, supra note 259, at 46–47.
\item Id.
\item Id.
\item Id.
\item Id.
\item H.P. Biggar, The Precursors of Jacques Cartier 1497–1534, at 50–51 (1911) (reproducing charter).
\end{itemize}
petuity by fidelity alone without any other compensation being rendered but the dignity, dominion, regality, jurisdiction, and suzerainty of the crown.266

Warde’s charter had a greater focus on settlement than Cabot’s. In the discovered land,

all and singular as well men as women of this our kingdom and the rest of our subjects, wishing and desiring to visit these lands and islands thus newly found, and to inhabit the same, shall be allowed and have power to go freely and in safety to the same countries, islands, and places with their ships, men and servants, and all their goods and chattels . . . under the protection and government of [Warde and others.].267

Warde and other voyagers had the ability to set up government and make laws, statutes, and proclamations for the “good and peaceful rule . . . of the said men, masters, sailors and other persons.”268 Warde had full power to appoint deputies for the administration of justice under the rule and government of the subjects according to the tenor and import of the ordinances, statutes, and customs they adopted.269

As with the patentees of Cabot’s charter, Warde and others were given a monopoly of trade in discovered lands.270 Subjects traveling to the discovered lands needed leave of Warde and the king.271 Warde and patentees were given permission to bring whatever was grown or found in discovered lands back to England to sell and distribute for their own gain notwithstanding any statute, ordinance, or other restriction.272

Warde’s charter specifically named foreign patentees from Portugal.273

266. Id. at 55.
267. Id. at 51. Charters to future American colonies also granted the right for subjects, and aliens willing to become subjects, to travel to the colonies. 7 THORPE, supra note 259, at 3786 (1606 Virginia charter, subjects); id. at 3799 (1609 Virginia charter, subjects and strangers); 3 id. at 1855 (1629 Massachusetts charter, subjects and strangers).
268. BIGGAR, supra note 265, at 51. Early sixteenth-century charters allowed grantees to exercise the Office of Admiral in the discovered territory with jurisdiction as in England. WILLIAMSON, supra note 251, at 125. Warde and other patentees had “full power and authority to do, exercise and carry out all and singular the things which pertain to the office of Admiral, according to the law and the naval custom obtaining in this our realm of England.” BIGGAR, supra note 265, at 55.
269. BIGGAR, supra note 265, at 55.
270. Id. at 52.
271. Id.
272. Id. at 52–54. Under the patent, Warde and company had a relationship of trade with other merchants. Merchants could bring imports back to England, paying customs and a fraction to the patentees. Id.; 1 J.A. DOYLE, ENGLISH COLONIES IN AMERICA: VIRGINIA, MARYLAND, AND THE CAROLINAS 27 (New York, Henry Holt & Co. 1889).
273. BIGGAR, supra note 265, at 50, 56–57.
Aliens would not fall under the protection of the crown, and their possessions in foreign lands were vulnerable to pirates and natives. By English law at this time, aliens faced restrictions in ownership and inheritance of land, use of courts, and trading privileges. Only English subjects with license could carry goods to and from the new land, and aliens attempting to land without permission could be punished at the discretion of the patentees. Addressing these disabilities, Warde’s charter contained a denization clause. Henry VII’s Charter granted to born subjects of the king of Portugal, and to any one of them whomsoever, that they and any one of them and all their children, as well born as to be born, are for ever subjects and lieges of us and of our heirs, and in all lawsuits, quarrels, affairs and matters whatsoever are to be considered, treated, held, esteemed and governed as our true and faithful lieges born within our realm of England, and not otherwise nor in any other way. And that they and all their children aforesaid, and any one of them whomsoever, may carry on and bring real, personal and mixed actions in all courts, places and jurisdictions of ours whatsoever in all ways, and may use and benefit by these, and may sue and be sued in the same, answer and be answered to,

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274. Without the crown’s protection, patentees and their possessions overseas were liable to be plundered at will by foreigners and others. See infra notes 310–11 and accompanying text (pirates and Gilbert’s charter).

275. Clive Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland 29–30 (1957) (commenting that aliens faced limitations in holding and inheriting land, limitations in use of courts, and discrimination in trade); 1 Pollock & Maitland, supra note 22, at 459 (discussing alienage in England); see also Norman Scott Brien Gras, The Early English Customs System 66–77, 79–80, 82–83, 110, 131–32 (1918) (discussing different customs for aliens and denizens); 9 Holdsworth, supra note 173, at 93–94, 98 (examining alienage in England); James H. Kettner, The Development of American Citizenship 1608–1870, at 5–6, 30–31 (1978) (noting that alien discriminations first began with hostilities toward other nations; most important element of denization was removal of property disabilities); William A. Shaw, Letters of Denization and Acts of Naturalization for Aliens in England and Ireland 1603–1700, at v–vi (1911) (observing that alien customs were double what natives paid). Restricting alien trade in the colonies was a theme throughout the colonial experience. See generally 4 Andrews, Colonial Period, supra note 228 (discussing England’s commercial policies toward colonies); Beer, supra note 237, at 220–27, 237, 272, 374, 384–400 (following merchant charters granting exclusive monopoly privileges in specified territories, England granted monopoly privileges in colonies and excluded or restricted foreigners from trade with colonies).

276. Biggar, supra note 265, at 54 (aliens without leave of patentees could be expelled or punished at discretion of patentees); 1 Doyle, supra note 272, at 27.

277. Technically, at least as the rule of law developed, only the crown was authorized to grant denization. By the seventeenth century, an act of Parliament was needed to naturalize or give an alien full citizenship. 9 Holdsworth, supra note 173, at 76–77; 1 Pollock & Maitland, supra note 22, at 460.
defend them and be defended in all things and everywhere as our true and faithful lieges born within our realm aforesaid. And that they, and any one of them whosoever, may examine, take, receive, own, hold, possess and inherit for himself, his heirs and assigns, in perpetuity or in any other way whosoever, lands tenements, rents, . . . and other possessions. 278

In other words, those endenized by the charter and their children may and can have and possess all things and all other liberties, privileges, franchises and customs, and may use and enjoy them, and any one of them may so do, within our said realm of England, our jurisdictions and dominions whatsoever, as freely, quietly, fully and peacefully as the rest of our lieges, born within our said realm generally hold, use and enjoy them, or ought and should hold, possess, use and enjoy them; any statute, act, ordinance, or any other cause, affair or matter notwithstanding. 279

These Portuguese individuals were granted citizenship throughout the realm and freed from most alien disabilities. 280 By charter, the foreign patentees trading with Warde were not to be forced or compelled to pay, give, or render anything other than the taxes or tallages the faithful lieges born within the realm pay. 281 In line with a custom also present in English municipalities, the crown’s charter further required that the endenized Portuguese pay homage and be lot and scot with other dues and customs payable in the realm in the same manner as other lieges born in the kingdom. 282 The crown, cognizant of revenue needs and abuse by foreign merchants, often retained limitations in its denization charters. Under the 1501 charter, the endenized Portuguese had to pay alien customs and other dues on goods brought into the realm as foreigners would pay. 283

278. Biggar, supra note 265, at 56–57. Common alien disabilities included restrictions on the ability to hold lands and limitations on the ability to use the courts for certain actions. See supra note 275.

279. Biggar, supra note 265, at 57.

280. During the late medieval period, the crown often granted group denizations to those in a particular industry of service to the crown. Parry, supra note 275, at 37–38.

281. Biggar, supra note 265, at 57.

282. Id. at 57–58; see also supra note 169 (discussing lot and scot requirement for gildsmen in boroughs).

283. Biggar, supra note 265, at 57; Shaw, supra note 275, at v–viii (examining early instances where king’s patent created distinctions between naturalization and denization by reserving alien customs to punish denizens for cheating the king of customs by entering goods for non-denizens). Following royal precedents, Parliament provided in 1485 that denizens, despite generic charter language, should pay aliens customs and subsidies unless expressly exempted. 1485, 1 Hen. 7 c. 2; George Hansard, A Treatise on the Law Relating to Aliens, and Denization and Naturalization 10–12 (London, V. & R. Stevens & G.S. Norton 1844); Kettner, supra note 275, at 34; see also infra note 284 (noting that denizations should contain express rather than generic exemptions).
After specifying certain rights for foreign patentees, Henry VII’s charter bestowed the liberties, privileges, and customs (within England and the dominions) as “freely, quietly, fully and peacefully as the rest of our lieges, born within our said realm.” Both clauses appear to be a basic grant of denization for foreign patentees and their children. The patentees were to be English subjects, specifically with rights to hold and enjoy land and to use the courts. Independent and conceptually separate from the privileges and immunities clauses, the crown granted, among other rights, the right to travel, monopolies in trade, and the right to exercise self-governance in the newly discovered lands.

Henry VII’s 1501 Charter to Warde, granting rights to travel, discover, set up government, and enjoy exclusive trading rights, served as a model for charters to explorers in the sixteenth century. The year following the issue of the 1501 charter, Henry VII granted a similar charter to mostly the same patentees with a few material changes, one of which was the removal of the obligation for the Portuguese patentees to pay alien customs.

With the loss of Cabot and failed explorations thereafter, England retreated some from pursuits of discovery. Henry VII was interested in discovery but Henry VIII was less interested. During the middle of the sixteenth century, England faced bigger problems and did not fully take ad-

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284. Biggar, supra note 265, at 57. Broad denization language should not be presumed to have removed all alienage disabilities unless the crown expressly provided such exemptions in the charter. In 1540, Parliament expressed its concern over denizens avoiding certain restrictions by claiming generic exemptions. 1540, 32 Hen. 8 c. 16 (denizations removing particular alienage disabilities should contain express rather than generic exemptions).

285. This form of denization follows a form common in the sixteenth century. William Page, Letters of Denization and Acts of Naturalization for Aliens in England 1509–1603, at ii–iv (Lymington, Chas. T. King 1893) (including denizens’ right to sue and be sued; to buy, sell, hold, and enjoy real estate; not to be compelled to pay more taxes, tallages, customs, or subsidies for merchandise exported out of or imported into England; and to enjoy all liberties, franchises, and privileges as freely and peacefully as other lieges born in England, any statute to the contrary notwithstanding).

286. See supra notes 262, 268–69, 271–72 and accompanying text.

287. Carr, supra note 232, at xxix–xxx (discussing 1501 and 1502 charters as precursors to 1555 charter to Fellowship of English Merchants for Discovery of New Trades (Muscovy or Russia Company)). The Russia Company enjoyed similar municipal privileges as other merchant associations. Id. at xxx–xxxi; see also supra notes 234, 242. Kingsbury described the Russia Company’s charter as the transition point between the explorer model and the colonial model. 1 Susan Myra Kingsbury, The Records of the Virginia Company of London 11–16 (1906).

288. Biggar, supra note 265, at 81; Carr, supra note 232, at xxix (noting expanded rights of discovery and conquest in 1502 charter); 1 Doyle, supra note 272, at 28; Williamson, supra note 251, at 132–33 (discussing changes in 1502 charter).

289. Quinn, North America, supra note 249, at 135.
vantage of the colonization of the New World. Any lapse by the English was made up by the efforts of other European nations, especially Spain.

C. 1578 Charter to Sir Humphrey Gilbert

Events in Ireland in the latter half of the sixteenth century reinvigorated England’s colonization efforts. Developing a colonization philosophy in Ireland fueled similar efforts in North America. The initial objective for colonization of the New World was not to create the United States but rather a means of trade and revenue and restraining the power of the Spanish overseas. Many of the figures leading American colonization had a start in the colonization of Ireland.

Sir Humphrey Gilbert recognized the value of colonization, and from his significant experience in Ireland, he devised a scheme for colonization of America. Colonization, like exploration, was mutually beneficial for

290. 1 DOYLE, supra note 272, at 29, 31–32.
291. The early and middle parts of the sixteenth century were filled with other European successes and failures in exploration and discovery. Spain and other European nations made major inroads into the exploration of Florida, Mexico, and South America.
292. During this period, England was forced to deal with the Irish, and colonization was offered as a means of adding stability. NICHOLAS P. CANNY, THE ELIZABETHAN CONQUEST OF IRELAND: A PATTERN ESTABLISHED 1565–1576, at 49–52 (1976) (English officials installed presidencies in Ireland with the hope of undermining Irish palatinates). This system had been successful in Wales to reduce the power of the Marcher Lords. Id. at 51, 93, 97–99; J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 59–60 (1987).
293. CANNY, supra note 292, at 92; David B. Quinn, Sir Thomas Smith (1513–1577) and the Beginnings of English Colonial Theory, 89 PROC. AM. PHIL. SOC. 543, 548 n.19, 558 (1945) (noting similarities between Sir Humphrey Gilbert’s efforts in America and his efforts in Ireland).
294. TAYLOR, supra note 258, at 163–64 (letter from Hakluyt the younger discussing break up of Spain’s power).
296. 1 DAVID B. QUINN, THE VOYAGES AND COLONISING ENTERPRISES OF SIR HUMPHREY GILBERT 9, 12–19 (1940) [hereinafter QUINN, VOYAGES]; see also DEWAR, supra note 295, at 157 (Gilbert in Ireland). Efforts at colonizing a foreign land were expensive. The crown, interested in reducing public debt, did not want to pay the cost for colonization. Colonial promoters willing to put up their own costs wanted something in exchange, and they petitioned for monopolies and privileges to this end. CANNY, supra note 292, at 80–82; id. at 82 (while seeking privileges in Ireland, colonists were looking to retain their rights as Englishmen so they could return at will to England and not be considered banished men); see also supra notes 253–54 (land and privileges in exchange for discovery and colonization); infra note 308 (concerns over retaining English allegiance for property and inheritance rights).
the crown and promoter. Promoters were out for adventure and profit, and the crown was interested in sharing profits and siphoning the success of other European nations in foreign trade.\footnote{Jones, supra note 295, at 460 (thwarting Spain’s success motivated American colonization).}

Following advances by other explorers, in 1578, Queen Elizabeth granted a charter or letter patent to Gilbert for discovery and colonization of North America.\footnote{1 THORPE, supra note 259, at 49 (letter patent to Sir Humfrey Gylberte, June 11, 1578). Sir Humphrey Gilbert had long been interested in seeking out the Northwest Passage. See 1 QUINN, VOYAGES, supra note 296, at 129–64 (Gilbert’s pamphlet on Northwest Passage). As early as 1567, Gilbert sought privileges to establish an American trading post and serve as governor. 1 SCOTT, supra note 164, at 71.} Similar to the charters granted to voyagers before him, the crown granted Gilbert the right to discover and conquer lands, countries, and territories not possessed by Christian princes.\footnote{1 THORPE, supra note 259, at 49 (using the broader language “not actually possessed” as opposed to narrower “unknown” from earlier explorer charters).} Gilbert’s charter followed a similar homage and one-fifth payment of discovered ore in exchange for services as found in Cabot’s charter.\footnote{Id. at 50; 1 OSGOOD, supra note 68, at 6–7.} Expanding upon earlier charters to Cabot and Warde, Gilbert and his assigns were granted all rights, royalties, and jurisdictions of discovered lands, castles, and villages.\footnote{1 THORPE, supra note 259, at 49–50.}

Gilbert and assigns, and others so licensed by Gilbert and the crown, had permission to travel and occupy the discovered lands, other laws prohibiting or limiting the travel of would-be colonists notwithstanding.\footnote{Royal charters permitted travel notwithstanding several laws restricting English from traveling. See supra notes 237, 257, 267.} Gilbert enjoyed all royalties and jurisdictions of the soil and was permitted to settle lands to persons and subjects in allegiance to the crown, with full power to dispose “in fee simple or otherwise, according to the order of the laws of England, as near as the same conveniently may be, at his, and their will and pleasure.”\footnote{1 THORPE, supra note 259, at 49.} Gilbert was given the right to defend his possession and exclusive rights of controlling settlement, both to the exclusion of British subjects and others within 200 leagues of his location.\footnote{Id. (discussing monopoly in charter). The seizure power did not apply to subjects and others in amity lost by shipwreck, etc. Id.} Gilbert had authority and power to seize vessels and possessions of those infringing upon his monopoly.\footnote{Id. (discussing monopoly in charter). The seizure power did not apply to subjects and others in amity lost by shipwreck, etc. Id.} To promote amity and unity, the Queen declared

298. 1 THORPE, supra note 259, at 49 (letter patent to Sir Humfrey Gylberte, June 11, 1578). Sir Humphrey Gilbert had long been interested in seeking out the Northwest Passage. See 1 QUINN, VOYAGES, supra note 296, at 129–64 (Gilbert’s pamphlet on Northwest Passage). As early as 1567, Gilbert sought privileges to establish an American trading post and serve as governor. 1 SCOTT, supra note 164, at 71.
299. 1 THORPE, supra note 259, at 49 (using the broader language “not actually possessed” as opposed to narrower “unknown” from earlier explorer charters).
300. Id. at 50; 1 OSGOOD, supra note 68, at 6–7.
301. 1 THORPE, supra note 259, at 49–50.
303. 1 THORPE, supra note 259, at 50.
304. Id.
305. Id. (discussing monopoly in charter). The seizure power did not apply to subjects and others in amity lost by shipwreck, etc. Id.
that the lands and territories discovered by Gilbert and heirs would be in allegiance with England. By the Queen’s charter

that the lands and territories discovered by Gilbert and heirs would be in allegiance with England.306 By the Queen’s charter

wee doe graunt to the sayd sir Humfrey 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 names shall be noted or entred in some of our courts of Record, within this our Realme of England, and that with the assent of the said sir Humfrey, his heires or assigns, shall nowe in this journey for discoverie, or in the second journey for conquest hereafter, travel to such lands, countries and territories as aforesaid, 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 with our allegiance, and which hereafter shall be inhabiting within any the lands, countreyes and territories, with such license as aforesayd, shall and may have, and enjoy all the priveleges of free denizens and persons native of England and within our allegeaunce [in suche like ample manner and fourme as if they were borne and personally resiaunte within our said realme of England] any law, custome, or usage to the contrary notwithstanding.307

This was a guarantee of denization status for Gilbert, his crew, and any who traveled to the discovered lands, and their heirs, provided they were in allegiance with the crown.308 This section of Gilbert’s charter might have been a modification of the denization section in Warde’s charter.309 Warde’s grant seemed to have the objective of granting denization to the Portuguese for the purpose of residing in England. In addition to the trading privileges accompanying denization, Gilbert’s charter seemed to have the intention of safeguarding English citizenship overseas.310 This

306. Id. The Spanish applied the theory of granting conquered natives allegiance (like Rome to other provinces) to help reduce conflict. Verlinden, supra note 253, at 40–41 (assimilation strategies of Spanish conquerors). Conquered Indians were subjects of the crown and were guaranteed certain freedoms such as travel and protection of goods. Id. at 41.

307. 1 Thorpe, supra note 259, at 51. Quinn observed that the version used by Thorpe omitted a few words from the last clause. 1 Quinn, Voyages, supra note 296, at 190–91.

308. Inheritance rights of children born overseas historically presented a problem for English subjects and authorities. Kim, supra note 75, at 103–25; Parry, supra note 275, at 30–34. Retaining allegiance with England was important for the colonies as a number of influential colonists owned land in England or expected to inherit land and wanted to retain English citizenship for inheritance purposes. Bauer, supra note 237, at 325–28 (noting disadvantages of independence in early seventeenth century); see also supra note 296 (concerns of English colonists losing Englishmen status in Ireland).

309. See supra Part III.B (Warde’s alien patentees).

310. Following charters securing the privileges and immunities of denizens and English citizenship to Warde and Gilbert, subsequent royal charters to most of the American colonies contained similar language. The 1606 Virginia Charter included language that subjects, and children born of such subjects, dwelling in the colonies shall have the “Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes,” as
might be because Gilbert’s colonization effort was intended to be more permanent. Also, Gilbert and company probably required heightened protection of English citizenship from the pirates of the era. 311

After securing denization privileges, Gilbert’s charter, like charters to other merchant associations, provided that Gilbert and his company may establish government and enact laws as necessary for the safety of the men. Gilbert and company

have full and meere power and authoritie to correct, punish, pardon, governe and rule by their, and every or any of their good discretions and

if they had been born in England or any of the other dominions. 7 THORPE, supra note 259, at 3788 (1606 Charter); id. at 3800 (1609 Charter). Massachusetts’s 1629 charter provided that all “the Subjects of Vs . . . which shall goe to and inhabite within the saide Landes . . . 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.” 3 id. at 1857 (1629 Massachusetts Charter). Similarly, Baltimore’s 1632 Charter, to encourage settlement and protect the colonists from savages and pirates, granted to Baltimore the ability to allow settlers to travel, form a colony, and build forts to defend themselves. 3 id. at 1681. Those traveling to Maryland under Baltimore’s charter, and their children, were “Natives and Liege Men of Us . . . 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 . . . born within our Kingdom of England” and permitted to inherit, buy, possess, sell, use and enjoy lands, tenements, revenues, and services “within our Kingdom of England, and other our Dominions” and enjoy “all Privileges, Franchises and Liberties of this our Kingdom of England” as other liege men. Id. (Baltimore’s 1632 charter). Similar language is found in the New England Council’s 1620 charter. 3 id. at 1839 (stating that subjects going to inhabit the colony, and their children born there, shall have the liberties, franchises, and immunities of free denizens and natural subjects within any English dominion as if born in England or the dominions).

311. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 25; BEER, supra note 237, at 18–25 (difficulties in colonization effort because of constant threat of foreign attack); 1 SCOTT, supra note 164, at 49, 71–73 (describing frequent plunders and seizures by Spanish and English privateersmen). Non-English, not in allegiance and treated as aliens, were not protected as subjects. Gilbert’s charter contained a threat of being cast out of allegiance if Gilbert abused his charter. 1 THORPE, supra note 259, at 52 (“free for all princes and others to pursue with hostilitie as being not our Subjects, nor by us any way to be advowed, maintained or defended, nor to be holden as any of ours, nor to our protection, dominion or allegiance”). Because the patentees of Gilbert’s voyage were denizens and treated as subjects, they received protection and were free of alien disabilities. Hakluyt, in his Discourse on Western Planting, described an attribute of exploration and colonization:

ffynally their shippes, their goodds, and their persons shoulde not be subjecte to soodden arrestes of straungers as they are in all other trades of Christendome: but shoulde enjoye as greate freedome, libertie, and securitie as they usually doo in their native Contrie, the havens, Townes, and villages in those partes being occupied and possessed by their fellowe subjects. Wch freedome and libertie will greatly incourage them to contynewe constantly in this newe traficque.

TAYLOR, supra note 258, at 273.
policies, as well in causes capitall or criminal, as civill, both marine and
other, all such our subjects and others, as shall from time to time hereafter
adventure themselves in the sayd journey... according to such statutes,
lawes and ordinaces, as shall be by him the said sir Humfrey, his heirs and
assignes, or every, or any of them, devised or established for the better
government of the said people as aforesayd: so always that the sayd stat-
utes, lawes and ordinances may be as neere as conveniently may, agreeable
to the forme of the lawes & policy of England.312

Gilbert’s first voyage was unsuccessful.313 For his second voyage,
Gilbert and subpatentees planned the colonization effort in more detail.
Gilbert raised funds by selling interests and forming a company of mer-
chant adventurers, the “Merchant Adventurers with Sir Humphrey Gilbert,”
who would receive membership and land for their contributions.314 Under
Gilbert’s scheme, grants varied in privileges ranging from those of a palat-
nate to those of simple manors depending upon the amount of the contribu-
tion.315 Gilbert planned to reward his friends and investors by allowing
them to create subordinate proprietorships with ample jurisdictions but sub-
ject to a quit rent payable to Gilbert.316 The colonization scheme also pro-
vided instructions for government. Gilbert’s plan included a governor and
council chosen by members.317 Following examples imposed on gilds and
merchant associations, judgments were to follow as near as possible to the
laws of England.318 Gilbert set sail a second time in 1583. After landing in
Newfoundland, Gilbert claimed the lands for the crown and sailed back

312. 1 THORPE, supra note 259, at 51.
313. 1 QUINN, VOYAGES, supra note 296, at 40, 44.
314. 1 OSGOOD, supra note 68, at 9–11 (Gilbert’s colonization scheme granting land and
jurisdiction for contributions); see also CARR, supra note 232, at xxxiv–v (discussing Gil-
bert voyages); 1 QUINN, VOYAGES, supra note 296, at 7–11 (noting early suggestions for
colonizing America and request for extensive privileges in attempt to discover Northwest
Passage); id. at 55–62 (describing commercial uses for Gilbert’s charter privileges).
315. Gilbert and assigns divided out seignories based on the amount of contribution:
100£ and ten men would get 10,000 acres with powers and jurisdictions as large as exist in
England; 50£ and 20 men would receive 1,000 acres with the same privileges; those con-
tributing lesser amounts received rights of court baron and court leet. 1 QUINN, VOYAGES,
supra note 296, at 258–60.
316. 1 OSGOOD, supra note 68, at 10–11; 1 QUINN, VOYAGES, supra note 296, at 59–60,
245–57 (agreements between Gilbert and assigns for land and rights in North America un-
der Gilbert’s patent).
317. 1 QUINN, VOYAGES, supra note 296, at 59 (councilors chosen by members).
318. Id. at 259 (agreements of Gilbert’s subpatentees); see also supra notes 210, 243–48
and accompanying text (concern for better government and welfare of larger body).
D. 1584 Charter to Sir Walter Raleigh

Sir Walter Raleigh, a one-half brother of Gilbert, inherited Gilbert’s rights under his charter. Raleigh’s 1584 charter authorized him to have, hold, occupy, and enjoy all prerogatives, commodities, jurisdictions, royalties, privileges, and franchises both by land and sea, “whatsoeuer we by our letters patents may graunt, and as we or any of our noble progenitors haue heretofore graunted to any person or persons, bodies politique or corporate.” Raleigh sought confirmation of his charter privileges by Parliament. Parliament initially supported the charter, but then drew grievances concerning granting licenses to convicts to leave the country to settle the new land. Eventually, Parliament dropped consideration of the bill, and Raleigh and his adventurers were forced to rely solely on the royal prerogative.

Raleigh landed at Roanoke Island, which he named Virginia in honor of the Queen. The government was to be run like a borough, and those free of the company could trade with Raleigh’s other settlements free of...

319. Gilbert landed in Newfoundland, took possession of the land in the presence of the other nations, and, having produced his commission, enacted three laws: (1) public exercise of religion should be according to the Church of England; (2) if anything be done prejudicial to her Majesty, the offender shall be executed as in a case of high treason, according to the laws of England; (3) if any person utter words to the dishonor of her Majesty, he should lose his ears, and his ships and goods should be confiscated. 1 DOYLE, supra note 272, at 50. After foreigners and English swore obedience, Gilbert granted large tracts of land in Newfoundland in fee farm for a yearly rent. Id. at 50; 1 QUINN, VOYAGES, supra note 296, at 86.

320. 1 DOYLE, supra note 272, at 51–52.

321. CARR, supra note 232, at xxxvi–vii; 1 OSGOOD, supra note 68, at 14; 1 QUINN, VOYAGES, supra note 296, at 95–96. Raleigh did not receive Gilbert’s monopoly in Newfoundland. Id. at 96.

322. 1 THORPE, supra note 259, at 53 (1584 letter patent to Sir Walter Raleigh). Similar to later grants, Raleigh essentially received privileges as extensive as the privileges granted to the Bishop of Durham. See supra notes 62–69 (palatinate of Durham); infra Part IV.C (discussing Durham references in colonial charters to proprietors).

323. David B. Quinn, Preparations for the 1585 Voyage, 6 WM. & MARY Q. 3d 208, 228–32 (1949). Raleigh may have been persuaded to seek parliamentary confirmation based on the Russia Company’s confirmation, which had the additional effect of discouraging infringement upon Russia Company’s privileges. 2 SCOTT, supra note 164, at 41. Early rationales for colonial settlement included reducing overcrowding and ridding England of excess poor and criminals. BEER, supra note 237, at 42 n.2; 1 DOYLE, supra note 272, at 47, 146, 201–02; QUINN, NORTH AMERICA, supra note 249, at 537.

324. Quinn, supra note 323, at 232.

325. 1 OSGOOD, supra note 68, at 15; Quinn, supra note 323, at 232.
IV. COLONIAL AMERICA

Following the exploration and settlement efforts of Gilbert and Raleigh, colonization of America was a permanent fixture of England’s state policy. By charter, the crown authorized colonial promoters, investors and proprietors, to organize and establish colonies and bear the risk and reward of the venture. Borrowing from English institutions, the model Tudor charter to adventurers was the feudum or fief to a proprietor. Under the Stuarts, for a time, colonization took place through the “Governor and Company” of the trading company before returning to the proprietorship. When the colonies became settled, there were three general forms: the proprietary colony, the corporate colony, and the royal colony. With few exceptions, these colonies were managed by the crown or a promoter residing in England.

A. Virginia and Royal Colonies

Tracing the progress of earlier efforts by Gilbert and Raleigh, several influential nobles and merchants pooled interest in North America and

326. 1 OSGOOD, supra note 68, at 21.
327. Quinn, supra note 323, at 208.
328. 3 LIPSON, supra note 71, at 167–69 (discussing financing of colonization efforts); 1 OSGOOD, supra note 68, at 3–4, 25 (discussing the same). Spain colonized directly; France and England colonized through companies. QUINN, NORTH AMERICA, supra note 249, at 105–06.
329. BEER, supra note 237, at 299–300 (listing several colonial proprietorships); 1 OSGOOD, supra note 68, at 3–4; see also infra Part IV.C (return to proprietorship).
330. 2 OSGOOD, supra note 68, at 3–4 (discussing temporary use of trading companies as promoters). For a detailed account of joint-stock companies in English trade and colonization, see SCOTT, supra note 164; 1 id. at 150–51 (noting standard “governor and company” nomenclature of joint-stock company).
331. Some historians categorize the colonies into two classes, the provincial and corporate—the province consisting of royal colonies and proprietorships. ALPHEUS H. SNOW, THE ADMINISTRATION OF DEPENDENCIES 96 (1902).
332. The mother corporation or body of investors provided resources and instructions for the management of colonial affairs. 1 OSGOOD, supra note 68, at 141; see also 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 390 (pointing out that Massachusetts was an exception to the class of trading corporations resident in England). Governance over companies and proprietors residing in England was easier because of the proximity to English authority. See 3 OSGOOD, supra note 68, at 25.
formed a company for trade and colonization. In 1606, King James I granted the investors a charter. The location of the venture focused primarily on the middle route of Raleigh’s Roanoke settlement, but there was also interest in the northern route for fishing (New England).

Under the 1606 charter, investors colonizing Virginia formed two companies, the London and Plymouth Divisions. These divisions were under the control of a dual council system: a superior council in England and a local council residing in each of the divisions. Because of harsh conditions, minimal colonization, factionalism, and the fact that grants of additional land required additional charters, the dual council system eventually failed. In 1609, the planters and adventurers of Virginia, influenced by and obtaining investment from London companies, received a second charter incorporating as a joint-stock company, the “Treasurer and
Company of Adventurers and Plantations of the City of London, for the First Colony in Virginia.\textsuperscript{339} The 1609 charter helped some, but the colony still faced problems. A follow up charter in 1612 granted more self-governance to the Virginia Company, which met in periodic courts throughout the year.\textsuperscript{340}

Despite these modifications, the company’s existing scheme was no longer adequate.\textsuperscript{341} Redefining its governance, the Virginia Company added to the colony’s local administration and established uniform government throughout the territory.\textsuperscript{342} Under its new government, Virginia’s local assembly consisted of the governor, a council, and a representative assembly of burgesses chosen by the planters of the towns, cities, hundreds, and plantations.\textsuperscript{343} In 1619, the first Virginian assembly met pursuant to instructions from the Company.\textsuperscript{344}

The many changes made to the Virginia Company in its early years were ultimately unsuccessful. Following general mismanagement and conflict with the Indians, in 1623 the Privy Council recommended the king resume Virginia’s charter privileges, and thereafter the crown brought quo
warranto proceedings against the corporation.\textsuperscript{345} As a result of the proceedings, the crown resumed Virginia’s privileges and thereby transformed the colony into a royal colony.\textsuperscript{346} A step in converting the Virginia Company to a royal colony was the substitution of royal officials for elected or appointed officials of the promoter.\textsuperscript{347} As a royal colony, the governor and council received commissions and instructions from the crown for the administration of the colony.\textsuperscript{348} Virginia remained a royal colony until the American Revolution.

B. New England and the Corporate Colonies

In addition to proprietorships and royal colonies, there was also the corporate colony. The colonies of New England were unique; corporate colonies were not like proprietorships run by an individual holding all land and government and were not run like a royal colony under the instructions and governance of the crown. The corporate colony was managed like a corporation or gild, and if that corporation was residing in the colony itself, there was little royal influence or control over internal affairs.\textsuperscript{349} In early colonial history, corporate colonies enjoyed more local government given the lack of effective control by the crown.\textsuperscript{350} In contrast to the proprietor-
ship and royal colony, the officers, assistants, and freemen of the corporate colony held their own political power secured by incorporation and charter. For these reasons, the corporate colony enjoyed a degree of independence not present in the other colonies.

Grantees of the Plymouth Division of the Virginia Company set out to form a colony in the North, the Popham Colony, but those efforts failed. Scattered grantees reassembled, and in 1620, James I formed the Plymouth Council of New England (New England Council). The New England Council was a holding entity for distributing lands. Under the design of the Council, land would be settled in the form of counties, baronies, hundreds, manors, and incorporated towns similar to settlement in England. In 1635, facing quo warranto proceedings, the New England Council surrendered its charter.

During its short existence, the New England Council granted land to many New England colonial promoters. The Council, for example, granted land in 1628 to the settlers of the “New England Company” (Mas-

351. Compare infra notes 381–82 and accompanying text (governance of corporate colony), with infra notes 390–99 and accompanying text (proprietorship and royal colony).
352. The corporate colony was more democratic than other types of colonies. 2 Andrews, Colonial Period, supra note 228, at 111–13, 142–43 (clarifying popular theories of New England democracy by emphasizing restricted powers of voting members and limitations on eligibility itself); 1 Osgood, supra note 68, at 425.
353. 1 Andrews, Colonial Period, supra note 228, at 90–94; 1 Osgood, supra note 68, at 98.
354. 1 Andrews, Colonial Period, supra note 228, at 320–27, 405 (discussing efforts by grantees of Plymouth Division to obtain new charter as corporation of proprietors); 1 Osgood, supra note 68, at 102–03.
355. 1 Osgood, supra note 68, at 123; Snow, supra note 331, at 63 (describing New England Council as impotent to do anything but grant land).
356. 1 Andrews, Colonial Period, supra note 228, at 326 (divisions into counties, hundreds, and baronies with court baron and court leet); 1 Osgood, supra note 68, at 104, 126 (identifying schemes which authorized populating New England with feudalism and other English institutions); see also infra Part IV.E (aspects of tenure clauses in charters); infra note 434 (settlement mimicked settlement in England).
357. 1 Andrews, Colonial Period, supra note 228, at 417; 1 Robert Noxon Toppman, Edward Randolph 16–17 (Boston, John Wilson & Son 1898).
358. Many settlements received land from the New England Council. See, e.g., 1 Osgood, supra note 68, at 123–24 (proprietorships of Maine and New Hampshire); see also infra note 359 (grant to Massachusetts Bay Colony). Lacking authorization from the king, land grants from the New England Council did not grant full governance powers. See 1 Osgood, supra note 68, at 126, 130; cf. infra note 412 (Duke of York, without authorization, could not grant governance rights to New Jersey proprietors).
In 1629, Charles I confirmed the Council’s land grant and further granted the colony a royal charter of incorporation with governance rights similar to other English corporations. Borrowing from municipalities and merchant associations, “The Governor and Company of the Massachusetts Bay in Newe-England” had a governor, deputy governor, and eighteen assistants. In the specific language of the charter, however, there was no provision requiring that the corporation remain in England, and the corporation removed itself to New England to become both the local and parent body of the corporate colony.

The independence of the corporate colony was an essential characteristic for many New England immigrants. A significant number of New England settlers were interested not in trade but rather ideological freedom. Given the religious turmoil in England, many pilgrims and puritans fled England to New England. Arriving in New England, immigrants had to interface with existing colonies on many levels. Several New England settlements began as a body of self-assembled squatters branching out from other colonies without any authority from England or other patent holders but later receiving such authority or a royal charter.
C. Return to the Proprietorship

Following a few colonization efforts by trading corporations, the crown returned to the feudum and several of the original thirteen colonies were settled as proprietorships.365 Royal privileges and immunities to proprietors such as Gilbert and Raleigh gave broad powers to establish government.366 Similar to early proprietors’ privileges, Charles I granted a charter to Lord Baltimore to hold Maryland as a palatine fief.367 By charter, Baltimore held his land “with . . . ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever . . . to be had, exercised, used, and enjoyed, as any Bishop of Durham.”368

Under royal charters, proprietors to a greater or lesser degree were authorized to create courts; to hear all pleas; to appoint officials and commissions in their name; to pardon; to establish cities, towns, corporations, and boroughs with privileges and immunities; to grant fairs or markets; and to coin money.369 Lord Baltimore had full executive power to raise armies, declare war, and institute martial law.370 To further the trading interests of the proprietorship, proprietors had the right to form monopolies and exclude trespassers.371 Proprietors had full executive authority and permis-

365. See infra note 375.
366. See supra Part III.C–D.
367. 3 THORPE, supra note 259, at 1679. Lord Baltimore, George Calvert, received the Avalon charter in 1623 for settling in Newfoundland but later moved to Virginia and received a second charter to settle Maryland. See 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 275–82; Bernard C. Steiner, The Maryland Charter and the Early Explorations of that Province, 16 SEWANEE REVIEW 148, 150–52 (1908) (discussing Avalon charter). Calvert died and his son inherited his title and Maryland.
368. 3 THORPE, supra note 259, at 1679; see also 2 OSGOOD, supra note 68, at 12–13 (noting differences between American proprietorships and other colonies); id. at 59, 76 (proprietors’ powers and relationship with local assemblies); supra notes 62–69 and accompanying text (discussing palatine lordships in England); infra note 375 (palatinate references in other proprietorships).
369. See, e.g., 1 THORPE, supra note 259, at 45–47 (1496 Cabot grant); id. at 49–52 (1578 Gilbert grant); 3 id. at 1677–1686 (1632 Baltimore grant). Later proprietors often delegated powers to a governor and council. 2 OSGOOD, supra note 68, at 61, 65–68 (commenting that proprietor’s council might function like Privy Council); see also 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 299–300, 329 (Baltimore’s administration).
370. 3 THORPE, supra note 259, at 1682; see also CARR, supra note 232, at lxxxvii–viii (observing that 1632 charter left indictments, process, and appointments with Baltimore); 2 OSGOOD, supra note 68, at 10 (Baltimore was clothed with, among other things, authority to establish courts, appoint officers, and bestow titles).
371. See BEER, supra note 237, at 220–28 (discussing colonial monopolies and charter privileges excluding foreigners); id. at 227–28 (Baltimore did not have monopoly rights in
sion of the proprietor was necessary for holding land and exercising political power.372 Proprietors were able to make any ordinance or bylaw needed for good government as long as such provisions were not repugnant to the laws of England.373 This last clause was one of the few restrictions found in the proprietor’s charter. In a proprietorship, there might be an assembly of freemen joining the proprietor’s governor and council, but the proprietor held control of the colony’s main powers notwithstanding.374 Following Baltimore’s charter, proprietorships arose in Maine, New Hampshire, New York, Carolina, New Jersey, Pennsylvania, and Georgia.375

D. Colonial Governance

Having introduced the different types of colonies, we can move on to discuss aspects of colonial governance. Because the history and organization of English towns, corporations, and gilds provided ready precedents for colonial affairs, American colonial government shared many similarities with English local government.376 Both English towns and colonies often suppressed widespread participation in local government. Many colonies, for example, restricted political privileges based on property

Maryland); supra Part III.A–C (exclusive monopolies in charters to Cabot, Warde, and Gilbert).

372. 2 OSGOOD, supra note 68, at 12–13 (origin of power placed in proprietorship; proprietor was considered miniature king).

373. See, e.g., 1 THORPE, supra note 259, at 51 (1578 Gilbert); 7 id. at 3801 (1609 charter to Virginia); 3 id. at 1680–81 (1632 charter to Baltimore); see also JER. DUMMER, A DEFENCE OF THE NEW-ENGLAND CHARTERS 65–71 (London, J. Almon 1765) (1721) (describing examples of colonial laws repugnant or not repugnant to laws of England). For similar restrictions on merchants, see supra notes 210, 242–48 and accompanying text (gild and merchant association charters and parliamentary statutes limiting governance to serve common weal and “better governance”).

374. See infra notes 390–97 and accompanying text.

375. 2 OSGOOD, supra note 68, at 4–5; 1 id. at 123. Maine and Carolina proprietorships were similar to Maryland with slight variation. Maryland and Carolina had the privileges of the Bishop of Durham at any time, but Maine’s proprietor held as the Bishop of Durham in the seventeenth century. 3 THORPE, supra note 259, at 1627; 2 OSGOOD, supra note 68, at 5 n.1; cf. 3 id. at 248–50 (powers of Northern Neck proprietors). Penn’s charter did not refer specifically to the Bishop of Durham. Henry VIII abolished many of the realties of the palatinate. 1536, 27 Hen. 8 c. 24; see also supra note 68 (Henry VIII’s legislation removing special jurisdictions).

376. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 105 n.1 (detailing similarities between local government in England and local government in New England colonies); see also KAMMEN, DEPUTYES & LIBERTYES, supra note 341, at 52–54 (summarizing influence of trading corporations on assemblies and representative government in colonies).
qualifications, similar to laws in England. Governance of English municipalities was influenced by gilds and restricted to probi homines. A large portion of English boroughs eventually became oligarchies closed to common townsmen. Likewise, participation in several colonial governments was limited to desirable inhabitants. In other colonies, political power resided in or was otherwise influenced by church membership. Massachusetts, for example, was designed to be an open corporation with participation by freemen and ruled by popular vote to some degree, but for

377. At times, as was the law in England, suffrage in the colonies was restricted to freemen holding land valued at a set figure. See generally 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 115 n.1; ALBERT E. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA (1905).

378. See supra note 194 (probi homines); supra notes 179–90, 198, 200–03 (gild influence).

379. See supra notes 208–11 (town oligarchies).

380. The selection of freemen and “admitted inhabitants” in the New England colony resembled the wise, discrete, and honest probi homines of medieval borough councils. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 104–06 & nn.3–4 (noting selection in early Connecticut of freemen from admitted inhabitants excluded certain offensive and unworthy classes); id. at 115–16 (inhabitants became “admitted” by criteria which might filter wanton dalliance, fornication, lying, drunkenness, blasphemy, criminal activity, etc.).

381. In the New Haven settlement, the governing body voted to select free burgesses from church members. One man objected that free planters should retain power of election, but government officials replied in analogy that many English entities limit burgess membership. 1 THORPE, supra note 259, at 525; 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 157–58, 194; 1 OSGOOD, supra note 68, at 313–15 (Church political power in River Town and effort by crown to open government); id. at 322–23 (Church political power in New Haven); id. at 464 (restrictions on becoming free of town). Other New England colonies (Plymouth, early Connecticut, and Rhode Island), did not require official church membership. Early Connecticut, for example, extended some political power to admitted inhabitants without regard to formal church membership, though religion might play a role in official recognition as “admitted.” 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 78, 89–91, 101, 104–08, 117; see also supra note 380 (selection of admitted inhabitants in early Connecticut).

Though it did not require church membership, early Connecticut limited participation in civil affairs. The General Court, as opposed to the general population, approved freemanship. Freemen had greater power and constituted the body of eligible officers. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 104–05 (distinguishing between admitted inhabitants and freemen; freemen selected from admitted inhabitants by General Court or group of magistrates; freemen eligible to become deputies or magistrates; freemanship required to attend election assembly to vote for major candidates); id. at 107–08 (gulf between freemen and people at large); id. at 108, 111, 115–17 (qualified freemen elect magistrates; admitted inhabitants could elect deputies (from freemen) to cure neglect of government if summoned by freemen); David H. Flower, Connecticut’s Freemen: The First Forty Years, 15 WM. & MARY Q. 3d 312, 314–15 (1958). Over the course of the next several decades, Connecticut relaxed restrictions on political rights.
a long time, the colony restricted power to the church. Shortly after receiving its charter, Massachusetts made a law that no man would be admitted as a freeman, and thus would be without a significant voice in military and civil elections, holding office, or serving on juries, unless he was certified by the church after having become a member and taken the prescribed oath. Restrictions on political rights in Massachusetts presented a struggle for the colony throughout a large portion of the seventeenth century.

As part of the British Empire, colonial governance, like borough governance, depended on and was governed by royal privileges and immunities. Beyond the charter, colonial promoters further regulated administration of the colonies. English boroughs were generally under royal or private lordship; colonies were royal, proprietary, or corporate. As with borough governance under different lords, different types of colonial promoters translated to different characteristics of colonial governance. But most colonies shared one essential feature, the colonial assembly—an insti-

382. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 435–37 (freemanship limited to church members). After some experimentation limiting government and the General Court to a select body of assistants and officers, freemen gained greater rights in government. Id. at 433–34, 438 (1630 oligarchy); id. at 440 (by 1632, general election of officers by freemen with church membership; governor selected from court of assistants); id. at 441–43 (powers of General Court; charges of arbitrariness resulted in freemen from towns receiving privilege to elect deputies to attend General Court and authorize taxes). By 1634, the General Court had the power to admit freemen, make laws, raise money, and grant lands. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 441–43; 1 OSGOOD, supra note 68, at 153–56. For a discussion of Massachusetts’s General Court and its officers, assistants, and freemen, see Herbert L. Osgood, The Corporation as a Form of Colonial Government, Part II, 11 POL. SCI. Q. 502 (1896). One of the grievances motivating change in Massachusetts’s governance was taxation by a body of assistants without the consent of the freemen. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 439–40, 442–43. Andrews estimated that a couple hundred freemen ruled the colony of 20,000 inhabitants. Id. at 443.

383. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 435–37, 459 (freemien, one of four categories of Massachusetts inhabitants, was limited to church members under local oath); 1 OSGOOD, supra note 68, at 211–13 (freemanship restrictions in Massachusetts); B. Katherine Brown, Freemanship in Puritan Massachusetts, 59 AM. HIST. REV. 865 (1954) (discussing freemanship in Massachusetts).

384. Brown, supra note 383, at 869–77, 879 (Massachusetts reduced restrictions on political rights in 1647 and again in 1664); see also 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 459, 460 (same).

385. Parliament, too, could legislate for the colonies. See infra notes 461, 466.

386. See supra Parts II.C, IV.A–C.

387. See supra notes 86, 148, 223–24 and accompanying text (conditions under different governments varied; royal boroughs were freer).
tution tracing back to medieval borough councils and gild assemblies.  

Following Virginia’s 1619 representative assembly and changes in England, colonial assemblies took root in most colonies. The charter-based right for colonists to have an assembly of freemen was a significant limitation on proprietors. Proprietors like Baltimore frequently fought with the assembly or lower house. The proprietor’s assembly differed from the assemblies or courts of other colonies. The assembly in the proprietorship, at least initially, was weak. Freemen under Baltimore’s charter participated in the legislative process, but the proprietor retained control and could pass reasonable ordinances absent the freemen. The proprietor generally had the ability, through its agents, to summon and prorogue the meeting of the assembly. Even initiation of legislation was typically reserved for the proprietor.

388. See supra Part II.G. The institutions and privileges of Parliament also influenced the colonial assembly, though the borough council and gild assemblies were likely closer relatives.

389. Not all colonies had assemblies. New York colonists and the Duke of York, or James II as King, fought over the right to have full assembly privileges. See supra note 68, at 160–62 (New York colonists wanted privileges of other colonies including election and tax-granting assembly); see also infra notes 408–29 (struggle for full assembly rights under Duke’s rule). The Duke’s charters did not mention an assembly for the colonists. Nonetheless, New York enjoyed an assembly for a brief period. But when the Duke became James II, he gave instructions omitting the local assembly. Id.

390. See, e.g., 3 THORPE, supra note 259, at 1679 (1632 charter to proprietor of Maryland); 3 id. at 1628 (1639 charter to proprietor of Maine); 5 id. at 2745 (1663 charter to proprietors of Carolina); 5 id. at 3037 (1681 charter to Penn). In 1681, Charles II granted to William Penn a large proprietorship with extensive privileges similar to Baltimore’s charter. Unlike other colonies, Penn, from the start, was a strong advocate for representative government. 2 OSGOOD, supra note 68, at 256 (Frames of Government and Charter of Privileges established government in Pennsylvania); id. at 257 (Frames submitted to the settlers for approval; elected council as opposed to appointees); cf. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 167, 273–74 (detailing Penn’s work in 1670s as West New Jersey proprietor ensuring representative government with ample legal and individual rights).

391. See infra notes 418–28, 432, and 493.

392. 2 OSGOOD, supra note 68, at 58–59, 75 (contrasting power in corporate colony with power and assembly in proprietorship).

393. A proprietor had the ability to pass emergency ordinances, but those emergency ordinances could not deprive any person of member, life, freehold, goods, or chattels. 3 THORPE, supra note 259, at 1680–81 (Baltimore’s emergency ordinance provision); 5 id. at 3038 (Penn’s emergency legislation provision).

394. 2 OSGOOD, supra note 68, at 13 (governmental authority in proprietor); id. at 59, 75–77, 80 (proprietor and governor summon, prorogue, and dissolve assembly and initiate and veto legislation); see also 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 334–35.

395. 2 OSGOOD, supra note 68, at 80. As in other colonies, Penn and the assembly fought over initiation power. Penn worried the assembly’s legislation would go beyond the
a governor and council. If the governor and council approved the legislation, the proprietor could then veto the legislation.

Despite the assembly’s initial weakness under proprietors, settlers wanted assemblies for greater self-government. Proprietors distributed land to settlers and made agreements concerning governance through “concessions” or “conditions of plantation.” These agreements, if covering governance as well as land, served as miniature constitutions between the proprietor and settler. In 1663, Charles II granted Carolina to a board of eight proprietors composed of London merchants, nobles, and other influential men. Promoters and London merchants with ties to Barbados and New England were interested in settling Carolina but wanted to retain corporate freedoms and government by consent. The bargain between the two resulted in the proprietors’ adoption of the Concessions and Agreements of 1665. The 1665 Concessions granted various freedoms, pro-

chart, upset the crown, and cause a forfeiture of Penn’s charter. kammen, deputyes & liberties, supra note 341, at 41–42, 64 (discussing shift in initiation power in Pennsylvania); 2 osgood, supra note 68, at 260; cf. labaree, supra note 347, at 219–23, 429 (initiation in royal colonies given to assembly).

396. 2 osgood, supra note 68, at 61 (commission for governor and council); id. at 74–75 (assembly of deputies).

397. Id. at 62, 76. By the turn of the eighteenth century, the crown also had power to disallow colonial legislation in several colonies. E.B. GREENE, PROVINCIAL AMERICA 1690–1740, at 49–50 (1905) [hereinafter GREENE, PROVINCIAL AMERICA] (Virginia, New York, New Hampshire, Pennsylvania, Massachusetts, Maryland, and New Jersey). See generally ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL (1915).

398. 2 osgood, supra note 68, at 20–29 (describing contracts between settlers and proprietors); id. at 60 (concessions for government); see also 2 andrews, colonial period, supra note 228, at 293 (“conditions of plantations” in Maryland); 3 id. at 167 (Penn’s 1677 Concessions for West New Jersey).

399. 2 osgood, supra note 68, at 20 (Baltimore’s land agreements for settlers); id. at 60, 205 (most proprietors issued these agreements, but Maryland’s agreements limited to land and not to rights of government); id. at 211 (agreements served as constitutions).

400. 5 thorpe, supra note 259, at 2743. The grant to Carolina followed liberal charters to Connecticut and Rhode Island. 3 andrews, colonial period, supra note 228, at 182–83, 186 (influence of London merchants and nobles in securing charter).

401. 3 andrews, colonial period, supra note 228, at 192–93 (groups of adventurers from New England and Barbados interested in settling Carolina); id. at 194–95 & n.3 (investors sought to secure commercial privileges, free trade, liberty of conscience, and representative assembly); 2 osgood, supra note 68, at 202–05.

402. Investors desired the Concessions be modeled on the corporate freedoms of certain English towns, but proprietors followed their own plan. 3 andrews, colonial period, supra note 228, at 143, 192–96 (noting Barbadians’ influence in drafting document); wesley f. craven, the colonies in transition 1660–1713, at 89 (1968) [hereinafter craven, colonies in transition]; 2 osgood, supra note 68, at 205, 210–12 (concessions
ected liberty of conscience, and provided ample assembly privileges with execution of local assembly legislation rather than executive initiation common in other proprietorships.\textsuperscript{403} The generosity of the 1665 Concessions, however, was short lived. Facing problems with the liberal agreements, proprietors reversed course and followed a feudal scheme beginning with the Fundamental Constitutions of 1669.\textsuperscript{404} With these efforts to avoid democracy, Carolina proprietors returned the colony to a palatine lordship with initiation power in the proprietors and reduced assembly rights.\textsuperscript{405} The settlers never fully adopted the change, and the Carolinas ended up in the crown’s hands in the first half of the eighteenth century.\textsuperscript{406}

With the help of representative assemblies, local government, though meandering at times through feudal or royal control, gravitated back to the people paying taxes and participating in commerce. The more community features a locality obtained, the more independence it sought. Communal gild and corporate forces, for example, helped liberate the townsmen of the private borough under a lord or church.\textsuperscript{407} Similar community and commercial features motivated colonial autonomy and eventually reduced proprietary and royal control in the colonies—often by analogy to English institutions or assimilation of a neighboring colony’s privileges.\textsuperscript{408}

\textsuperscript{403} See supra notes 223–24 and accompanying text.

\textsuperscript{404} See supra notes 401–02 (London merchants and corporate freedoms of other colonies influenced colonization under Carolina charter as would-be settlers in Carolina wanted to retain their corporate freedoms); infra note 412 (noting influence of Carolina Concessions on New Jersey Concessions); infra note 423 (Duke of York’s grant of privileges of neighboring colonies); infra note 498 (observing convergence toward citizenship status of freer societies through charter association directly or by claims for generalized free customs, liberties, privileges, and immunities of freer entity); see also 4 Andrews, Colonial Period, supra note 228, at 423 n.1 (commenting in reflection that colonies might not be seeking “democracy” in its strictest definition but were constantly seeking to free themselves of ex-
The history of seventeenth-century New York illustrates these dynamics and provides an example of a colony struggling for self-government, initially under a proprietorship and later under the crown. In the early part of the seventeenth century, the Dutch formed the colony of New Netherland in northeastern North America—a colony that eventually became home to both Dutch and English local settlements. At the Restoration, the Dutch and English were temporarily at peace but that would soon change as England initiated plans to retaliate against the Dutch for various injuries.

On the eve of England’s conquest of New Netherland, in March 1664, Charles II granted the territory of New York (still New Netherland under the Dutch) to his brother, the Duke of York. A few months later, the Duke conveyed a portion of his grant, New Jersey, to loyal friends. Meanwhile, Colonel Richard Nicolls, the Duke’s future appointee for Governor of New York who did not know of the grant to New Jersey proprietors, presided over a commission to hear grievances and restore order in the territory in anticipation of the conflict. As part of his commission, Nicolls appeased English settlers by promising them some degree of self-government and the privileges of English subjects. Specifically, Nicolls promised settlers and Long Island promoters equal privileges as those enjoyed in other New England colonies.

ternal proprietary, royal, and parliamentary control); Herbert L. Osgood, The Proprietary Province as a Form of Colonial Government, Part I, 2 AM. HIST. REV. 644, 652–54 (1897) (comparing democratic forces in proprietary colonies with similar democratic forces in medieval England).

409. 2 OSGOOD, supra note 68, at 153–54, 157; see also infra note 420.

410. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 56.

411. Id. at 57.

412. CRAVEN, COLONIES IN TRANSITION, supra note 402, at 83–84. The Duke’s conveyance of New Jersey did not authorize governance rights because the Duke was not authorized to grant such authority. The absence of formal authority for governance plagued New Jersey proprietors. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 142, 145 & n.1. Nonetheless, New Jersey grantees, also Carolina proprietors, adopted almost verbatim the Carolina Concessions for their Concessions. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 140, 143, 196; CRAVEN, COLONIES IN TRANSITION, supra note 402, at 88–89; 2 OSGOOD, supra note 68, at 169–70, 173–74 (1665 agreements granted broad rights).

413. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 56, 59, 63.

414. See infra note 415.

415. AARON LEAMING & JACOB SPICER, GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 661–63, 671–73 (2d ed., Philadelphia, W. Bradford 1881) (Monmouth and Elizabethtown grants); 2 OSGOOD, supra note 68, at 159; cf. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 320 (similar promise in Penn’s 1701 charter of liberties).
Overwhelmed by English forces, leaders of New Netherland surrendered to the English and New Netherland became New York.\textsuperscript{416} Assisted by Nicolls’s leadership, the Duke established his laws for New York in early March 1665.\textsuperscript{417} The Duke’s law was a vast code of provisions assembled from various sources.\textsuperscript{418} Under the Duke’s rule, however, New York colonists were not participating in essential components of the legislative process, and they grieved for full privileges of representative government.\textsuperscript{419} When the Duke’s laws reached the English on Long Island, a community long accustomed to self-government,\textsuperscript{420} they petitioned the king

Nicolls promised settlers and local promoters (including those in the Duke’s grant of New Jersey) “equal freedom, immunities and privileges with any of his majesties’ subjects in any of his colonies in America.”\textsuperscript{421} Under the authority of Nicolls’s grant, assembled settlers enacted laws and established courts to try minor causes. Nicolls, however, did not have authority under the commission to grant a full legislative assembly for authorizing taxes.\textsuperscript{422} Nicolls’s grants of liberal, but limited self-government to towns and promoters in area of New York and New Jersey;\textsuperscript{423} at 144–45 (settlers under grants held town meetings, enacted laws, formed courts and held trials; enjoyed exemption from taxation for seven years; settlers promised privileges of neighboring colonies); Craven, Colonies in Transition, supra note 402, at 80, 84–85.

The rule of law under New York and New Jersey proprietors eventually conflicted with Nicolls’s earlier grants of self-government, or perceptions thereof, and Nicolls’s grants would prove problematic for the proprietors throughout the latter half of the seventeenth century.\textsuperscript{424} Assemblies in New Jersey towns met under two authorities: one more autonomous under Nicolls’s grant, the other under New Jersey proprietors’ rule;\textsuperscript{425} at 156–57 (contrast between freer self-governance in New England and Long Island and governance under proprietary government; proprietors viewed Nicolls’s patents as illegitimate).

416. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 60–63.

417. 1 CHARLES Z. LINCOLN, THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 6 (Albany, James. B. Lyon 1894) [hereinafter LINCOLN, THE COLONIAL LAWS OF NEW YORK]. Lincoln has the date as March 1, 1664 instead of March 1, 1665.


420. English on Long Island had a long history of advocacy for representative government. Before the English Conquest of New Netherland, the English in the Dutch territory advocated for greater self-governance. Kammen, Colonial New York, supra note 419, at 39–40 (English migrating to New Netherland brought town meetings, churches, and concept of communal land);\textsuperscript{426} id. at 49, 52–54 (English demands for political participation under the Dutch); id. at 54–55 (Dutch leadership resisted calls for autonomy, appointed town leaders, and created upper and lower town citizens). The English-influenced plea for participation in the 1653 Petition of the Commonality of New Netherland declared:
for the right to participate in taxation and enjoy corporate privileges. Similar disputes for full assembly privileges continued throughout the Duke’s rule. By the early 1680s, New York merchants, refusing to pay customs, claimed that if they were taxed without consent, it would be a violation of the Magna Carta, the Petition of Right, and other fundamental laws. The Duke, to quell the dispute and collect revenue, reluctantly granted the inhabitants an assembly and the privileges and immunities enjoyed by other colonies. When the new assembly met, it crafted the 1683 Charter of Liberties, a broad grant of liberties that received some

tis contrary to the first intentions and genuine principles of every well regulated government, that one or more men should arrogate to themselves the exclusive power to dispose, at will, of the life and property of any individual, and this, by virtue or under pretense of a law or order he, or they, might enact, without the consent, knowledge or election of the whole Body, or its agents or representatives. Hence the enactment, except as aforesaid, of new Laws or orders affecting the Commonality, or the Inhabitants, their lives or property, is contrary and opposed to the granted Freedoms of the Dutch Government, and odious to every freeborn man, and principally so to those whom God has placed in a free state on newly settled lands, which might require new laws and orders, not transcending, but resembling as near as possible, those of Netherland. We humbly submit that tis one of our privileges that our consent or that of our representatives is necessarily required in the enactment of such laws and orders.

1 E.B. O’CALLAGHAN, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 550, 551 (1856) (Resolution 4, Petition of the Commonalty of New Netherland); see also 2 OSGOOD, supra note 68, at 154–57 (English in New Netherland); supra note 415 (discussing Nicolls’s grant of equal privileges and immunities to settlers and Long Island promoters in territory of New York and New Jersey).

421. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 109–12 (discontented English claimed Duke’s rule violated liberty of Englishmen); id. at 106–07, 109 (chief complaint was taxation without popular participation); DAVID S. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA 108–09 (1972) (English on Long Island upset with heavy taxes and no representation). The Duke dismissed the assemblies of New Jersey and New England as unnecessary for New York colonists. In his view, assemblies were dangerous and destructive to the peace of the colony. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 112–13.

422. 3 JOHN R. BRODHEAD, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 289 (Albany, Weed, Parsons & Co. 1853) (bill against William Dyer for collecting customs); LOVEJOY, supra note 421, at 110–12; 2 OSGOOD, supra note 68, at 162–63 (merchants refused to pay customs; treated payments as violations of fundamental laws, e.g., Magna Carta, Petition of Right, and other statutes).

423. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 110–11 n.2, 113–14 (Duke granted equal liberties and an assembly, which Englishmen and fellow plantations enjoy); 2 OSGOOD, supra note 68, at 164–65.

424. A copy of the 1683 legislation can be found in 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 95–107 (1906) (1683 legislation provided for trial by jury, due process, consent in legislation and taxation, individual liberties, religious toleration, parliamentary privileges, and triennial meetings). See also 2 OSGOOD, supra note 68, at
support but later did not receive confirmation by James II and the Lords of Trade.\textsuperscript{425} The 1683 legislation was perceived as harmful because it granted liberal freedoms and recognized the “people” as the source of power.\textsuperscript{426} After the death of Charles II, the Duke became King James II, and with an eye for consolidation of all of the New England colonies,\textsuperscript{427} he disallowed the 1683 charter and the assembly altogether, placing the power to legislate with the governor and council.\textsuperscript{428} Following the Glorious Revolution and James II’s abdication, New York regained its assembly.\textsuperscript{429}

As a vehicle for change in New York and other colonies, assemblies were instrumental in mobilizing settlers and curbing royal and proprietary government.\textsuperscript{430} With the House of Commons’ long history of struggling to

\textsuperscript{425} The Lords of Trade and Plantations was a crown body designated to oversee the colonies. See infra note 470.

\textsuperscript{426} Lovejoy, supra note 424, at 512–15 (belief of Lords of Trade that charter granted privileges beyond those of any colony; governed directly by English laws; lodged government in governor, council, and “people”; and imposed burdensome obligation of requiring frequent meetings); see also 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 117 n.2 (discussing use of “people” in various documents); 2 OSGOOD, supra note 68, at 166–68.

\textsuperscript{427} During the mid-1680s, the crown challenged and voided the charters of New England colonies to form the Dominion of New England. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 68 (summarizing policy to consolidate the corporate and proprietary colonies); \textit{id.} at 118 (noting Duke’s goal to consolidate colonies); \textit{infra} note 475 (briefly discussing lawsuits voiding charters in order to consolidate colonies into Dominion of New England); VIOLA F. BARNES, THE DOMINION OF NEW ENGLAND 29 (F. Ungar Pub. Co. 1960) (1923).

\textsuperscript{428} 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 122–23 (loss of local assembly especially poignant to English towns in New England); 2 OSGOOD, supra note 68, at 168; 3 \textit{id.} at 358–59 (omission of assembly in New York’s instructions); Lovejoy, supra note 424, at 513–15. New England under the Dominion, which included New York as of 1688, also lacked a local assembly. BARNES, supra note 427, at 40–41 (suggesting James II was responsible for removal of assembly from first draft of Dominion’s commission and instructions); \textit{id.} at 41–42 (noting criticisms of assemblies as disruptive and entrenching theocracy in Massachusetts); see also \textit{infra} note 495; cf. supra note 207 (criticisms against the commonalty in English towns).

\textsuperscript{429} 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 137; 3 OSGOOD, supra note 68, at 508.

\textsuperscript{430} LABAREE, supra note 347, at 35–36 (assemblies stronger in eighteenth century; parliamentary sovereignty in England not transferable to colonies under crown); \textit{id.} at 172–74 (conflict between colonial assembly and crown); \textit{id.} at 215–17, 267–68 (contest between royal prerogative, parliamentary privileges, and local assemblies); \textit{id.} at 227–28 (weakening of crown’s control led to greater efforts to control assembly); \textit{id.} at 426–28 (as colonial assemblies grew in strength, they ignored royal instructions and brought about transformation from royal prerogative to government by consent); LOVEJOY, supra note 421, at 78 (efforts by Maryland’s assembly to combat proprietor’s power); 2 OSGOOD, supra note 68, at 80–94.
obtain privileges, colonists had a wealth of perceived precedents to throw at the crown or proprietor. Wielding de jure or de facto revenue authority, colonial assemblies mimicked Parliament in taxation and parliamentary privileges. By the eighteenth century, American colonies had assemblies, but these assemblies to a large degree existed or functioned at the will of the crown or proprietor.

E. Tenure Clauses in Colonial Charters

The discussion to this point has focused on charter privileges and immunities concerning the colonies’ formation and other aspects of colonial governance. Royal privileges and immunities also regulated tenure in the colonies. Merchants eyeing North America in the sixteenth century did not envision a thriving colony but rather a trading post with temporary citizens serving trading interests. Subsequent royal charters focusing more on

(describing ascent of Maryland’s assembly to state of greater independence); see supra notes 408–29 (struggle of assembly in New York proprietorship); see also KAMMEN, DEPUTYES & LIBERTYES supra note 341, at 56–68 (describing evolution of colonial assembly and its influence in curbing arbitrary government).

431. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 301, 336–37, 338, 341–42 (assembly under Baltimore claimed parliamentary privileges based on House of Commons’ privileges); 3 id. at 304 (parliamentary privileges served as a model for Penn’s assembly); LOVEJOY, supra note 421, at 75–78, 89–92 (assembly’s advocacy for parliamentary privileges in Maryland); see also MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGES IN THE AMERICAN COLONIES (1943); LABAREE, supra note 347, at 174–75, 272, 308 (commenting that most colonies, under rights of Englishmen, enjoyed revenue authority, excepting Dominion of England and New York in late 1680s); id. at 215–16 (parliamentary privileges and local assemblies); id. at 274–75 (colonial assemblies wanted same powers as House of Commons over revenue); id. at 284, 296–97, 299 (lower assembly refused to pass revenue law, objected to upper council’s amendments of money bills); id. at 428–30 (assembly emulated House of Commons; although prerogative was limited in England after Glorious Revolution, crown wanted to keep royal prerogative strong in colonies; colonial assembly responded with argument that crown cannot do anything in colonies that it cannot do in England). By the time Parliament exercised its authority in taxation, the colonial assembly had already asserted its dominance. LABAREE, supra note 347, at 430–31.

432. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 339–41 (Baltimore reduced assembly membership and invoked property requirement to restrict voting eligibility); 3 id. at 114 (Duke of York briefly conceded liberal assembly rights to New York, but governor retained power to consent to laws and to summon, adjourn, and dissolve assembly for cause); id. at 137 (same arrangement for crown after Glorious Revolution); LABAREE, supra note 347, at 177–78, 179, 190, 214–15, 218, 297–98 (noting that crown frequently reminded royal colonies that assemblies existed by grace and permission of crown); id. at 207–15 (observing that crown was reluctant to clothe assemblies with same privileges as Parliament).

433. See supra Part III (expansion of merchant associations overseas; transformation from trading model to colonization model).
settlement added clauses concerning tenure. Promoters desired to settle the American wilderness in a similar fashion to the settlements of England, often mimicking the county, hundred, manor, and borough system in nomenclature if nothing else.\footnote{1 ANDREWS, COLONIAL PERIOD, supra note 228, at 510–11 (land system in New England followed that of England); 2 id. at 293–98 (manorial outline of Maryland); 3 id. at 219 (describing manors in Carolina as large plantations without true manorial features); 1 OSGOOD, supra note 68, at 12 (Gilbert’s plans mimic English institutions); id. at 21, 85–86, 92–93 (private plantations in early Virginia); id. at 90–91 (discussing development of boroughs, manors, corporations, and cities in Virginia); id. at 425–26 (agricultural aspect of New England town resembled English hamlet and village); 2 id. at 25–26, 33 (manors with manorial privileges in Maryland and Carolina); id. at 30 (manors in New Netherland); id. at 50 (village system in New England and New Netherland).}

1. Socage Tenure

An essential part of the colonization effort was granting and managing lands.\footnote{434} Throughout the colonial period, colonizing agencies rewarded colonists with land for bringing additional settlers.\footnote{435} The colonizing agency and the crown wanted land settled to help provide a stable and safe environment for trade.\footnote{436} Englishmen wanted land and were willing to face a dangerous frontier in exchange for large tracts of land.\footnote{437}

Most royal charters to colonial promoters contained a variation of the tenure clause that provided for holding land in free and common socage, “as of our Manor of East Greenwich,” in the County of Kent, not \textit{in capite},

\footnote{437. HARRIS, supra note 37, at 255–60, 362–63 (grants to military officers to set up military posts for stability).}

\footnote{438. Creating border palatinates with regal privileges was common on the frontiers of England. Some argue England’s palatine earls were clothed with higher privileges and jurisdictions in exchange for their service as a barrier to the more conflict-prone borders. This rationale has been applied to colonial frontiers. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 197 (warlike America during colonial period resembled an earlier period in England); HARRIS, supra note 37, at 255–56 (noting similarities between English palatinates near Wales and Scotland and grants to military figures in colonial America). But see LAPSLEY, supra note 62, at 12–13 (noting absence of evidence to support theory that English palatinates were created to serve as buffers).}
and not in knight’s service. The Manor of East Greenwich in the County of Kent, by the mid-sixteenth century, was a royal manor held of the king. By the reign of James I, granting crown lands as of the Manor of East Greenwich in the County of Kent was mostly generic charter formula. References to the royal Manor of East Greenwich and similar tenure clauses were deemed necessary to avoid any presumption that the land was held in any tenure other than socage tenure, free of knight’s service, and not in capite.

Other more burdensome tenures would not work. The tenant in capite, for example, was required to receive a license from the crown to permit alienation, and if a license had not been obtained prior to the transfer, the grantor had to pay a fine. Because settling and transferring land would be a necessary component of colonization, colonial promoters endeavored to secure language in their charter that the land would not be held in capite.

As discussed above, the common attribute of socage tenure, like burgage tenure, was rent in exchange for most feudal obligations, especially military and wardship and marriage burdens. Socage tenure was more

439. Edward P. Cheyney, The Manor of East Greenwich in the County of Kent, 11 AM. HIST. REV. 29, 29 (1905) (listing charters that used phrase or a variation of phrase); see also 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 139 n.2; McPherson, supra note 39, at 35–56 (detailing attributes of Manor of East Greenwich formula); infra note 442 (discussing tenure in capite and by knight’s service). In 1732, Georgia was held in free socage, not in capite, as of the manor of Hampton Court in Middlesex—not significantly different from East Greenwich. 2 THORPE, supra note 259, at 771; see also Cheyney, supra, at 29.


441. Cheyney, supra note 439, at 32 (commenting that East Greenwich manor was a common reference manor in royal charters).

442. Id. at 29–30 (describing late seventeenth-century survey of Manor of East Greenwich listing customs of manor). Tenure in capite meant holding of the king directly as tenant in chief. Land held of the king was presumably in capite unless specified otherwise. See McPherson, supra note 39, at 42, 43–44, 45–46 (colonial grants avoided burdens of knight’s service and alienation fees accompanying lands held in capite); supra note 40 (discussing tenure in capite and alienation of land held of king). Tenants in knight’s service owed military services; military tenure was common in England after the Conquest. See supra note 33.

443. McPherson, supra note 39, at 44, 45 (noting emergence of reasonable fines for unlicensed alienation of land held in capite; discussing “not in capite” disclaimer and reference to holding of manor); see also supra note 40.

444. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 282 (change in tenure from in capite to socage and not in capite in Maryland’s charters).

445. Settlers wanted land free of common feudal obligations. William R. Vance, The Quest for Tenure in the United States, 33 YALE L.J. 248, 254 (1924) (describing common feudal incidents such as escheat for felony or failure of heirs; distress for failure of services;
freely alienable and deviseable, and this was a key requirement for a colony abroad.\textsuperscript{446} In many of the original colonies, grants to settlers, whether by royal governors or proprietors, were made in free and common socage, often reserving a quit rent to the promoter.\textsuperscript{447} Colonists perceived the quit rent as a form of land tax to the proprietorship or crown.\textsuperscript{448} Other than the facial grant of socage tenure and the fiction of holding of a manor, the particular reference to holding as of the Manor of East Greenwich was not

\textsuperscript{446} McPherson, supra note 39, at 40.

\textsuperscript{447} Id. at 39–45 (describing common colonial tenure clauses). The Tenure Abolition Act of 1660 converted existing tenures into socage tenure. 1660, 12 Car. 2, c. 24, § 4.

New Netherland was lost to England in the latter half of the seventeenth century, and Charles II granted large tracts of land to his brother, the Duke of York. When the Duke’s appointees took over New Netherland, in line with the socage-tenure theme of other colonies and the new law in England, most feudal obligations were waived. I Lincoln, The Colonial Laws of New York, supra note 417, at 44 (freedom to alienate, freedom from heriots, wardships, escheats, and forfeitures); see also Harris, supra note 37, at 213; 2 Osgood, supra note 68, at 40–42.

\textsuperscript{448} Vance, supra note 445, at 259. Quit rents were a controversial topic in colonial affairs—successfully collected in some colonies but almost non-existent in New England’s corporate colonies. Bond, supra note 445, at 32–33 (detailing collection efforts in various colonies); id. at 35 (discussing colonies free of quit rents).
considered significant to the colonies. 449

2. Proprietorships and Quia Emptores Terrarum

Though common in colonial charters, socage tenure was not required for all lands. As described above, the crown granted to proprietors all rights, privileges, and jurisdictions of the land. 450 Under typical charter language, proprietors themselves may have held land of the king in socage tenure with compensation and homage or fealty in exchange for services. 451

If the statute of Quia Emptores Terrarum did not apply, promoters had the ability to create tenures. 452 Quia Emptores Terrarum allowed alienation but required the grantee hold the same tenure as the grantor. 453 This prevented the alienation and subinfeudation problems in which estates of high lords were being reduced in quality and status by intermediary lords creating new tenures or subinfeudating the land with incidents and customs conflicting with those owed to the original high lord. 454 When an intermediary lord alienated land under the statute, the grantee held as the grantor, thus preserving the tenure and services owed to the high lord. 455

A number of colonial charters to proprietors suspended the application of Quia Emptores Terrarum, and these proprietors were allowed to subin-
The feudum to Maryland, for example, was held by Baltimore in socage tenure as of the Castle of Windsor in the County of Berkshire, not in capite, not in knight’s service, with fealty in exchange for all services. The statute of Quia Emptores Terrarum was expressly excluded, and Baltimore could subinfeudate and mimic English feudal institutions. At a later date, several decades after the charter to Baltimore, William Penn received his proprietorship. With several exceptions, Penn’s charter was modeled after Baltimore’s charter. In Penn’s grant, the statute of Quia Emptores Terrarum not only did not apply to Penn and his heirs but also did not apply to their immediate grantees, who could also subinfeudate, erect manors, and create subdivisions.

F. Conflict with the Crown

As noted throughout, whether reviewing colonial assemblies or colonial tenure, English institutions directly or indirectly influenced the colonies. The institutions of proprietorships and corporate colonies were charter-based rights as the crown granted privileges and immunities to the colony. The charter was as important to the promoter and colonist as it

456. See, e.g., 3 THORPE, supra note 259, at 1632–33 (1639 charter to Gorges of Maine); 5 id. at 2750 (1663 charter to proprietors of Carolina); 2 OSGOOD, supra note 68, at 19; see also infra notes 457–60 (proprietorships of Penn and Baltimore).

457. 3 THORPE, supra note 259, at 1679. Baltimore and Penn both held their grant as of the Castle of Windsor in the County of Berkshire. Cheyney, supra note 439, at 29 (listing variations of more common Manor of East Greenwich formula). The crown’s charter specifying that the land was to be held of the Castle of Windsor avoided the presumption that the land would be held in capite. See supra notes 442–44.

458. 3 THORPE, supra note 259, at 1684–85 (suspension of Quia Emptores Terrarum in Maryland’s charter; ability to create manors with court baron and view of frankpledge); see also 2 OSGOOD, supra note 68, at 8–9. Those who brought settlers to Maryland received large tracts of land as manors with rights of court baron and view of frankpledge, paying various quit rents to Baltimore. 1 DOYLE, supra note 272, at 285–86. Smaller land holders were also rewarded for bringing additional settlers. Maryland had about sixty manors averaging about 3,000 acres. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 293–98 (comparing Baltimore’s manors with English tenures); 2 OSGOOD, supra note 68, at 25.

459. Penn received his charter in 1681. 5 THORPE, supra note 259, at 3035–36.

460. Id. at 3042–43 (Quia Emptores Terrarum suspended in Penn’s grant). The creation of manors in Penn’s charter was extended one step, i.e., Penn and his immediate grantees could create tenures but no further grantees of grantees were so authorized. McPherson, supra note 39, at 52–53 (Penn’s charter and Quia Emptores Terrarum); see also HARRIS, supra note 37, at 237–41 (land distribution in Pennsylvania).

461. Parliament also passed legislation affecting the colonies. Where Parliament expressly claimed that legislation covered the colonies, there was little debate. The application of preexisting statutes to the colonies gave parties more trouble. 1 GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE 194–225
was to the borough, gild, and corporation in English municipal history. The charter gave permission, among other things, to travel, inhabit discovered lands, and form a colony. The charter held the colony’s powers and gave direction for internal administration. Charter-based privileges regulated or granted the right to incorporate, enjoy assembly privileges, retain English citizenship, and hold and dispose of land. Excepting the period of the English Civil War and the Commonwealth, there were only a few examples of parliamentary legislation concerning the American colonies before the turn of eighteenth century.

As the colonies became populated with English subjects, and to some degree with modified English institutions, conflicts arose between settlers, colonial governments, and the crown. The crown struggled to regulate and maintain control of corporations and proprietors. As the colonies ma-

(London, Reed & Hunter 1814) (legal opinions on the force of English law in colonies); St. George Leakin Sioussat, The Theory of the Extension of English Statutes to the Plantations, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 416–30 (1907); see also DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD 1664–1830, at 68–69 (2005) (describing research around effect of Parliament in colony); KETTNER, supra note 275, at 135–36 (discussing theories of discovery and conquest and respective implications on force of English law in colonies); 2 OSGOOD, supra note 68, at 436, 438 (force of English statutes considered not binding and ignored).


462. LABAREE, supra note 347, at 7 (high ranking of royal charter in scheme of colonial authority); see also supra Part II.D (borough charters).

463. See supra notes 259–60, 267 and accompanying text.

464. See supra notes 268–69, 312 and accompanying text.

465. See supra Parts III–IV.E ( charters to merchant associations and explorers traveling overseas and eventually planting colonies).

466. Most of Parliament’s acts expressly affecting the colonies in the seventeenth century involved commerce and trade. 3 OSGOOD, supra note 68, at 513; see also BEER, supra note 237, at 341–42 (Long Parliament and Civil War increased Parliament’s role in colonial affairs); id. at 343 (during the English Civil War, Parliament took over all legislative and executive aspects of the Empire).

tured, ironically the charter’s greatest use was protection from royal interference.468 Throughout the colonial period, the charter was a safeguard for the colonist or promoter and an obstacle to the crown’s control.469 Nonetheless, as a colony of the Empire, the crown retained control in a variety of ways.470 Because the charter was a royal grant, it was subject to repurchase or revocation for abuse.471 When it was displeased with the colony, in the same manner as it would with a corporation or municipality, the crown would bring quo warranto472 or scire facias proceedings against the colony and its charter.473 Some colonies chose to fight the legal proceedings; oth-

468. See, e.g., 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 445–46 n.3; 2 JOHN WINTHROP’S JOURNAL, HISTORY OF NEW ENGLAND 314–15 (J.K. Hosmer ed., 1908) (deflecting several royal grievances by appealing to privileges and immunities of charter); LABAREE, supra note 347, at 95 (discussing crown’s commission as central authority for royal governor except in case of Massachusetts with its 1691 charter to which colonists could appeal); cf. 2 ANDREWS, COLONIAL PERIOD, supra note 228, at 346 (crown’s charter privileges as liberties and rights against arbitrary proprietor).

469. 4 ANDREWS, COLONIAL PERIOD, supra note 228, at 371–72, 389–91, 402–03 (noting crown’s animosity toward private colonies in light of commercial goals).

470. LOUISE P. KELLOGG, THE AMERICAN COLONIAL CHARTER 207–10, 256–61, 267–68, 272–73 (1904) (commissions, veto power, appellate review, and appointment powers). When the colonies grew in number and local complexity, the crown delegated royal power to a council, commission, or board to handle colonial affairs. CHARLES M. ANDREWS, BRITISH COMMITTEES, COMMISSIONS AND COUNCILS OF TRADE AND PLANTATIONS 1622–1675, at 9–23 (1908) [hereinafter ANDREWS, BRITISH COMMITTEES] (describing commissions and committees of the Privy Council from 1622–1675). In 1634, the crown established a formal royal commission for trade and plantations. 1 ANDREWS, COLONIAL PERIOD, supra note 228, at 412. With royal assent, the commission had power to make laws, ordinances, and constitutions concerning public, ecclesiastic, and private affairs in the colonies. The commission and its successors had full power to enforce the laws, review colonial executive action, appoint officers, serve as a royal court of appeal, and issue charters for new colonies. ANDREWS, BRITISH COMMITTEES, supra, at 16–17; SNOW, supra note 331, at 69–72. Throughout the colonial period, a similar body handled colonial affairs. It was natural for these committees to treat all the colonies as one entity to maximize England’s interests, even if those interests conflicted with the welfare of the colony. ANDREWS, BRITISH COMMITTEES, supra, at 25.

471. See supra notes 30, 120–21 (remarking that royal charters to lords and entities could be revoked for abuse or abandonment).

472. The king pursued an action of quo warranto against a franchise holder to resume charter privileges of those who usurped authority beyond the privileges granted or who exercised privileges without a charter. See supra note 121.

473. The king pursued an action of scire facias to repeal a charter granted by deceit or against the liberty of the subject. 9 HOLDSWORTH, supra note 173, at 66–67 (explaining quo warranto was appropriate for de facto franchise holders who operated without authority and scire facias was appropriate for de jure holder who abused authority); Philip S. Haefliden, The Crown and the Colonial Charters, 1675–1688: Part I, 15 WM. & MARY Q. 3d 297, 302 n.12 (1958). Toward the end of the seventeenth century, the crown initiated legal proceed-
ers surrendered their charter and became royal colonies to avoid litigation costs. The crown took advantage of its ability to revoke charters on several occasions, notably toward the end of the seventeenth century, before the Glorious Revolution, when it made efforts to consolidate the colonies into the Dominion of New England.

V. PRIVILEGES AND IMMUNITIES OF ENGLISHMEN AND THE U.S. CONSTITUTION

Up to this point, this Article has focused on rights and liberties granted by charter. Charters clothed subjects and entities with a variety of privileges and immunities. The seventeenth century produced a different kind of liberty, the liberty of the Englishmen—a step removed from, and often hostile to, the crown’s charter.

474. KELLOGG, supra note 470, at 197, 201–06, 236–37; see also 4 ANDREWS, COLONIAL PERIOD, supra note 228, at 118–19 (indicating that the Duke of York’s motivation for the Dominion of New England was a reason for backing away from the 1683 Charter of Liberties; within months of reaching throne, the Duke of York authorized quo warranto proceedings against the charter colonies); BARNES, supra note 427, at 29–30 (explaining that the Dominion was favored over several independent royal colonies because of the expense of having separate royal officials in each colony); 3 OSGOOD, supra note 68, at 378 (revocation of Massachusetts’s charter); id. at 381–82, 393, 395–400 (efforts to revoke Rhode Island and Connecticut charters); id. at 383 (royal commission for government of New England); id. at 387, 402–04 (complaints that the commission for New England did not contain assembly and thus abridged privileges of Englishmen).

475. 3 ANDREWS, COLONIAL PERIOD, supra note 228, at 394–95, 401–02 (discussing the status of the colonies following royal litigation, noting specifically that Maryland, Connecticut, Rhode Island, and Pennsylvania ultimately survived royalization efforts while Massachusetts remained in class of itself); DUMMER, supra note 373, at 6–11.

476. For example, many charters gave permission to travel, discover lands, and form colonies. See supra notes 259–60, 267 and accompanying text.

477. See generally CHRISTOPHER HILL, THE CENTURY OF REVOLUTION 1603–1714 (1961) (providing an account of how the years between 1603 and 1714 shaped modern English so-
A. Monopolies and the Liberty of the Subject

Royal privileges and immunities to merchants and entities historically included an element of exclusivity. One of the main benefits of membership to the gild or regulated company was its monopolistic trading privileges. Royal privileges and immunities to merchants and entities historically included an element of exclusivity. One of the main benefits of membership to the gild or regulated company was its monopolistic trading privileges. Many merchant associations enjoyed monopoly privileges, and the latter part of the sixteenth century saw a variety of royal monopolies. Toward the end of Queen Elizabeth’s reign, representatives in Parliament invoked the right to free trade and free use of labor against the crown’s monopolies and its prerogative. In 1602, one subject affected by a monopoly on playing cards questioned the validity of the royal patent, a dispute which resulted in the famous Case of Monopolies. The court ruled against the crown’s patent.

Seventeenth-century grievances focused on the king’s arbitrary taxation and the royal prerogative generally. Seventeenth-century grievances focused on the king’s arbitrary taxation and the royal prerogative generally. J.W. Gough, Fundamental Law in English Constitutional History 58, 60–61, 70, 80–86 (1955) (discussing the rise of the House of Commons against the king in the first half of the seventeenth century); Stephen D. White, Sir Edward Coke and “The Grievances of the Commonwealth,” 1621–1628, at 27–274 (1979) (describing the parliamentary career of Sir Edward Coke and the common grievances of the commonwealth voiced during the first half of the seventeenth century); see also infra notes 479–83 and accompanying text (free subjects and liberty of Englishmen in debates on crown’s monopolies).

Seventeenth-century advocacy was replete with references to ancient statutes, such as the Magna Carta, but contained little discussion or concern for the ancient context of those statutes. 1 J.W. Allen, English Political Thought 1603–1660, at 28–29 (1938); Gough, supra, at 66; Hulsebosch, supra note 461, at 28–35 (describing the rise of “fundamental law” in the first half of the seventeenth century); 3 Osgood, supra note 68, at 11–12 (noting colonists’ reliance on birthright privileges of Englishmen which were supposedly secured by the Magna Carta, common law, and several fundamental statutes); Pocock, supra note 292, at 47–48 (discussing use of ancient statutes out of context); see also infra note 503 (identifying several fundamental ancient statutes).

478. See supra notes 164–65, 175, 233, 262 and accompanying text.


480. Darcy v. Allen, (1603) 77 Eng. Rep. 1260 (K.B.); 11 Co. Rep. 84b; see also Nachbar, supra note 479, at 1328 (analyzing the case).

481. Nachbar, supra note 479, at 1327.
An outcome of the litigation and debates on monopolies was the plea for the "liberty of the subject." Sir Edwin Sandys, an early figure in American history and an opponent of monopolies, especially charter privileges to large trading companies, argued in 1604 that

All free Subjects are born inheritable, as to their Land, so also to the free Exercise of their Industry, in those Trades whereto they apply themselves, and whereby they are to live. Merchandize being the chief and richest of all other, and of greater Extent and Importance than all the rest, it is against the natural Right; and Liberty of the Subjects of England to restrain it into the Hands of some few, as now it is; for although there may be now some Five or Six Thousand Persons, counting Children and Prentices, free of the several Companies of the Merchants, in the whole; yet apparent it is, that the Governors of these Companies, by their monopolizing Orders, have so handled the Matter, as that the Mass of the whole Trade of all the Realm is in the Hands of some Two Hundred Persons at the most, the rest serving for a Shew only, and reaping small Benefit.

Once such a grand concept of “liberty of subject” was introduced, advocates in Parliament, echoed by pamphleteers throughout the colonial period, carried the “Englishmen” torch far and wide to serve various needs. Advocacy was initially directed against royal privileges, though it became more general by the parliamentary debates over the Petition of Right. These grievances came together in Leveller writings of the 1640s. In

482. Darcy, 77 Eng. Rep. at 1262–63 (describing the monopoly as “against the common law, and the benefit and liberty of the subject”); Nachbar, supra note 479, at 1333–36 (analyzing Coke’s report on Darcy). Lipson cited the 1497 merchant adventurer statute, 12 Hen. 7 c. 6, as the first instance of merchants claiming “Englishmen’s liberty.” 1 Lipson, supra note 71, at 575; see also Carus-Wilson, supra note 228, at 172–75; supra note 246 and accompanying text.


484. White, supra note 477 at 219–74 (explaining that, by the late 1620s, the Commons’ view on liberty and rights of subjects had expanded beyond monopolies to include arbitrary acts by the crown, imprisonments without cause, forced loans, and martial law); see also Frances Helen Relf, The Petition of Right 19, 27–29 (1917) (describing the debates leading up to the Petition of Right).

opposition to royal, parliamentary, or monopolistic forces, Leveller writings of the mid-seventeenth century championed the birthright liberties, privileges, and immunities of the freeborn Englishmen.486

B. Englishmen in the Colonies

Across the Atlantic, pleas for the “privileges and immunities of Englishmen” were of great importance to colonists and colonial governance. As noted above, colonial charters to explorers and colonists contained a denization clause preserving English citizenship, removing alienage disabilities, and granting colonists the privileges and immunities of Englishmen as if they were born in England.487 With the language of colonial charters, reinforced by parliamentary advocacy and popular pamphlets, pleas for the liberties, privileges, and immunities of Englishmen became a part of the lexicon of the American colonist. A few years after Baltimore’s 1632 charter, Maryland’s assembly proposed “[a]n Act for the Liberties of the People”:

Be it Enacted By the Lord Proprietarie of this Province of and with the ad-

and the Petition of Right. KAMMEN, DEPUTYES & LIBERTYES, supra note 341, at 71–85; see supra note 484.

486. Leveller advocacy for greater coverage of ancient charter privileges and immunities, such as London’s, might have contributed to the absorption of privileges and immunities language associated with the rights of freeborn Englishmen. See, e.g., LILBURNE, LONDON’S LIBERTY IN CHAINS DISCOVERED, supra note 485 (relying on London’s ancient charter privileges and immunities to support free elections and greater participation in London’s government).

Part II discussed a variety of borough franchises, privileges, and immunities from crown to recipient. While other individuals and entities also received privileges, the privileges and liberties of major towns, especially London, became not only a benchmark for other towns but also a standard for the privileges and liberties of the common subject.

The larger communities, the city and the nation, began to assert their rights over the partial interests of family or trade or class, and to demand that these should cast off the devices of feudal faction and subordinate their differences to the rule of a common authority.

In this object the city, as was natural, succeeded in advance of the nation. The struggle of factions in London was a kind of rehearsal on a small scale of that larger conflict in which the feudal privileges of the nobility were to batter themselves to pieces on the fields of Towton and Bosworth.

UNWIN, supra note 198, at 155–56; see also NORTON, supra note 33, at 51 (explaining that burgage tenure and mercantile liberties helped free towns and noting that once boroughs participated in Parliament, burghal liberty eventually spread similar liberties throughout whole nation); id. at 52–53, 66–69 (remarking that liberties of London were sacred and that London and the crown had symbiotic relationship).

487. See supra Parts III.B, III.C (describing the charters to Warde and Gilbert).
vice and approbation of the freemen of the same that all the Inhabitants of this Province being Christians (Slaves excepted[]) Shall have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subjects of England hath or ought to have or enjoy in the realm of England by force or vertue of the common law or State Law of England (saveing in such Cases as the same are or may be altered or changed by the Laws and ordinances of this Province).  

Not long after Maryland’s legislation, in 1646, Dr. Robert Child and fellow petitioners challenged Massachusetts’s political restrictions that limited freemanship to church members. Child argued that Massachusetts failed to settle according to the laws of England and that colonists were denied the liberties of freeborn Englishmen. Child, as memorialized by his brother, claimed there must be a “comfortable enjoyment of our Lives, Liberties and Estates, according to our due Naturall rights, as Free-born subjects of the English nation.”

Several additional examples fill colonial record books. Following the English Civil War, loyal Virginians surrendering to the commissioners of the Commonwealth of England claimed the rights of freeborn Englishmen, including freedom from taxation without consent and the right to the same privileges as enjoyed in other colonies. After the Restoration, colonists...
in Maryland’s lower house, seeking to curb Baltimore’s veto power and arbitrary taxation, grieved unsuccessfully in the “publick grievances of 1669” for the privileges of Englishmen.\footnote{Lovejoy, supra note 421, at 74–78.} Toward the end of the seventeenth century, colonists in New York, having been treated less favorably than other colonists in neighboring colonies or Englishmen generally and having been promised such privileges, fought with the Duke of York for full assembly rights.\footnote{The Duke, to appease colonists, allowed an assembly and assured colonists that they would receive privileges and immunities equal to those of settlers in other colonies. See supra notes 408–29 and accompanying text.} After briefly receiving such rights, subsequent loss of the local assembly in New York and other colonies forming the Dominion of New England likewise evoked claims of violations of Englishmen’s rights.\footnote{Barnes, supra note 427, at 50, 87–90 (noting claim that taxation without representation violated the rights of Englishmen and specifying ancient statutes securing such rights); Craven, Colonies in Transition, supra note 402, at 219–20 (colonists challenged the Dominion’s authority over taxation, among other issues); Lovejoy, supra note 421, at 180–86 (taxation without representation in Dominion violated rights of Englishmen); 3 Osgood, supra note 68, at 387, 393, 402–04; see also supra note 475 (describing the Dominion of New England’s formation).} Similar efforts were employed by colonists in Carolina at the turn of the eighteenth century.\footnote{3 Andrews, Colonial Period, supra note 228, at 235 & n.2 (deputies of assembly fought for the rights and liberties of Englishmen).} By the end of the seventeenth century, advocacy for colonial self-government and participation in taxation, long considered privileges of Englishmen, was commonplace.\footnote{See generally Henry Care, English Liberties or the Free-Born Subject’s Inheritance (John Carter 1774) (1680) (citing the Magna Carta, the Habeas Corpus Act, other important statutes, and the powers of Parliament); William Penn, The Excellent Priviledge of Liberty & Property Being the Birth-Right of Free-Born Subjects of England (n.p. 1687) (discussing the Magna Carta, the Confirmation of the Charters of Liberties of England, De Tallagio Non Concedendo, the patent granted by the King to William Penn, and the Charter of Liberties granted by William Penn to the freemen and inhabitants of Pennsylvania); see also supra notes 487–96. For additional reading, consult the materials.}
Legal import aside, colonists’ pleas for the “privileges and immunities of English subjects” had the political effect of leveraging desirable aspects of English law in force in England or soliciting the rights of freer neighboring colonies. In this sense, use of the language functioned like the “liber burgus,” “liberum burgagium,” and charter-association language of the twelfth- and thirteenth-century borough charter, converging boroughs to the freedoms of a free or common mother town. The goal of the mesne borough was to gain borough status, a court, burgage tenure, or otherwise free itself of a lord and obtain the liberties of a free borough. The objective of American colonists was to obtain or protect its assembly and associated privileges copied from the House of Commons, typically from a proprietor but also, to a lesser degree, from the crown. Arbitrary taxation by the crown and feudal authorities was a grievance throughout both periods and, when joined by parliamentary taxation in the eighteenth century, ultimately contributed to the American Revolution.

C. American Revolution

As the discussion above demonstrates, the patriots of the American Revolution inherited privileges and immunities language from various sources, and when they felt they were denied rights enjoyed by neighbors or fellow Englishmen, the claim for equal privileges and immunities was a
natural response. Grieved colonists often argued that such language meant that they too enjoyed the benefit of binding English common and statutory law such as the Magna Carta, the Petition of Right, and other fundamental statutes securing, for example, trial by jury and taxation by consent or representation.

The various strands of privileges and immunities language (charter privileges and immunities, denization or membership privileges and immunities, and birthright privileges and immunities of freeborn Englishmen) came together briefly in the pre-Revolution grievances of the colonies.

502. See, e.g., Richard Bland, The Colonel Dismounted (1764), reprinted in 1 Pamphlets of the American Revolution 1750–1776, at 301, 320–21 (Bernard Bailyn ed., 1965) (arguing that colonists, born free, were entitled to all the “liberties and privileges of English subjects,” including the right to be free of legislation by English Parliament reaching into the internal governance of the colonies); Thomas Fitch, Reasons Why the British Colonies, in America, Should Not be Charged with Internal Taxes (1764), reprinted in 1 Pamphlets of the American Revolution, supra, at 386–407 (liberty and privilege of being taxed only with consent; birthright to enjoy English law; colonists have “the same general and essential privileges of the British constitution” (quotation at 388)).

503. Gough, supra note 477, at 61–63 (1628 House committee finding liberty of subject safeguarded by the Magna Carta and several fundamental statutes in force in England); 3 Osgood, supra note 68, at 11–12 (noting colonists’ reliance on birthright privileges of Englishmen secured by the Magna Carta, common law, and several fundamental statutes); see also supra note 477 and accompanying text (rise of fundamental law in early seventeenth century); supra notes 488–502 and accompanying text (colonial use of birthright privileges); infra notes 504–09 and accompanying text (grievances of American Revolution).

504. See October 14, 1774 Declarations and Resolves, in 1 Journals, supra note 14, at 63–73. Similar privileges and immunities language can be found in colonists’ responses to the Stamp Act:

That His Majesty’s Liege Subjects in these Colonies, are entitled to all the inherent Rights and Liberties of his Natural born Subjects, within the Kingdom of Great-Britain. . . . That it is inseparably essential to the Freedom of a People, and the undoubted Right of Englishmen, that no Taxes be imposed on them, but with their own Consent, given personally, or by their Representatives. . . . That the People of these Colonies are not, and from their local Circumstances cannot be, Represented in the House of Commons in Great-Britain. . . . That the only Representatives of the People of these Colonies, are Persons chosen therein by themselves, and that no Taxes ever have been, or can be Constitutionally imposed on them, but by their respective Legislature.


[i]that the first Adventurers and Settlers of . . . Virginia brought with them . . . all the Liberties, Privileges, Franchises, and Immunities, that have at any Time been held, enjoyed, and possessed, by the people of Great Britain. . . . That by two royal Charters, granted by King James the First, the Colonists . . . are . . . entitled to
Just prior to Independence, in one of the colonists’ formal grievances, the October 14, 1774 Declaration and Resolves, members of the Continental Congress described the controversies facing the colonists.\footnote{See October 14, 1774 Declarations and Resolves, in 1 JOURNALS, supra note 14, at 63–73.} Taxation without representation or consent, this time by Parliament, was one of the foremost complaints and directly or indirectly pervaded most of the colonists’ grievances.\footnote{See id. at 63–64, 68–69.} In Resolution 2 of the Declarations and Resolves, colonists urged that “our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.”\footnote{Id. at 68 (Resolution 2).} Resolution 3 followed with a declaration indicating that subjects did not lose these rights by emigrating from England to the colonies but that they “and their descendants now are . . . entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.”\footnote{Id. (Resolution 3).} Subsequent resolutions specifically claimed the benefit of English common and statutory law. After declaring the general benefit of English law as modified by local circumstances, colonists grieved in Resolution 7 that they were “likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.”\footnote{Id. at 69 (Resolution 7).}
Colonial grievances were ultimately unsuccessful, and in 1776, the American colonies declared Independence and entered into war with England.

D. Privileges and Immunities Language in the Articles of Confederation and Article IV of the U.S. Constitution

After declaring Independence, the former colonies no longer needed to reference the privileges and immunities of freeborn English subjects.\(^{510}\) States were in the process of adopting their own constitutions, and they confederated under the Articles of Confederation to enjoy a harmonious relationship amongst themselves.\(^{511}\) Citizenship concerns—especially concerning intercolonial discriminations in trade, travel, and commerce—remained an important issue, and a residue of privileges and immunities language ultimately made it into the text of the Articles of Confederation and the U.S. Constitution.\(^{512}\)

Prior to Independence, colonists depended upon the benefits of English citizenship, and the former colonies struggled to fill the void left by this parental relationship in post-Independence governance. Anticipating interstate conflict, the July 12, 1776 draft of the Articles of Confederation provided:

Art VI. The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

Art VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from any Part of the World, which the Natives of such Colony or any

\(^{510}\) See infra notes 523, 527.

\(^{511}\) For the colonies’ state constitutions adopted in 1776 or shortly thereafter, see the state’s listing in 1 THORPE, supra note 259, at iii–xiv (including Delaware (1776), Maryland (1776), Massachusetts (1780), New Hampshire (1776), New Jersey (1776), North Carolina (1776), Pennsylvania (1776), South Carolina (1776), Virginia (1776), Georgia (1777), New York (1777) and Vermont 1777)). See also May 10, 1776 Declarations and Resolves, in 4 JOURNALS, supra note 14, at 341–42 (John Adam’s proposal for states to form their own governments).

\(^{512}\) Id. at 63–73.

\(^{510}\) Indeed, Chalmers points out this would have been hypocritical. 2 CHALMERS, supra note 461, at 412 (noting that Americans who had renounced their English citizenship could not argue for the privileges and immunities of Englishmen); see also KETTNER, supra note 275, at 183–209 (indicating that questions of allegiance remained despite separation).

\(^{511}\) See also 4 May 10, 1776 Declarations and Resolves, in 4 JOURNALS, supra note 14, at 341–42 (John Adam’s proposal for states to form their own governments).
Art VIII. Each Colony may assess or lay such Imposts or Duties as it thinks proper, on Importations or Exportations, provided such Imposts or Duties do not interfere with any Stipulations in Treaties hereafter entered into by the United States assembled, with the King or Kingdom of Great Britain, or any foreign Prince or State. 513

Reviewing the proposed language, one sees a division between the more general sixth and the more specific seventh and eighth articles. The fact that the proposed sixth article links the seventh with “said Inhabitants now have . . . except in those provided for by the next following Article” suggests that the sixth article was a broad declaration of principle for the status quo except for the more specific concerns addressed in the next articles. The sixth article, proposed within days of Independence, seems to be an effort to replace or convert the claim to the status of natural-born Englishmen, prominent in the years leading up to the Revolution, into an Article of governance for the Confederation. 514 Before Independence, Englishmen status served various functions in the colonies. 515 Drafters did not want fellow colonists to be aliens in the other colonies. In other words, as a starting point, colonists, post-Independence, retained all the rights, liberties, privileges, immunities, and advantages of natural-born Englishmen in the other colonies without the natural-born Englishmen language. 516 As a dec-

513. July 12, 1776 Declarations and Resolves, in 5 JOURNALS, supra note 14, at 546–48 (strikethrough in original), see also Bogen, supra note 488, at 817–22 (discussing the proposed articles). In its July 1776 Plan of Treaties with Louis the Sixteenth, the Continental Congress discussed similar anti-discrimination concepts:

Art. I: The Subjects of the most Christian King shall pay no other Duties or Imposts in the Ports, Havens, Roads, Countries, Islands, Cities, or Towns of the said United States, or any of them, than the Natives thereof, or any Commercial Companies established by them or any of them, shall pay, but shall enjoy all other the Rights, Liberties, Priviledges, Immunities, and Exemptions in Trade, Navigation and Commerce in passing from one Part thereof to another, and in going to and from the same, from and to any Part of the World, which the said Natives or Companies enjoy.

July 18, 1776 Declarations and Resolves, in 5 JOURNALS, supra note 14, at 576–77, 768.

514. See supra notes 504–09 and accompanying text.

515. KETTNER, supra note 275, at 69, 91–93, 117–21 (noting that those traveling to the colonies sought English naturalization beforehand to avoid restrictions in trade, travel, and land ownership in colonies); id. at 74–75 (discussing Parliament’s 1740 act naturalizing aliens residing in colonies); id. at 93–96 (emphasizing that status as an Englishmen was important to avoid disabilities under navigation acts and that colonial naturalization was not a substitute for Englishmen status); id. at 98–99 (observing that colonial naturals under local naturalization acts without English citizenship faced the threat of forfeiture).

516. For example, the Continental Congress stated
laration of principle, the proposed sixth article led to the real object: prevention of local restrictions and discriminations in trade, navigation, and commerce. The proposed seventh and eighth articles addressed the substance of the drafters’ initial interstate concerns and replaced English regulations by placing inhabitants of each colony or state on the same basis as natives with respect to rights in trade, navigation, and commerce.

Both the proposed sixth and seventh articles were omitted from the second draft. On November 11, 1777, the committee formed to consider new articles reintroduced both the general and substantive anti-discrimination privileges and immunities language. In the reintroduction, the more general clause (albeit with residency language) again introduced the more specific clauses. For the general sentence, drafters even throw in “natural born free citizens” as further evidence confirming its replacement of the former “natural-born” or “freeborn” Englishmen concept. Following the general statement, the rest of the proposed third draft, like the proposed seventh and eighth articles of the first draft, addressed substantive restrictions concerning anticipated discriminations in travel, imposts, and duties:

And for the more certain preservation of friendship and mutual intercourse between the people of the different States in this Union, the Citizens of every State, going to reside in another State, Shall be entitled to all the rights and privileges of the natural born free Citizens of the State to which they go to reside; and the people of each State Shall have free egress and regress for their persons and property to and from every other State, without hindrance, molestation or imposition of any kind. Provided, that if Merchandize of any sort be imported for purposes of traffick within any State, that the person So importing Shall be liable to the Same imposts and duties as the people of the State are by law liable to where Such importations are made, and none other. And provided also that the benefit of this Article Shall ex-

(2) That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England . . . .

(3) That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

October 14, 1774 Declaration and Resolves, in 1 JOURNALS, supra note 14, at 68; see also supra note 504 and accompanying text.

517. See August 20, 1776 Declaration and Resolves, in 5 JOURNALS, supra note 14, at 672, 676.

518. See November 11, 1777 Declaration and Resolves, in 9 JOURNALS, supra note 14, at 885, 888.

519. Id.
tend to the property of the United States, and of any particular State, in the
Same manner as to the property of an Individual in any State. 520

The edits to this draft produced a version similar to the final version:

And the better to secure and perpetuate mutual Friendship and Intercourse
between the People of the different States in this Union, the free Inhabitants of each of these States, Paupers Vagabonds and fugitives
excepted, shall be entitled to all Priviledges and Immunities of free Citizens in all and every of said the respective States (saving to the Inhabitants of the respective States the Admission of their own Inhabitants and the Sole
Management of their own municipal Affairs). And the People of each
States, shall have free Ingress and Egress for their Persons and Property to
and from every other State, to trade and traffick, without any Hindrance or
Imposition of any Kind whatsoever, provided that if any Merchandise or
Commodity be imported into any State for the purpose of Traffick therein,
the Person so importing shall be liable to the same Imposts and Duties as the People of the State are by Law liable to where such Importations are
made and none other, provided also that the Benefit of this Article shall Ex-
tend to the property of the United States and of any particular State in the
same Manner as to the property of an Individual. 521

In this intermediate draft, drafters retained the general-specific dichot-
omy and removed the residency language. The next draft adds back the residency language but retains the general-specific division. 522

520. Id. (footnotes omitted). The contemplated use of “natural born free citizens” and proposals for the same import customs as natives pay suggest that the drafters were consulting denization charters and naturalization acts which typically removed alien customs for covered parties importing merchandize into a state. See supra note 285 and accompanying text.

521. November 11, 1777 Declarations and Resolves, in 9 JOURNALS, supra note 14, at 888 (strike-through in original) (footnotes omitted).

522. The proposed revisions read:

And the better to secure and perpetuate mutual friendship and intercourse between
the people of the different States in this Union, the Inhabitants of every State[,] Paupers Vagabonds and fugitives from justice excepted[,] going to reside in another State shall be entitled to all the rights and privilidges of the natural born free Citizens of the State to which they go to reside: And the people of each State shall have free Ingress and Egress for their persons and property to and from every other state without hinderance, or imposition of any kind. Provided that if Merchandise be imported into any State for purpose of traffick therein, the person so importing shall be liable to the same imposts and duties as the people of the State are by law liable to where such importations are made, and none other. And provided also that the benefit of this article shall extend to the property of the United States, and of any particular State, in the same manner as to the property of an Individual.

Id. at 889 (footnotes omitted).
ditional revisions, the final draft of Article IV of the Articles of Confederation provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant; provided also, that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them. 523

Tracing the progress from earlier drafts to the final draft, one sees the drafters struggling with awkward language prohibiting interstate discriminations in trade and commerce as the former colonies replaced the role of English citizenship and English trade restrictions in the confederated colonies. 524 The final draft of Article IV of the Articles maintained the specific attributes with respect to non-discrimination in trade, commerce, duties, and imposts but also contained general language securing free inhabitants all the “privileges and immunities of free citizens in the several States.” 525

Government under the Articles suffered many defects. Within ten years, the Framers met to forge the United States Constitution. Unlike the Articles, the Constitution created a union of states with greater national powers in raising revenue and regulating commerce among the states and foreign entities. 526 In the transformation from Article IV of the Articles to the Constitution, the Framers retained only a variation of the broader language: “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” 527 Other specific and sub-

523. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.
524. THE FEDERALIST NO. 42 (James Madison) (noting potential embarrassing problems with privileges and immunities language present in Article IV of Articles where a free inhabitant in their domiciled state can compel citizenship rights in the domicile state by receiving citizenship rights in another state, which the domicile state must recognize under Article IV of the Articles).
525. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.
526. See, e.g., THE FEDERALIST NO. 30 (Alexander Hamilton); THE FEDERALIST NO. 42 (James Madison). Many other grievances of the American Revolution were addressed in the text of the Constitution. See generally U.S. CONST. (taxation powers, naturalization, regulation of interstate commerce, habeas corpus, separation of powers, trial by jury, etc.).
527. U.S. CONST. art. IV, § 2, cl. 1; see also ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1 (“[F]ree inhabitants of each of these States, paupers, vagabonds, and fugitives
stantive anti-discrimination concerns formerly found in Article IV of the Articles were swept into the Constitution’s structural modifications as the states granted Congress greater authority in regulating, among other national issues, interstate commerce. In this light, the residual language may be viewed as serving a citizenship function nominally related to the former “privileges and immunities of Englishmen” concept, leaving more specific substantive concerns to the structural modifications of Article I of the U.S. Constitution. This explains, perhaps, why the Framers adopted the residual sentence with almost no debate while Article I’s provisions dealing with interstate harmony and commerce received significant debate.

The interpretation of the remaining language of Article IV of the Constitution, separated from its more specific attributes in Article I, has been troubled. Attempting to reconcile the confusion, some commentators and courts have argued that privileges and immunities language of Article IV protects natural law. Others have argued that the language confers specific rights such as the right to travel or fundamental law in gen-

from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States.

528. See, e.g., U.S. CONST. art. I, § 8 (granting congressional power to impose uniform imposts and duties; to regulate commerce among the states; to provide uniform naturalization and bankruptcy laws; to enact necessary and proper laws); id. § 9 (prohibition on taxing exports from states; prohibition against giving preferences to ports; prohibition on requiring ships to land and pay duties in states); id. § 10 (prohibition on state taxation of imports and exports beyond inspection fees unless approved by Congress; prohibition on tonnage duties unless approved by Congress).


Particular questions on the meaning and intent of the privileges and immunities language of Article IV of the Constitution remain unanswered. But it is clear that the several structural changes expanding the role of the national legislature and limiting the states, perhaps combined to some degree with the remaining privileges and immunities language, carved from the states’ broad powers a national citizenship for citizens to enjoy the Constitution and federal law regulating naturalization, taxation, interstate commerce, and other national affairs.  

E. Privileges or Immunities Clause of the Fourteenth Amendment

Privileges and immunities language was also used in post-Civil War documents. The Thirteenth Amendment ended slavery, but former slaves lacked civil status. To grant citizenship rights to recently freed slaves and negate the slave codes, the Reconstruction Congress adopted the Civil Rights Act of 1866 (CRA). The CRA provided

533. See, e.g., Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (describing privileges and immunities as “fundamental” and difficult to enumerate, but which include protection by government and enjoyment of life, liberty, property, happiness, and safety subject to necessary governmental restraints); Douglass v. Stephens, 1 Del. Ch. 465, 470–74 (1821) (holding clause includes all basic natural rights for welfare and good required by person in society including right to contract, sue, and enjoy and defend life, liberty, and property); Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797) (opinion of Chase, J.) (Judge Jeremiah T. Chase arguing “privileges and immunities” includes the right to own and enjoy property as well as personal rights). Justice Stephen Field also struggled with the language in a case arising under Article IV. Field described the clause as guaranteeing freedom from alienage disabilities before going on to describe the clause as prohibiting discriminatory legislation, securing equal protection, ensuring freedom to travel, and protecting free enjoyment of property and pursuit of happiness in the other states. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869). But see Antieau, supra note 531, at 22 (criticizing Field’s interpretation as too narrow and limited to laws of a reference state as opposed to natural law in general). See generally Richard L. Aynes, Ink Blot or Not: The Meaning of Privileges and/or Immunities, 11 U. PA. J. CONST. L. 1295 (2009) (advocating several categories of rights protected under privileges and immunities language)

534. See generally supra notes 511–33 and accompanying text.


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, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, 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. 537

Concerns over the constitutionality of the CRA motivated Congress to include privileges or immunities language in Section One of the Fourteenth Amendment to constitutionalize the civil rights legislation. 538 Section One provides that

[all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.539

537. Id.
538. Thomas H. Burrell, Justice Stephen Field’s Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony, 43 GONZ. L. REV. 77, 88–99 (2007) (citing legislative history supporting the position that the amendment was intended to constitutionalize the civil rights bill).
539. U.S. CONST. amend. XIV, § 1. The Privileges or Immunities Clause of the amendment accents the Citizenship Clause the same way “citizenship rights” accents “citizenship” in the phrase “newly freed slaves enjoyed citizenship and citizenship rights” under Reconstruction legislation. Comparing the CRA of 1866 and Section One of the Fourteenth Amendment side by side, the “privileges or immunities” language in Section One matches “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” in the CRA. See supra note 537; infra note 544. The same comparison can be made with the Equal Protection Clause and corresponding language in the CRA.

Earlier drafts of CRA language protected newly freed slaves from all discrimination in civil rights and immunities. Sen. Trumbull, the principal author of the CRA, defined “civil rights” in the early draft as “the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property.” CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (statement of Sen.
With the ratification of the amendment, former slaves, now citizens, enjoyed the privileges and immunities of state and national citizenship. Under Section Five of the amendment, Congress was authorized to enforce citizenship rights through enforcement legislation.\textsuperscript{540}

Citizenship language, whether enumerated in the CRA or referred to generically in privileges and immunities language, followed a general recognition theme from disability to membership status. Aspects of citizenship rights granted to former slaves in the CRA had strong similarities to the English denization privileges granted to aliens\textsuperscript{541} and the incorporation rights granted to a community.\textsuperscript{542} The transition involved a move from a non-recognized, disabled person or entity to a member or citizen privileged with rights to sue and be sued, as well as rights to buy, sell, inherit, and enjoy property.

F. Judicial Interpretation versus Legislative Enforcement

When debating the language of the CRA or Section One of the Fourteenth Amendment, some congressmen discussed earlier court precedents interpreting privileges and immunities language of Article IV; others discussed broad definitions by commentators such as Sir William Blackstone.\textsuperscript{543} Many in the 39th Congress equated the privileges and immunities

\textsuperscript{540} U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

\textsuperscript{541} The clause from the CRA, as noted above, is remarkably similar to the specific alienage disabilities removed in denization and naturalization provisions. And for those charters that did not enumerate removed alienage disabilities, the citizenship grant might substitute generic privileges and immunities language for citizenship rights. \textit{Compare supra} notes 273–85 (denization removed common alienage disabilities and allowed en denized to enjoy franchises, liberties, and privileges as other Englishmen enjoy—to sue and be sued as other lieges, and to buy, sell, hold, and enjoy land), \textit{with} notes 306–11 (more generic language securing denization status).

\textsuperscript{542} See \textit{supra} Part II.G (observing that borough incorporation resulted in corporate rights to sue and be sued, contract, buy and sell land, make bylaws, and elect leaders).

\textsuperscript{543} CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (statement of Rep. Bingham) (noting Article IV as source of “privileges and immunities” in early draft of amendment); id. at 1117–18 (statement of Rep. Wilson) (discussing, in reference to CRA, Article IV, Blackstone, and Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (describing “privileges and immunities” as fundamental and difficult to enumerate)); id. at 1122 (statement of Rep. Rogers) (citing \textit{Corfield} in discussion of meaning of privileges and immunities); id. at 2765 (statement of Sen. Howard) (discussing \textit{Corfield} when introducing final draft of amendment to Senate for vote); see also Bogen, supra note 530, at 44–53. See
language of Section One to corresponding language of the CRA. 544

Given the absence of direct intent or instruction for judicial use of the phrase, courts have struggled with its implementation. As a result, the Privileges or Immunities Clause of the Fourteenth Amendment has remained dormant for much of its life. 545 Following the Supreme Court’s interpretation of the scope of the Second Amendment’s Right to Bear Arms in *District of Columbia v. Heller*, 546 commentators have argued that courts should judicially resuscitate the Privileges or Immunities Clause to incorporate the Second Amendment as a fundamental right protected against state infringement. 547 In light of the broader history of privileges and immunities discussed above, one questions the merit of substantive, self-executing constructions of the language. Such constructions of broad language essentially leave the judiciary free to “interpret” the privileges and immunities of American citizens in lieu of express enforcement legislation.

Colonial history produced distinct but related sources of privileges and immunities language: direct charter privileges and immunities, charter denization language, and reference language to leverage the perceived rights of freeborn Englishmen. To the extent the latter two sources differ (though it is unlikely colonists at the Revolution perceived such a distinction) most colonial advocacy for fundamental law fell under the reference concept as colonists sought to enjoy the benefits of several English statutes in the colonies. 548 If these fundamental statutes are taken as representative of colonists’ claims, the underlying rights sought by colonists were mostly creations of the state, whether royal privileges and immunities or ancient

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544. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 575–77 (1871) (statement of Sen. Trumbull) (emphasizing amendment’s first section was a “copy of the civil rights act”); see also supra note 539 (noting structural similarities between CRA and Section One and comparing privileges and immunities language with CRA language protecting rights to sue, be sued, contract, and enjoy property). Bingham frequently defined privileges and immunities language and Section One by referring to the Bill of Rights. See infra note 556.

545. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) (interpreting Privileges or Immunities Clause narrowly); see also *Saenz v. Roe*, 526 U.S. 489, 503 (1999) (discussing Privileges or Immunities Clause of Section One).


547. See briefs cited supra note 1.

548. See supra notes 503–09 (advocates felt that the phrase “privileges and immunities of Englishmen” meant several English laws applied in the colonies). Once Independence became likely, colonists and pamphleteers may have substituted the “inalienable rights of man” or elements of natural law in place of rights of Englishmen. See BAILYN, supra note 502, at 50–51 (commenting on pamphlets discussing natural, inalienable rights of man derived from common law decisions, statute law, and colonial charters).
statutory law enacted or confirmed by Parliament. In either case, in drafting the United States Constitution, the Framers replaced Parliament and the crown and incorporated perceived fundamental law into the express language of the written document itself.

After declaring independence from England, states crafted their own constitutions to replace either the crown’s instructions or charter privileges and immunities, whichever was applicable based on the form of the colony. As discussed above, the Articles of Confederation and Articles I and IV of the Constitution solidified the relationship between broad state powers and emerging federal power. The relationship ultimately culminated in a surrender of a segment of inherent state authority, that in which the individual states were not competent, to the federal government. With the transformation, states retained autonomy within their respective spheres but conceded enhanced federal power to regulate national concerns and interstate commerce among other things.

Reconstruction legislation and the three post-Civil War amendments to the Constitution also addressed the balance of federal and state powers—though this time over slavery and not commerce. As noted above, the 39th Congress proposed Section One of the Fourteenth Amendment in part to constitutionalize the CRA. The final version included privileges and immunities language based in large part on the language of Article IV.

In the incorporation argument, advocates argue that privileges or immunities language of Section One protects fundamental law and that certain protections in the Bill of Rights are fundamental and thus protected under the Privileges or Immunities Clause itself. There are two main obstacles to this argument. First, a majority of the Reconstruction congressmen, after debates and revisions, supported a limited Fourteenth Amendment, and it is not clear that a constitution-amending majority would have supported the federal intrusion that incorporation might impose. Second, accepting arguendo the shared intent to protect some quantum of fundamental rights

549. Throughout most of the colonial period, the crown regulated colonial affairs through charter privileges and immunities. Retaining English citizenship in the colonies did not necessarily mean English law applied in the colonies. See supra note 461 (literature discussing effect of English law in colonies).

550. See supra note 511 (following Independence, states adopted their own constitutions).

551. See supra Part V.D.

552. See supra Part V.E (referring to adoption of civil rights legislation and Fourteenth Amendment).

553. See supra note 543 (noting Article IV’s influence on Section One of the Fourteenth Amendment).

554. See briefs cited supra note 1.
and the Bill of Rights, the debates do not indicate any support for judicial enforcement of Section One outside of Section Five’s enforcement authority.

The 39th Congress, the body primarily responsible for the Reconstruction legislation at issue, generally supported reform but varied significantly on the scope of reform and the extent that Congress would be permitted to invade the states to achieve that reform.555 Following John Bingham, a Republican congressman from Ohio and the principal author of the language ultimately becoming Section One, a handful of members of the 39th Congress advocated, to a greater or lesser degree, that the protections of the Bill of Rights should be secured against state infringement.556 Initial drafts of legislation called for congressional enforcement of life, liberty, and property and equal privileges and immunities.557 Revisions, however, scaled back the scope of the amendment to give Congress a supervisory enforcement role.558 Reconstruction congressmen generally supported some degree of civil rights for newly freed slaves but fractured sharply over coverage of political rights, for example, voting and jury service, and over social rights, for example, interracial marriage and public desegregation.559

It is not necessary, however, to solve the exact degree and scope of the 39th Congress’s intentions for Section One of the Fourteenth Amendment. Even if one places the protection of the Bill of Rights within the intended scope of Section One, there is little evidence that the 39th Congress intend-

555. See infra note 559.

556. Bingham introduced the amendment with the desire to protect the Bill of Rights against state infringement. CONG. GLOBE, 39th Cong., 1st Sess. 1034, 1089–92 (1866) (statements of Rep. Bingham). Throughout the debates, Bingham maintained his aim to protect the Bill of Rights against state infringement and was followed by others in that general goal. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) (claiming several rights listed in Bill of Rights are protected by the Fourteenth Amendment). See generally Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment, 99 GEO. L.J. 329 (2011) (examining the legislative history of Section One).


558. Id. The 39th Congress also made similar revisions to the CRA.

559. For example, Sen. Trumbull stated:

The bill is applicable exclusively to civil rights. It does not propose to regulate the political rights of individuals; it has nothing to do with the right of suffrage, or any other political right; but is simply intended to carry out a constitutional provision, and guaranty to every person of every color the same civil rights.

ed for the judiciary to achieve this change absent congressional enforcement legislation. The legislative history of the amendment is replete with references to congressional enforcement. The absence of any role for the judiciary in implementing Section One is compelling.560

Bingham began his effort to secure passage of the amendment by discussing Congress’s power, the Supremacy Clause, and congressional enforcement.561 One of the earlier drafts of what would become Section One proposed that

Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.562

As noted above, the final provision provides

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.563

The argument supporting judicial enforcement of Section One is that by changing the language from the initial draft to the form “no State shall,” drafters intended to create an absolute prohibition on the states, one the courts could enforce outside of Section Five.564 In support of this theory, commentators cite to debates recommending Bingham create an absolute ban on discrimination against any class of citizens, one beyond congressional control. In February 1866, Giles Hotchkiss noted Bingham’s initial draft was too conservative and suggested that protection should extend beyond the caprice of Congress.565 Hotchkiss was worried that a faction of rebels and their northern sympathizers would gain control of future Congresses, undo legislative advances, and, by the amendment as initially pro-

560. See Burrell, supra note 538, at 101–05 (arguing Section One was not intended to be self-executing).
562. Id. at 1034.
563. U.S. CONST. amend. XIV, §§ 1, 5.
posed, establish uniform laws for life, liberty, and property. Hotchkiss commented that Bingham’s initial draft language

provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as part of the organic law of the land, subject only to be defeated by another constitutional amendment . . . [?]566

The language ultimately becoming Section One was in the form “no State shall” and thus resembled Hotchkiss’s suggestion to remove congressional enforcement.567 But when viewing the amendment as a whole, the final language discounts his general suggestion by retaining congressional enforcement of the amendment. The final text and the clear balance of debates—including the shared understanding after the revisions—weigh against such an absolutist interpretation and in favor of congressional enforcement of Section One.568 A better interpretation of the change in Bing-

566. Id.

567. Lash, Part II, supra note 556, at 396 (suggesting a connection between second draft of amendment and Hotchkiss’s earlier prompting for an amendment beyond congressional enforcement).

568. In the first draft, Bingham’s proposed language expressly advanced congressional enforcement. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (statement of Rep. Bingham) (arguing that the amendment would “enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements”); id. at 1090 (statement of Rep. Bingham) (arguing that, through the amendment, “Congress is . . . vested with power to hold [the states] to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men”). Rep. Woodbridge argued:

What is the object of the proposed amendment? It merely gives the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which pertain to citizenship. It is intended to enable Congress by its enactments when necessary to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty . . . and property.

CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866); id. at 1094 (statement of Rep. Hale) (asking Bingham whether the proposed amendment conferred “upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property”—to which Bingham answered in the affirmative).

After the revision into the “no State shall” form, Bingham and others continued to emphasize the role of congressional enforcement of Section One. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (statement of Rep. Stevens) (“This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States”); id. at 2542 (statement of Rep. Bingham) (stating that the amendment will provide the power “by congressional enactment . . . to protect by national law the privileges and immunities of all citizens”); id. at 2765–66 (statement of Sen. Howard) (following an argument similar to Bingham’s); see
ham’s second draft is an effort to address the 39th Congress’s concerns over giving Congress plenary power to enact uniform laws in life, liberty, and property. Drafters wanted this general power to remain with the states, provided those states did not abuse their authority. Shortly after Bingham introduced the initial language, Representative Hale challenged the draft in the form “Congress shall” and expressed concern for states’ general civil and criminal legislation.\(^{569}\) He stated:

> What is the effect of the amendment which the committee on reconstruction propose[s] for the sanction of this House and the States of the Union? I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution. . . .

> [I]t is a grant of the fullest and most ample power to Congress to make all laws ‘necessary and proper to secure to all persons in the several States protection in the rights of life, liberty, and property[.]’\(^{570}\)

Hale also objected to the effect of the amendment on non-rebellion states. He continued

> [I]f we confer upon the Federal Congress powers, in such vague and general language as this amendment contains, to legislate upon all matters pertaining to the life, liberty, and property of all the inhabitants of the several States, I put it to the gentleman, whom I know sometimes at least to be disposed to criticise this habit of liberal construction, to state where he apprehends that Congress and the courts will stop in the powers they may arrogate to themselves under this proposed amendment.\(^{571}\)

Hale sympathized with the goals of Reconstruction legislation but felt the proposed language was dangerous to existing federalism principles:

> [T]here are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. I believe that whatever most clearly distinguishes our Government from other Governments in the extent of individual freedom and the protection of personal rights we owe to our decentralized system, to the fact that the functions of govern-

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\(^{570}\) Id. (statement of Rep. Hale).

\(^{571}\) Id. at 1065 (statement of Rep. Hale). Hale went on to point out the breadth of the courts’ interpretation of “necessary and proper” language found in both the Constitution and the proposed draft.
ment with which the citizen has immediate relation are brought home to him, that he operates immediately upon them and they immediately upon him, instead of there being that long chain of communication which in a centralized government must extend from the fountain of power, whether despotic or republican, whether executive or legislative, to the citizen. 572

While Hotchkiss proposed to remove the caprice of Congress, others proposed to alter the amendment to conform to Hale’s criticisms above by removing congressional power to legislate for life, liberty, and property in the first instance and substituting supervisory congressional enforcement. 573 Representative Delano summarized this suggestion as follows:

I said in the outset that I wanted to see the provisions of this bill adopted or enforced upon the South, and it was with this thought before me that I introduced, at an early day of the session, an amendment to the Constitution requiring each State to provide for the security of life, liberty, and property, and the rightful pursuit of happiness, and giving to Congress power to enforce these rights where the States withheld them. That, in my estimation, is a better theory of proceeding on this subject than the one introduced by my colleague, which proposes to vest that power in Congress at once; because I want Congress to exercise no more power over the local legislation of the States than is absolutely necessary, and I would not allow it to go in the first instance to secure these rights, but allow it to go only when the States refuse to apply and give such security under the fundamental law of the nation. . . .

If we do anything upon this subject at all, we had better do it by taking up the amendment to the Constitution offered by my colleague, [Mr. Bingham,] now postponed till April, modifying it in the form I have suggested, and making it the fundamental law, and then proceeding to secure the rights of these persons in a way in which we shall not be trampling down or endangering the fundamental law of the land. 574

The final draft follows a form in line with Delano’s suggestion.

After the Fourteenth Amendment’s passage, Bingham concurred with those who felt Section One protected the Bill of Rights but emphasized

572. Id. at 1088 (statement of Rep. Woodbridge) (assuring other members of limited reach of amendment and protection for state sovereignty). When discussing the scope of Section One, Bingham also maintained the importance of states laws and local government. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84–85 (1871) (statement of Rep. Bingham).

573. See infra note 574.

574. CONG. GLOBE, 39th Cong., 1st Sess. app. at 158–59 (statement of Rep. Delano during debates on CRA) (taking issue with Bingham’s initial version and suggesting an approach similar to the final version wherein Congress was authorized to exercise remedial powers).
Congress would play this enforcement role. Bingham was asked why he changed the language from “Congress shall” in the initial draft to “no State shall.” Bingham answered that the amendment as adopted was more complete and comprehensive than the initial draft. Quoting Sections One and Five, Bingham responded “[t]hat is the grant of power. It is full and complete.”

Bingham further explained that he changed the language to “no State shall” to aid in the enforcement of the Bill of Rights against the states. Bingham repeated his belief that Section One was defined by the first eight amendments and that the language “‘no State shall make or enforce any

575. Bingham summarized his view of Section One:

The question as presented here and now may be stated thus: is it competent for Congress to provide by law for the better enforcement of the Constitution and laws of the United States and the better security of the life, liberty, and property of the citizens of the United States in the several States of the Union? The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government . . . or any officer thereof.

CONG. GLOBE, 42d Cong., 1st Sess. app. at 81; id. at 83 (“The powers of the States have been limited and the powers of Congress extended by the last three amendments of the Constitution. These last amendments . . . do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted.”).

576. Id. at 83.

577. Id.

578. Incorporation theory frequently makes use of the 39th Congress’s discussion of *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), in which the Court held that the Bill of Rights did not apply to the states. The argument states that the amendment in the “no State shall” form overturned the federalism limitation in *Barron* and thus authorized courts to apply the Bill of Rights against the states. Some members of the 39th Congress certainly intended to enforce the Bill of Rights against the states and felt that Section One accomplished this task. But the 39th Congress’s discussion of *Barron* and the inability to apply the Bill of Rights against the states does not mean that the “no State shall” form as adopted in the final draft was a grant of judicial power to effect this goal through incorporation. Bingham discussed *Barron* in a similar manner when the draft under consideration was in the form “Congress shall.” CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866). *Barron* was simply a symbol of antebellum federalism that some members of the 39th Congress wanted to alter with additional congressional powers to enforce the Bill of Rights against the states. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (Bingham discussing *Barron* in a post-amendment debate).
law which shall abridge the privileges or immunities of citizens of the
United States’ [creates] an express prohibition upon every State of the Un-
ion, which may be enforced under existing laws of Congress, and such oth-
er laws for their better enforcement as Congress may make.” 579

Under the text of the final draft of the amendment, as reinforced by
Bingham’s understanding, Congress was to enforce the privileges or i m-
munities language through Section Five. 580 Bingham believed that the
states had not adequately enforced the Constitution and federal law in their
own tribunals. The amendment remedied the problem but also protected
state laws. 581 Bingham resolved the ambiguity in the form change from
“Congress shall” to “no State shall” by explaining that the language of the
Reconstruction amendments was both negative and positive, that it restrict-
ed the states with the negative but affirmatively gave Congress the power
to enforce the negative restriction:

Let gentlemen consider the last three amendments and the new limitations
thereby imposed upon the power of the States, and the new powers thereby
vested in Congress. The first of these (the thirteenth) provides that invol-
untary servitude, or slavery, shall not exist in the United States. That is
negative. Then we have the further provision that Congress shall have
power to enforce, by appropriate legislation, this amendment. That is af-
firmative. Do gentlemen undertake to say to-day that this does not impose
a new limitation upon the power of the States, and grant a new power to
Congress? . . .

I rather think not. Let any State try the experiment of again enslaving
men, and we will see, whether it is not competent for the Congress of the
United States to make it a felony punishable by death to reduce any man,
white or black, under color of State law, to a system of enforced human
servitude or slavery. . . .

Will gentlemen undertake to tell the country that we cannot enforce by
positive enactment that negative provision, the thirteenth article . . . ? 582

Summarizing his answer to the question about the form change to “no
State shall,” Bingham declared

[B]y virtue of these amendments, it is competent for Congress to-day to
provide by law that no man shall be held to answer in the tribunals of any

579. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84.
580. Id. at 84 (“[T]his House may safely follow the example of the makers of the Constitu-
tion and the builders of the Republic, by passing laws for enforcing all the privileges and
immunities of citizens of the United States, as guarantied by the amended Constitution and
expressly enumerated in the Constitution.”).
581. Id. at 84–85 (Bingham noting importance of local government and federalism).
582. Id. at 85.
State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances, for these are of the rights of citizens of the United States defined in the Constitution and guarantied by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered.583

Bingham’s post-ratification understanding was shared by his contemporaries in the 39th Congress. Senator Howard, whose speech before the Senate is frequently cited by proponents of incorporation, also described the scope of the final form of Section One in terms of the Bill of Rights.584

Like Bingham and the 39th Congress, Howard emphasized that additional congressional power was necessary for the enforcement of the guarantees of Section One:

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that ‘the Congress shall have power to enforce by appropriate legislation the provisions of this article.’ Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.585

Under the final draft and understanding of the amendment, Congress managed Reconstruction through enforcement legislation. The text and debates discussing congressional enforcement make sense. The alternate theory for judicial enforcement is at odds with the amendment’s context. Because the 39th Congress was bitterly divided over post-slavery issues and the rights of citizens, it is highly unlikely they would have cast aside their differences and provided for a self-executing ban on state “discrimination,” leaving it to the courts to determine the details and definitions—details and definitions over which even they could not presently agree.

583. Id.
585. Id. at 2766.
As noted above, the Articles of Confederation failed at creating a harmonious relationship among the states. The states met to forge a stronger but limited federal government. In so doing, the Framers banned the states, in absolute terms, from many activities. In Article I, Section 10, Clause 1, Framers employed the “no state shall” form to create direct prohibitions on the states entering treaties, granting letters of marque and reprisal, coining money, emitting bills of credit, and passing bills of attainder, among other things. Unlike Framers’ intentions concerning a more easily executable provision barring states from entering treaties and coining money, the 39th Congress did not have a consensus on Reconstruction goals, and Hotchkiss’s proposal for an absolute ban declaring that “no State shall discriminate against any class of its citizens” — independent of congressional development — would have been meaningless to an amending majority internally conflicted on post-slavery issues and the scope of desired reform. To the contrary, the overwhelming evidence confirms that the drafters had no vision for the courts independently enforcing Section One. While the text of the Fourteenth Amendment called for congressional enforcement and Congress initially pursued enforcement legislation, within a few decades of the amendment’s ratification the courts had taken over the role of enforcing Section One.

Courts have struggled with interpreting privileges and immunities language precisely because the language is legislative language not self-executing language. One can speak about the importance of individual rights and label those rights fundamental. Fundamental law was important throughout English and colonial history, and the Framers had the oppor-

586. U.S. Const. art. 1, § 10, cl. 1. Framers rejected the request to provide direct prohibitions on import and export duties and imposts (Art. 1, § 10 cl. 2) beyond congressional oversight and potential regional biases. Madison, supra note 529, at 394, 543–44 (Madison unsuccessfully proposing to transfer language providing “no state shall . . . lay imposts or duties on imports” from the proposed Article XIII (Art. 1, § 10 cl. 2), where Congress could license such duties and imposts, into Article XII (Art 1, § 10, cl. 1), similar “no state shall” language without authorization for congressional approval). In a post-amendment debate on Section One, Bingham confusingly analogized to the direct state limitations found in Art. 1, § 10, cl. 1 (no state shall enter into treaties, emit bills of credit, pass bills of attainder, ex post facto laws, etc.). This discussion, taken in itself, might suggest a self-executing ban on the states, but Bingham clarified that, unlike § 10, cl. 1, the amendment provided an affirmative role in Section Five for Congress to enforce the provisions of the amendment, including Section One. Cong. Globe, 42d Cong., 1st Sess. app. at 83–84 (1871).


588. Burrell, supra note 538, at 128–57 (discussing early dissenting ideology and tracing its capture of majority opinion by 1880s).

589. See supra Parts II–IV (discussing concept of royal privileges and immunities and tracing influence of crown’s charter on colonies).
tunity to expressly provide for fundamental law in the written Constitution. Further, one can distill a goal to protect fundamental rights in the Reconstruction debates leading up to the adoption of Section One. But as conceived, the protection of the amendment’s perceived fundamental rights intended by one, a few, or a majority of the 39th or later Congresses was to be articulated, defined, limited, or not adopted through the congressional enforcement provision, Section Five of the amendment. In giving privileges and immunities language independent life to protect “fundamental” law, modern commentators advocating for substantive interpretations of the language seem to be guilty of conflating a reference to a body of laws with the law-making authority itself.

VI. CONCLUSION

This story of privileges and immunities presented the medieval concept behind the language and traced the concept’s influence on the colonies. Royal privileges and immunities, through a kaleidoscope view, represent the background of the privileges and immunities language of Article IV and the Fourteenth Amendment.

The Article began by discussing several medieval English institutions. During the medieval period, burdens and obligations accompanied the occupancy of land. From these burdens, the king granted immunities and privileges. With the Norman Conquest, feudal tenure swept across England; feudal tenure involved a reciprocal relationship between lord and tenant. The crown granted franchises to lords in exchange for greater financing and a hand in running government. Enfranchised lords stood in the king’s place with respect to granted immunities.

Anglo-Norman England was an agricultural society. Both the king and lord held manors. Next to the manor, boroughs protected by the king’s peace were centers of administration catering to merchants and trade. As an institution for trade, the borough fostered gilds and mercantile communities. For this reason, among others, the crown frequently granted privileges and immunities to boroughs. The privileged borough grew as a community with freedoms of self-governance and financial independence. When overseas trade developed, voyaging merchants received charters granting extensive feudal privileges and immunities regulating international trade and permitting self-governance overseas. Charters to merchant associations often borrowed from borough and gild institutions.

With the allure of far western lands, explorers began voyaging great distances for new trade and riches. Prior to this time, most foreign settlement involved a trading post to service the trade. After the discovery of the New World, merchant voyagers received charters granting extensive feudal
jurisdictions and monopolies in discovered lands. Colonization soon fol-
lowed.

The European colonization of the New World grew rapidly during the sixteenth century. After conceptualizing colonization in Ireland, several early proprietors such as Gilbert and Raleigh received charters to conquer and colonize North America. Colonies served the crown; adventurers in turn received land, governance, and trading rights protected by the crown and the English flag.

Royal charters controlled most colonial development. Throughout the colonial period, to a greater or lesser degree, the right to travel, right to discover and inhabit foreign lands, right to governance, right to incorporate, and the right to trade were examples of charter-based privileges from the crown to colonists and promoters. Supported by charter clauses, settlers migrating to the colonies were to remain Englishmen and enjoy the privileges and immunities of Englishmen as if they were born in England. 590

After initial failures, settlement efforts in North America found success. In the first few decades of the seventeenth century, several colonies were planted along the East Coast. Colonial institutions mimicked English institutions. To facilitate land use, the crown granted to colonizing agencies easy tenure clauses holding land in free and common socage, not in capite, as of the Manor of East Greenwich in the County of Kent. Socage tenure was a system of tenure very similar to burgage tenure of English boroughs.

The American colonies were managed locally with supervision by the crown and promoter in England. Given the shared governance across the seas, events in England typically affected the colonies—especially those concerning the crown. Challenging royal monopolies and other regal acts, seventeenth-century pamphleteers and advocates in Parliament advanced the rights and liberties of Englishmen through debates and popular writings. Similar language and advocacy permeated the colonies and influenced colonists' relations with the crown and proprietors. The colonial assembly, armed with the plea for the privileges and immunities of Englishmen, was an essential vehicle in the transformation of the colonial subject. The phrase had the political effect of leveraging English law or the privileges of other colonies. 591 With the language serving as a meme for a body of fundamental law, colonists converged around free principles and invoked the rights of freer societies around them, much like medieval England’s baronial burgesses coalescing to the free borough and seeking rights


591. *See supra* Part IV.D; *supra* notes 430, 498.
The plea for the “privileges and immunities of Englishmen” served an important role throughout the colonies but especially during the American Revolution with the reoccurring claim for the right to participate in legislation and taxation. By the eve of the American Revolution, colonists attributed a broad degree of rights to the phrase. Following Independence, colonists no longer needed to reference the privileges of Englishmen. States crafted their own constitutions to replace charter privileges and immunities or the crown’s instructions. With Article IV of the Articles of Confederation, the nation of former colonies as a whole replaced the role of English citizenship and English regulation of intercolonial affairs in travel, trade, and commerce. Defective on many grounds, the Articles were replaced by the Constitution. The Constitution advanced the efforts of Article IV of the Articles by expanding Congress’s role to regulate, among other things, interstate affairs and naturalization. With Article I’s structural changes, the Framers established a body of general citizenship rights among the states.

Following the American Civil War, the Reconstruction Congress adopted the CRA to negate the slave codes and grant citizenship rights to recently freed slaves. Citizenship rights granted to former slaves had similarities to denization clauses, to the freedoms granted to individuals suppressed by feudal obligations, and to the corporate rights granted to communities. The transformation involved a move from a non-recognized person or entity to a citizen with the right to sue and be sued, to buy and sell property, and to enjoy associated civil rights. Concerns over the constitutionality of the Act motivated Congress to propose Section One of the Fourteenth Amendment with privileges and immunities language to constitutionalize the CRA.

The interpretation of privileges and immunities language has been problematic. Modern commentary has suggested the phrase protects some degree of rights ranging from personal rights to fundamental law. Given the broader history of royal privileges and immunities discussed above, one questions the merit of substantive, self-executing constructions of the language. Such constructions leave the judiciary free to interpret, and perhaps create, “privileges and immunities”—concepts historically derived from state authority.

592. See supra notes 147–50, 499 (liber burgus and charter association); supra notes 415, 423 (influence of freer colonies).
593. See supra notes 541–42 (comparing citizenship rights to newly freed slaves, denization provisions, and incorporation rights).
594. See supra note 1.