

## University of Richmond Law Review

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Volume 42 | Issue 1

Article 3

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9-1-2007

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### Recommended Citation

A.E. D. Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. Rich. L. Rev. 9 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss1/3>

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# ARTICLE

## THE BRIDGE AT JAMESTOWN: THE VIRGINIA CHARTER OF 1606 AND CONSTITUTIONALISM IN THE MODERN WORLD

*A.E. Dick Howard* \*

In the year 2015, it will have been 800 years since King John met the barons at Runnymede to agree to the terms of what came to be known as Magna Carta. When that anniversary comes to hand, lawyers, judges, and others in countries touched by the Anglo-American legal tradition are apt to pause to reflect on the remarkable vitality of ideas still associated with that venerable document. Many of the Charter's provisions deal with arcane matters of feudal relations and thus hold little interest for our time. We are not likely to muse, for example, on provisions deal-

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\* White Burkett Miller Professor of Law and Public Affairs and Earle K. Shawe Research Professor, University of Virginia. The text of this essay is a fuller development of the keynote address given at the annual conference of the American Inns of Court in Richmond, Virginia, on April 13, 2007. The Inns of Court met in Virginia to mark the 400th anniversary of the settlement at Jamestown. Symbolically, not only did the meeting take place at The Jefferson Hotel, it also occurred on Jefferson's birthday. As the reader of this essay will see, I take us on a journey from Jamestown to Jefferson's day and then to our own time.

Regarding the title, there is no physical bridge at Jamestown—there is a ferry by which one crosses the James River. Lest the reader think I have confused my geography (as conventional wisdom, perhaps unaware of the full extent of the ancient kingdom of Bohemia, supposes Shakespeare to have been when, in *The Winter's Tale*, he refers to the coast of Bohemia), I hasten to say that in my essay I use the Virginia Charter as a metaphorical bridge, one spanning space and time.

I wish to acknowledge the assistance of Alexandre Lamy in the preparation of this essay. He now has an edge on his classmates in his understanding of the roots and contours of constitutionalism.

ing with “aids,” a kind of tax or fee, for ransoming the King’s person or marrying his eldest daughter.<sup>1</sup>

Magna Carta remains, all the same, a cornerstone of much of our modern jurisprudence, indeed, of our very notion of constitutionalism. One notable provision declares: “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We [the King] proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”<sup>2</sup> In the Charter’s decree of “law of the land,” we find the roots of the concept of “due process of law.”<sup>3</sup> Implicit in Magna Carta is the principle which today we call the rule of law. The fact that King John—unwillingly, to be sure—was forced to assent to Magna Carta was a precedent for later generations’ arguments that no person, however powerful, is above the law. It was a precedent invoked when Parliament denied the pretensions of Stuart kings in seventeenth-century England and has its echo in modern times, for example, when the Supreme Court of the United States placed limits on presidential claims of privilege in *United States v. Nixon*.<sup>4</sup>

In 2007, Americans marked the 400th anniversary of the first successful English settlement in North America—the colony at Jamestown. Remarkable tales come to us of the efforts to plant a colony in Virginia—hardship and privation among the earliest settlers, encounters with wary and often hostile natives, the near extinction of the colony during the “starving times” in 1609–1610, and moments of drama such as those relived when we speak of John Smith and Pocahontas. Disease and death notwithstanding, the colony survived.<sup>5</sup> With it were planted the seeds of modern America, including the English common law and notions of constitutionalism and the rule of law.

The legal basis for the colony’s creation was the Virginia Charter of 1606. In the era of settlement and colonization, the Crown’s use of charter companies was a strategy to create a colonial em-

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1. For the events surrounding Magna Carta, and for the provisions of the charter itself, see A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* (rev. ed. 1998).

2. *Id.* at 45 (Chapter 39).

3. By the end of the fourteenth century, “due process of law” and “law of the land” were largely interchangeable.

4. *United States v. Nixon*, 418 U.S. 683, 713 (1974).

5. See, e.g., JAMES HORN, *A LAND AS GOD MADE IT: JAMESTOWN AND THE BIRTH OF AMERICA* (2005).

pire by harnessing the capital and goals of private investors. At the close of the sixteenth century, England was not yet the center of the powerful empire that so occupied the world stage in the eighteenth and nineteenth centuries. Poor by the standards of Spanish and French monarchs, England's Stuart kings were bothered by such nuisances as Parliament's insistence on being consulted about taxes. Thus James I, who came to the throne in 1603, saw the advantage of chartering groups of adventurers who were willing to shoulder the expense of colonization in hopes of profit and reward.<sup>6</sup> Portugal and Spain had already divided the Americas to be colonized and exploited. Great wealth was flowing back to the Iberian Peninsula. English investors were keen to realize quick profits in North America, similar to those being collected by the Spaniards and Portuguese.

The Virginia Company was by no means the first such enterprise. English charter companies had their antecedents in trading companies such as the Muscovy Company, the Levant Company, and the East India Company, which generally had monopolies on trade between England and a part of the world.<sup>7</sup> Starting in the 1550s with the Levant Company, trading companies were transformed into joint stock companies. This made it possible to raise more money and to spread risk among more investors. The most successful of the joint stock companies was the East India Company, and it was this model that served as the basis for the Virginia Company of London.<sup>8</sup>

The Virginia Company and its successors in Virginia, and elsewhere in North America, carried charter enterprise beyond the model shaped by the trading companies and their progeny. Trade and enterprise lay, of course, at the heart of all these initiatives. The Virginia Company, however, was concerned, not only with

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6. Elizabeth Mancke, *Chartered Enterprises and the Evolution of the British Atlantic World*, in *THE CREATION OF THE BRITISH ATLANTIC WORLD* 237, 238–39 (Elizabeth Mancke & Carole Shammas eds., 2005).

7. See generally, GEORGE CAWSTON & A.H. KEANE, *THE EARLY CHARTERED COMPANIES* (1896); 2 JOHN P. DAVIS, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATIONS TO AUTHORITY OF THE STATE* (1905); T.S. WILLAN, *THE EARLY HISTORY OF THE RUSSIA COMPANY: 1553–1603* (1956); Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 *HOFSTRA L. REV.* 89, 115–17 (2004); Cyril O'Donnell, *Origins of the Corporate Executive*, 26 *BULL. BUS. HIST. SOC'Y* 55, 63–66 (1952).

8. See H.L. Osgood, *The Corporation as a Form of Colonial Government*, 11 *POL. SCI. Q.* 259, 263–64 (1896).

trade, but also with the rather more daunting prospect of creating new communities in order to develop new markets. Thus governance became intertwined with trade and enterprise. Not only did this make the Company's work more complicated and challenging, it also brought into being permanent settlements that presented issues of government and protection for the Crown. It was one thing to establish a trading post that could be exploited and then abandoned; it was quite something else to bring new communities into being, as occurred in Virginia. As the seventeenth century unfolded, not only had the colonies in North America taken root, but the early risks of financing the colonies and protecting them against other nations had receded as well. By the eighteenth century, the Crown and Parliament would face a different set of challenges—colonists who, while subjects, were asserting manifest claims of self-government in such areas as taxation and internal affairs.<sup>9</sup>

### I. THE CHARTER AND ITS PROVISIONS

When the Virginia Charter of 1606 was drafted, modern constitutions as we know them still lay over a century and a half in the future. Constitutions took on their familiar form with the writing of constitutions for the American states upon the break with England. Meeting in Williamsburg in May 1776, the same convention that instructed Virginia's delegates in Philadelphia to introduce a resolution for independence also set to work on the state's first declaration of rights and frame of government. Constitutions soon followed in other states. The Philadelphia convention of 1787 produced the first written national constitution of the modern era. In 1791, Poland adopted Europe's first written constitution, followed in the same year by France; the era of constitutions had been truly launched.

Today, virtually every country has a written constitution.<sup>10</sup> Not all, of course, are enforced, but, by and large, proclaiming a constitution is as much a rite of passage for a country as adopting a

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9. Mancke, *supra* note 6, at 260–61.

10. The best known exception is the United Kingdom. Although constitutional changes, including Scottish devolution, reform of the House of Lords, and qualified entrenchment of rights (in the Human Rights Bill), are unsettled in that country, one must assume that the United Kingdom is a long way from enacting a written constitution.

flag. In substantive terms, constitutions vary in their provisions. The United States Constitution, for example, is largely silent on positive rights such as social and economic welfare entitlements, while such rights are commonplace in the constitutions of many other countries. Even so, there are some features which one could say define the notion of what constitutions are about. If one were to create a checklist for the drafters of a constitution, it might include the following:

- A statement of sovereignty
- The constitution's constitutors (commonly something like "We the People")
- Purposes and aspirations
- Structure of government
- An enumeration of powers, including procedures for their exercise
- Limitations on power (such as a bill of rights)
- Provisions for change (revision, amendment, etc.)

By the end of the seventeenth century, England had seen the emergence of important documents that helped shape the constitutional order—among them, Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689). Such documents were not, however, efforts to speak to the full range of issues implicit in the writing of a modern constitution. In large part, their drafters were concerned with contesting royal claims of power or prerogative. Unlike constitution-makers, neither the barons at Runnymede nor the seventeenth-century's parliamentarians were seeking to constitute a state.

In planting colonies in the New World, English settlers found themselves in circumstances calling for something closer to a constitution. The investors in the Virginia Company could not have proclaimed, and would not have imagined proclaiming, sovereignty; they operated at the leave of the Crown. But because they were writing a document for a new land, the entrepreneurs had to think about many of the issues constitution-makers inevitably encounter. When we examine the text of the Virginia Charter of 1606, what do we find?

At the Charter's outset, James I licensed various of his subjects "to make Habitation, Plantation, and to deduce a colony of sundry

of our People into that part of *America* commonly called VIRGINIA . . . .”<sup>11</sup> The Charter sets forth more than one purpose. There is the obligatory reference to Christianizing a savage people; the colony is seen as “propagating of *Christian* Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government.”<sup>12</sup> Having thus nodded to a higher purpose, the Charter then gets down to business—for that, of course, is what the Charter is ultimately about. The grantees are referred to as “adventurers”—don’t think of Huck Finn; think of “venture,” as in “venture capital.” Identifying the region in which plantations may be established, the Charter gives the adventurers the right to exploit “all the Lands, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Waters, Marshes, Fishings, Commodities, and Hereditaments, whatsoever.”<sup>13</sup> Everyone, it seems, is going to get rich. Lest the generic reference to “mines” and “minerals” not be a sufficient clue, the Charter explicitly enjoins that the colonists “shall and lawfully may” mine for gold, silver, and copper (note the directive “shall” added to the permissive “may”).<sup>14</sup> The King is to get his share—one-fifth of all the gold and silver, one-fifteenth of all the copper.<sup>15</sup>

Governance is expressly dealt with in the Charter.<sup>16</sup> The colony is to have a Council empowered to “govern and order all Matters and Causes,” subject to laws, ordinances, and instructions given the King’s Privy Seal.<sup>17</sup> In some detail, the Charter confers powers upon the Council. Both in its specificity and in the subjects that it addresses, this enumeration reminds one of the manner in which Article I, Section 8, of the United States Constitution con-

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11. 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3783 (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe]. The text of the Charter may also be found in 1 THE JAMESTOWN VOYAGES UNDER THE FIRST CHARTER, 1606–1609, at 24–34 (Phillip L. Barbour ed., 1969).

12. 7 Thorpe, *supra* note 11, at 3784.

13. *Id.*

14. *Id.* at 3786.

15. *Id.*

16. The Charter recognizes the adventurers’ desire to create two colonies. It therefore provides that a group based in London will settle in one area (between the 34th and 41st parallels), and those from Bristol, Exeter, and Plymouth will settle in another (between the 38th and 45th parallels). *Id.* at 3783. For simplicity’s sake, I refer in this narrative to “the Colony” rather than to the (two) “Colonies.”

17. *Id.* at 3785. The Charter also provides for a Council in England. *Id.* at 3786.

fers powers upon Congress. Some of the Council's powers, like those of Congress, are clearly intended to facilitate trade and commerce. An example is the power of coinage—to “cause to be made a Coin, to pass current there between the people of those several Colonies, for the more Ease of Traffick and Bargaining between and amongst them and the Natives there,” the Council is to decide on the metal and form of such coins.<sup>18</sup> Among the Article I, Section 8 powers of Congress is a like power—“To coin Money, regulate the Value thereof . . . .”<sup>19</sup> Similarly, the Charter's grant of power to levy tariffs upon those, whether Crown subjects or foreigners, who might traffic within the Colony's territory brings to mind Congress's power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”<sup>20</sup>

Defense is a particular concern of the Charter. In undertaking voyages and settlements, the colonists are enjoined to have sufficient “Armour, Weapons, Ordinance, Powder, Victual, and all other things necessary” for the colony's defense.<sup>21</sup> Moreover, the colonists are given plenary power in defending themselves to “encounter, expulse, repel, and resist, as well by Sea as by Land, by all Ways and Means whatsoever, all and every such Person or Persons, as without the especial License [of the Colony], shall attempt to inhabit within [the Colony].”<sup>22</sup> Defense, as we know, along with facilitating commerce, was paramount among the concerns bringing the framers to Philadelphia in 1787. Thus one finds, in Article I, Section 8 extensive concern with defense—the powers to tax in order to provide for the “common Defence,” to maintain an army and a navy, and to call forth the militia, among others.

Thus, sovereignty aside, the Charter tracks much of a modern constitution's concern for purpose, structure, and power. But what of rights? It is the rare constitution in our time that does

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18. *Id.* at 3786.

19. U.S. CONST. art I, § 8, cl. 5.

20. *Id.* art. I, § 8, cl. 3; 7 Thorpe, *supra* note 11, at 3787. The Charter's provision is manifestly protectionist, in that it provides for an imposition upon “Strangers, and not Subjects under our Obeysance” of twice the rate imposed upon those “being of any Realms, or Dominions under our Obedience.” 7 Thorpe, *supra* note 11, at 3787.

21. 7 Thrope, *supra* note 11, at 3786.

22. *Id.* at 3787. The Charter's language reflects an obvious concern on the part of England that France, Spain, or other European powers might seek to encroach on the English domain—not an unreasonable fear.



not have a bill of rights or, alternatively, protections for rights spelled out in the body of the constitution or in another document of constitutional status. Looking at a seventeenth-century charter preoccupied with exploitation and trade, one might not expect to find provisions dealing with rights, but the 1606 Charter has just such a provision. The King declares that every English subject who dwells within the Colony, as well as their children, "shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born" in England or in any of the King's other dominions.<sup>23</sup> In other words, when a colonist emigrated from England, he did not leave the protections of English constitutionalism or the common law behind. Subsequent history, especially during the American colonists' claims of right in protesting British policies in the years leading up to the Revolution, would prove how potent and enduring this Charter guarantee proved to be.

The Virginia Charter of 1606 was not a constitution. Yet its provisions took the North American colonists an important step closer to the world of modern constitutions.

## II. AFTER JAMESTOWN

The Virginia settlement survived, and others followed. The legal basis for the later colonies varied. Virginia was founded by a chartered company while some colonies were in the hands of proprietors, such as Cecil Calvert's Maryland. As time passed, direct royal control became more common. Yet an important precedent from the Virginia Charter became a leitmotif of subsequent charters. The 1606 Charter's guarantee of "[l]iberties, [f]ranchises, and [i]mmunities"<sup>24</sup> (or like phraseology) commonly appeared in charters granted for later colonies. The Charter of Massachusetts Bay of 1629, for example, declared that all who should settle in that colony should "have and enjoy all liberties and Immunities of free and naturall Subjects . . . to all Intents, [Constructions], and Purposes whatsoever, as [if] they and [everyone] of them were borne within the Realme of England."<sup>25</sup> One finds similar lan-

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23. *Id.* at 3788.

24. *Id.*

25. 3 *id.* at 1857.

guage in other charters, including Maryland (1632), Maine (1639), Connecticut (1662), North Carolina (1663), Rhode Island (1663), North Carolina (1665), and Massachusetts Bay (1691).<sup>26</sup> Indeed, the last American charter, that of Georgia in 1732, had language virtually identical to that of Massachusetts Bay's Charter almost a century earlier.<sup>27</sup>

As the colonies expanded, the need for laws became more evident. As English colonists, the settlers looked, not surprisingly, to English laws for guidance. The colonies' charters encouraged this natural tendency. It was standard practice for the charters' drafters to insert language requiring that laws and ordinances enacted in the colonies be agreeable to the laws of England. Typical was the provision in Virginia's second Charter (1609), which required that all "Statutes, Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our Realm of *England*."<sup>28</sup> Later charters sometimes provided for the transmission of colonial statutes to England for approval or disapproval.<sup>29</sup> A few charters allowed litigants in colonial courts to appeal certain judgments to the Privy Council in England.<sup>30</sup>

Notwithstanding the ties of laws and trade, England was a long way from the North American colonies in time and communication. Moreover, seventeenth-century England saw upheavals such as a fierce civil war, the execution of Charles I, the Cromwellian regime, the return of the Stuarts, and their eventual ouster in favor of William and Mary. As they became better established, distance and distraction fed a natural tendency for the

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26. *Id.* at 1681 (Maryland, 1632); *Id.* at 1635 (Maine, 1639); 1 *id.* at 533 (Connecticut, 1662); 5 *id.* at 2747 (North Carolina, 1663); 6 *id.* at 3220 (Rhode Island, 1663); 5 *id.* at 2765 (North Carolina, 1665); 3 *id.* at 1880–81 (Massachusetts Bay, 1691).

27. 2 Thorpe, *supra* note 11, at 773.

28. 7 *id.* at 3801. For similar provisions in other charters, see THE THREE CHARTERS OF THE VIRGINIA COMPANY OF LONDON 86–87 (E.G. Swem ed., 1957); 7 Thorpe, *supra* note 11, at 3806 (Virginia, 1611–1612); see also 3 *id.* at 1833 (Massachusetts, 1620); *id.* at 1853 (Massachusetts Bay, 1629); *id.* at 1680 (Maryland, 1632); *id.* at 1628 (Maine, 1639); 1 *id.* at 533 (Connecticut, 1662); 5 *id.* at 2746 (North Carolina, 1663); 6 *id.* at 3215 (Rhode Island, 1663); 3 *id.* at 1638–1639 (Maine, 1664); 5 *id.* at 2764 (North Carolina, 1665); 3 *id.* at 1642 (Maine, 1674); 5 *id.* at 3038 (Pennsylvania, 1681); 3 *id.* at 1882 (Massachusetts Bay, 1691).

29. See, e.g., 3 Thorpe, *supra* note 11, at 1864 (the Commission of Sir Edmund Andros for the Dominion of New England (1688)).

30. See, e.g., *id.* at 1881–82 (Charter of Massachusetts Bay (1691) (appeals in actions in which amount in controversy exceeded 300 pounds)).

colonies to have a greater say in their own affairs. An important step in that direction came when the Virginia Company instructed the Governor, Sir George Yeardley, to summon an assembly to participate in the colony's governance. The Governor was instructed to have the inhabitants of each town, hundred, or plantation choose two burgesses to meet annually as a General Assembly "to make, ordain, and enact such general Laws and Orders, for the Behoof of the said Colony, and the good Government thereof, as shall, from time to time, appear necessary or requisite," subject to the Governor's power of veto.<sup>31</sup>

What motives led the Virginia Company to take this step? Some historians, such as Thomas J. Wertenbaker, see idealism as a driving force.<sup>32</sup> Others, such as Perry Miller, discern purely commercial purposes—the Company's efforts to shore up its investments in times of financial difficulties.<sup>33</sup> Whatever the backers' motives, in 1619 Yeardley did convene the General Assembly—the first representative legislative assembly in the New World. Virginia's example spread to other colonies; the Charter of Massachusetts Bay (1629), for example, called for the Governor to assemble a General Court.<sup>34</sup>

The colonies' charters, of course, reminded colonial legislators that their laws must not be in conflict with the laws of England. Even so, especially with the passage of time, colonial legislators came to see their chambers as direct descendants of the House of Commons, vested with the privileges asserted and maintained by that body in its protracted struggles with the Crown.<sup>35</sup> An interesting example of this attitude came in the first sitting of Vir-

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31. 7 *id.* at 3811. There is no modern copy of the 1618 Great Charter; this text is based on "An Ordinance and Constitution of the Treasurer, Council, and Company in England, for a Council of State and General Assembly," dated July 24, 1621. Richard L. Perry explains that "Articles 1-5 of the Ordinances of July 24, 1621, are believed to be almost identical to some of the provisions of a lost document issued November 28, 1618, under which the first Assembly of Virginia was convened by Governor [Sir George] Yeardley." SOURCES OF OUR LIBERTIES 52 n.17 (Richard L. Perry ed., 1978).

32. See Thomas J. Wertenbaker, VIRGINIA UNDER THE STUARTS: 1607-1688, at 32-36 (1914).

33. Perry Miller, *Religion and Society in the Early Literature: The Religious Impulse in the Founding of Virginia*, 6 WM. & MARY Q. (3d ser.) 24, 25 (1949). For the fullest statement of this thesis, see WESLEY FRANK CRAVEN, DISSOLUTION OF THE VIRGINIA COMPANY (1932).

34. 3 Thorpe, *supra* note 11, at 1852-53.

35. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 31 (1977).

ginia's House of Burgesses when the assembly's speaker disputed the qualifications of two members. In response, the burgesses exercised their right to be the sole judge of the assembly members' qualifications—the same prerogative claimed by Parliament.<sup>36</sup>

### III. SEVENTEENTH-CENTURY ENGLAND

The seventeenth century saw extraordinary events unfolding in England. As the colonies in North America were taking root, England saw struggles between Stuart kings and Parliament, a civil war, the execution of Charles I, the Cromwellian Commonwealth, the Leveller movement, the restoration of the Stuarts, their ouster during a bloodless revolution, the accession of William and Mary, and the laying of the foundation of the modern British Constitution. Even though these events took place in the mother country, they nevertheless had profound implications for notions of constitutionalism in America, especially in the eighteenth century.

The first Stuart king, James I, (formerly James VI of Scotland), came to the throne in 1603. He and his successor, Charles I, often found themselves at cross-purposes with Parliament. The Stuart kings seemed propelled by a chronic need for money, for example the expenses of maintaining a lavish court. As a result, they resorted to various forms of prerogative taxation, such as forced loans. These and other actions, including illegal arrests and the application of martial law to civilians, provoked calls for action in Parliament. Sir Edward Coke, a leader of the parliamentary cause, insisted that the subjects' liberties were not acts of grace on the king's part, but matters of right. "[S]overeign power' is no parliamentary word," Coke declared, "Magna Carta is such a fellow, that he will have no sovereign."<sup>37</sup> Parliament affirmed its constitutional beliefs in the Petition of Right (1628), which reaffirmed Parliament's right to consent to taxation, condemned imprisonment without cause, opposed the quartering of soldiers in

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36. *Id.*; cf. U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.")

37. CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 130 (1940).

private homes, and denounced the practice of military tribunals' trying civilians.<sup>38</sup>

The struggles between Charles I and Parliament continued. In 1629, Charles dissolved that body and no Parliament was convened for eleven years—the longest period during which an English king attempted to govern without a parliament. Charles continued to govern in an arbitrary fashion, levying prerogative taxes and imprisoning persons who refused to pay. In 1642, civil war broke out. Eventually, after war had subsided only to resume again, a radical faction in control of Parliament tried Charles I for treason and executed him in 1649. From 1649 to 1660, England was ruled by the regime established by Oliver Cromwell.

It was this period of upheaval that saw the appearance of the Agreement of the People (1649)—a document which foreshadows the modern democratic tradition. The protracted civil war had stirred discontent even in the ranks of Cromwell's army. Disenchanted soldiers, junior officers, and civilian radicals pressed for reforms and put forth ideas that caused them to be known as the "Levellers."<sup>39</sup> Their efforts were opposed by the New Model Army's senior officers and led to the arrest and imprisonment of some of the radicals' leaders, including "Free John" Lilburne. From the Tower of London, Lilburne and several comrades in May 1649 issued the Agreement of the People.<sup>40</sup> It is a remarkable document. The Agreement abolishes the monarchy and the House of Lords, vests governmental authority in a popularly elected Representative, decrees a broad franchise, mandates annual elections of the Representative, enumerates individual rights (among them counsel, trial by jury, and speedy trial), and protects freedom of conscience. The Agreement even includes a supremacy clause—the declaration that any laws made contrary to any part of the Agreement are null and void.<sup>41</sup> Had the Agreement gone into effect, it would have effected a constitutional revo-

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38. 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 19–21 (Bernard Schwartz ed., 1971) [hereinafter THE BILL OF RIGHTS]. On the Petition of Right, see CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603–1714, at 52–53 (2002).

39. See HENRY HOLORENSHAW, THE LEVELLERS AND THE ENGLISH REVOLUTION 14–15 (1971); see generally THE ENGLISH LEVELLERS (Andrew Sharp ed., 1998).

40. For the text of the Agreement of the People, see LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 400–10 (Don M. Wolfe ed., 1944). Actually, the document of May 1649 was the third Agreement of the People, previous drafts having been urged upon the Army's General Council as early as October 1647. HILL, *supra* note 38, at 128.

41. LEVELLER MANIFESTOES, *supra* note 40, at 409 (Article XXX).

lution in England. Even without the force of law, the Agreement proved unquestionably effective in nurturing democratic and constitutional thinking, especially in America.

Cromwell's regime was short-lived; in 1660, the Stuarts were returned to the throne. Charles II (1660–85) is sometimes referred to as the "Merry Monarch," and his era is perhaps best remembered for his mistress, Nell Gwynne, and for restoration theatre (the previous regime had enforced a more puritanical order). But he and his successor, James II, employed policies that showed the struggles between the Crown and Parliament marking the earlier part of the century were to continue. James II made broad use of prerogative powers, including that of dispensing with a law (making exceptions to a law in particular cases) and the even more sweeping power of suspending a law (treating a law as being not in force). James took steps to place judges favorable to his prerogative powers on the bench—an attack on the independence of the judiciary. In an effort to subvert Parliament, he interfered with elections and paid the salaries of sympathetic members. He even had a standing army (20,000 troops—an uncommonly large army for peacetime) quartered near London, probably to intimidate Parliament. Having perhaps less political sense than Charles II, James II embarked on a program openly aimed at the political ascendancy of Catholics. Opponents of James's policies turned to William of Orange for help. William assembled an army, landed in England in November 1688, and marched unopposed to London. James II fled to France, never to return to England (Stuart uprisings in 1715 and 1745 were put down).

A provisional government was organized in London, and in January 1689, the Convention Parliament declared James II to have abdicated the throne. Parliament offered the throne to William and Mary. In December 1689, Parliament enacted the Bill of Rights, a comprehensive settlement emphatically curtailing royal prerogative and making clear that, henceforth, constitutional government centered on Parliament. The Revolution Settlement of 1689—often called the Glorious Revolution—is the foundation on which rests much of constitutionalism in modern Britain. It is also important for its influence on American constitutionalism. Anyone familiar with the United States Constitution and Bill of Rights will recognize the manner in which many of the American

provisions draw directly from their counterparts in the English Bill of Rights. Examples include the following:

- A ban on the Crown's levying taxes without the consent of Parliament<sup>42</sup>
- The right of petition<sup>43</sup>
- The right to bear arms<sup>44</sup>
- Free election of members of Parliament<sup>45</sup>
- The right of members of Parliament not to have their speech or proceedings questioned in any other place<sup>46</sup>
- A ban on excessive bail and fines and on cruel and unusual punishment<sup>47</sup>
- The requirement of frequent parliaments<sup>48</sup>

By the end of the seventeenth century, England had taken manifest steps toward the principles which animate modern constitutional discourse, both in that country and elsewhere. Documents like the Petition of Right, the Agreement of the People, and the Bill of Rights are landmarks in the shaping of constitutionalism. Even while adding their own contributions to notions of law and constitutionalism, the North American colonists were, of course, well aware of events in England. Moreover, heir as they were to the organic and evolving traditions of the common law, the colonists had not forgotten the charter guarantees of the "liberties, franchises, and immunities" to which they and their posterity were entitled. These claims were to take on new force in the eighteenth century when the colonists were roused to oppose British policies they saw as infringing fundamental rights.

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42. *Cf.* U.S. CONST. art. I, §§ 7-8 (mandating that revenue bills are to originate in the House of Representatives and Congress has the power to levy and collect taxes).

43. *Cf. id.* amend. I (forbidding Congress from enacting laws abridging the right to petition).

44. *Cf. id.* amend. II (right to bear arms). The English provision is limited to Protestants' bearing arms—a reminder of Catholic support for James II.

45. *Cf. id.* art. I, § 2 (elections of House of Representatives "by the people").

46. *Cf. id.* art. I, § 6 (right of members of Congress not to be questioned "in any other place" for "any speech or debate in either house.").

47. *Cf. id.* amend. VIII (ban on excessive bail and fines and on cruel and unusual punishment).

48. *Cf. id.* art. I, § 2 (elections of the House of Representatives every two years).

## IV. THE ROAD TO THE AMERICAN REVOLUTION

After the Seven Years War (1756–63)—the French and Indian War in North America—Britain’s Parliament turned to the colonies to help defray the heavy expenses of conducting those wars. His Majesty’s government thought, perhaps understandably, that, having defended the colonies on the frontiers, the government should look to the colonists to pay some of the tab. History records the American response. The colonists were unmoved by the notion that, although they did not have actual members in Parliament, they enjoyed “virtual” representation in that body. Colonial leaders responded to Parliament’s taxes with cries of “no taxation without representation.” They were as outraged by British taxing measures as seventeenth-century parliamentarians were by the Stuart monarchs’ abuse of the royal prerogative.

In opposing British policies, the colonists based their case squarely on the early charters. In 1765, Virginia’s House of Burgesses adopted resolutions condemning the Stamp Act. In so doing, they invoked the original charter. The first “Adventurers and Settlers,” the resolutions declared, “brought with them, and transmitted to their Posterity, and all other his Majesty’s Subjects since inhabiting in this his Majesty’s said Colony, all the Liberties, Privileges, Franchises, and Immunities, that have at any [t]ime been held, enjoyed, and possessed, by the people of *Great Britain*.”<sup>49</sup>

Foremost among those rights, the burgesses averred, was the right of the people through their chosen representatives to tax themselves—“the only Security against a burthensome Taxation, and the distinguishing Characteristick of *British* Freedom, without which the ancient Constitution cannot exist.”<sup>50</sup>

Repeal of the Stamp Act and other duties, save for a tax on tea, eased tensions and brought for a time renewed sentiments of loyalty and affection for the Crown. But the Boston Tea Party provoked Parliament into taking punitive measures, such as the Boston Port Bill, and placing Boston under a kind of blockade until it paid reparations for the jettisoned tea. This and other measures

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49. JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1761–1765, at 360 (John Pendleton Kennedy ed., 1907).

50. *Id.*



adopted by Parliament were denounced in the colonies as the Coercive or Intolerable Acts. The colonies were quick to rally to the support of Massachusetts. In May 1774, just before the punitive measures were to take effect, Virginia's House of Burgesses set aside a day of prayer so that King and Parliament might be dissuaded from a course "pregnant with their ruin."<sup>51</sup> Governor Dunmore forthwith dissolved the Assembly. Reconvening in the Raleigh Tavern, the burgesses agreed upon a resolution recommending that each colony appoint delegates to meet in a general congress to deliberate on a common course of action. Spurred by the efforts of the well organized Committees of Correspondence, other colonies passed similar resolutions.<sup>52</sup>

The Continental Congress, convening in September 1774, addressed a number of issues, among them a petition to the King, an address to the people of Great Britain, and agreements on imports and exports. The keystone of their resolutions was the Declaration and Resolves making the case for the colonists' rights. In articulating those rights, the document stakes the colonists' claims to rights of life, liberty, and property on the colonial charters. Our ancestors, the first settlers, declare the resolutions, "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."<sup>53</sup> Their descendants, it continues, are entitled to the exercise and enjoyment of those rights. The very foundation of English liberty, indeed, of all free government, is the people's right to participate in their legislative councils. Not being represented in Parliament, the colonists are entitled to a "free and exclusive power" to legislate in all cases of taxation and internal polity.<sup>54</sup>

One who reads colonial resolutions and tracts from the decade leading up to revolution is likely to note their intriguing eclecticism. Some colonists looked to higher law. John Dickinson, in his Address to the Committee of Correspondence in Barbados (1766), said that Americans' rights derive, not from "parchments and seals," but from "the decrees of Providence . . . [i]n short, they

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51. JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1773-1776, at 124 (John Pendleton Kennedy ed., 1905).

52. 1 AMERICAN ARCHIVES 350-51 (Peter Force ed., 4th ser. 1837).

53. 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 68 (Worthington Chauncey Ford ed., 1904) [hereinafter CONTINENTAL CONGRESS].

54. *Id.*

are founded on the immutable maxims of reason and justice.”<sup>55</sup> Others argued for grounding the colonists’ case in the charters and the British Constitution. At the Continental Congress in 1774, James Duane, of New York, preferred a constitutional case to one sounding of natural law; he was for:

grounding our Rights on the Laws and Constitution of the Country from whence We sprung, and Charters, without recurring to the Law of Nature—because this will be a feeble Support. Charters are Compacts between the Crown and the People and I think on this foundation the Charter Governments stand firm.<sup>56</sup>

Ultimately the colonists were willing to announce that natural law, British constitutionalism, and the colonial charters were all aligned on their side. The Continental Congress’s 1774 resolutions put it succinctly: “That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following Rights . . . .”<sup>57</sup> The resolutions then proceed to enumerate those rights—among others, their own legislatures’ control over taxation and internal polity, trial by jury, peaceable assembly, petition, and no standing armies during peacetime nor troops quartered in their homes. In these 1774 resolves, one finds a blending of the guarantees of the colonial charters, beginning with the Virginia Charter of 1606, and the constitutional principles forged in seventeenth-century England, especially the Bill of Rights of 1689. Moreover, one finds an emerging sense of the people’s control over their own affairs, the heightened confidence of eighteenth-century Americans in their own cause, and the readiness to stake that cause on the charters, the British Constitution, and higher law.

## V. THE VIRGINIA CHARTER’S IMPORTANCE

Over a century and a half lies between the drafting of the Virginia Charter of 1606 and the era during which Americans challenged British authority and then, revolution won, created their

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55. 1 *Writings of John Dickinson*, in 14 MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA 1, 262 (Paul Leicester Ford ed., 1895).

56. John Adams, Notes of Debates in the Continental Congress, in 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 129 (L.H. Butterfield ed., 1962).

57. 1 CONTINENTAL CONGRESS, *supra* note 53, at 67.

state and federal constitutions. What place does the Virginia Charter have in the journey to constitutional government?

A. *The Idea of a Written Constitution*

Long before the Virginia settlement, England had begun shaping its tradition of written "liberty" documents. That story began at least as early as the thirteenth-century's Magna Carta, and it took on fuller body in the seventeenth century when the Petition of Right and the Bill of Rights were conceived. These documents grew out of struggles for power and concerns regarding the Crown's overreaching itself, as when the barons confronted King John in 1215 and when Parliament challenged the Stuart kings' claims of prerogative power. All of these contests took place within a well established polity. The Agreement of the People came closer to looking like what we would call a constitution, but it was not adopted.

By contrast, the Virginia Charter and the subsequent charters for other colonies applied to newly established territories. Lying far from England, these colonies were not meant to be mere trading posts but were intended to be settlements in a new land. Principles and institutions for governance needed to be sketched. However much those ideas and structures might be modeled upon those found in England, they framed polities which, as populations grew and new challenges were posed, would inevitably invite local adaptation. The Virginia Charter and those of its sister colonies were an important step toward modern constitutions.

B. *The Planting of an Organic Legal and Constitutional Tradition*

Students of comparative law and constitutionalism are bound to be struck by the distinctiveness of law and constitutionalism shaped in England and exported to its colonies. Unlike the civil law, the common law has an unfolding, evolutionary character. British constitutionalism includes the notion of ancient inherited right. Whether at Runnymede in 1215 or at Westminster in 1628, those who drew up Magna Carta or the Petition of Right did not see themselves as mere legislators. Instead they were giving voice to enduring principles which, if a monarch strayed, had to be called into renewed service. This tradition looks both to the past and to the future. It looks to the past by building upon an inher-

ited legacy and it looks ahead by seeing rights as being passed along to future generations. Thus the Virginia Charter guaranteed liberties, franchises, and immunities not only to the immediate settlers but also to their posterity. In the decade before independence, colonial resolves regularly invoked the charter assurances as part of their generation's constitutional right.

American constitutionalism has taken on the unmistakable qualities of the organic, evolving nature of the common law and of British constitutionalism. The United States Constitution is not, of course, infinitely malleable, even though some Supreme Court opinions may make us wonder. Many of its provisions are precise and determined (such as the requirement that the President must be 35 years of age). But, as Chief Justice John Marshall reminded us, it is after all, a constitution, meant to endure and to weather the storms of passing generations.<sup>58</sup> It is not a train ticket, good only for travel to one destination. Even while it commands fidelity to its great purposes and design, the Constitution requires interpretation. This is especially true of those provisions that have a history grounded in English law and constitutionalism. Thus due process of law, whose history reaches back to Magna Carta's "law of the land," has seen manifold applications in American constitutional law. Not only does it lay down requirements of fundamental fairness in criminal procedure, but it also continues to this day to have expanding substantive dimensions, such as those embracing rights of personal privacy and autonomy.<sup>59</sup> Similarly, the ban on cruel and unusual punishment, found in the 1689 Bill of Rights, continues to evolve as the Supreme Court looks to contemporary community standards (not only in the United States, but abroad) in deciding when death sentences cannot be carried out.<sup>60</sup>

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58. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.").

59. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (intimate sexual conduct); *Roe v. Wade*, 410 U.S. 113, 164–66 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring) (marital privacy); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–36 (1925) (educating one's children in private schools); *Meyer v. Nebraska*, 262 U.S. 390, 390–403 (1923) (teaching foreign languages).

60. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (barring execution of youthful offenders, overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (barring execution of the mentally retarded, overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

### C. *The Articulation and Protection of Fundamental Rights*

Closely allied to the notion of unfolding constitutionalism is the notion that ultimately it is individual liberty and rights that are protected. Magna Carta set the precedent for the idea of the rule of law—that no one, not even the King, is above the law. The Great Charter spelled out fundamental guarantees, chief among them the requirement that proceedings be conducted according to the law of the land. The Virginia Charter of 1606 brought such principles to the New World. England saw further statements of fundamental rights in the Petition of Right and in the Bill of Rights. When the colonists wrote their resolutions and declarations in the decade after the Stamp Act, they were building a constitutional case, intertwined as it was with notions of higher law. From the very beginning of the American polity, the whole enterprise was founded upon a belief, as the Declaration of Independence maintained, in “certain unalienable rights.” In May 1776, the convention at Williamsburg that instructed Virginia’s delegates at Philadelphia to introduce a resolution for independence went to work on a constitution. Before drafting a frame of government, the convention thought the first step must be the drafting of a declaration of rights. Largely the work of George Mason, the Virginia Declaration of Rights was the model for other state bills of rights and even influenced the drafting of France’s Declaration of Rights of Man and the Citizen in 1789. When the 1787 Philadelphia Convention thought it unnecessary to include a bill of rights, the Constitution’s proponents were so hard pressed in the ratification contest that they undertook an implicit pledge that upon ratification, they would add a bill of rights—a pledge that James Madison redeemed at the First Congress. Much of the genius of the Madisonian design for the Constitution itself lies, of course, in institution, design, and process, such as separation of powers and checks and balances. But from the Virginia Charter of 1606 through the drafting of the American state and federal constitutions, a belief in fundamental rights has been an *idée fixe* of American constitutionalism.

### D. *Toward the Idea of a Constitution as Fundamental Law*

The notion of a superstatute—a fundamental law superior to ordinary law—has ancient origins. In 1368, a statute of Edward III commanded that Magna Carta “be holden and kept in all

Points; and if there be any Statute made to the contrary, it shall be holden for none.”<sup>61</sup> Here, for all the obvious questions about Parliament’s power to repeal any statute, we see the emergence of the idea that some laws—today we would point to constitutions—are more fundamental than others. England’s Agreement of the People anticipated modern constitutional supremacy when it declared that any law contrary to the Agreement was to be considered null and void.<sup>62</sup> William Penn’s Fundamental Law for West New Jersey (1676) brought this principle of constitutionalism to the New World when it declared that the colony’s legislative body was “to make no laws that in the least contradict, differ or vary from the said fundamentals . . . .”<sup>63</sup> In the years leading to independence, the colonists’ arguments were manifestly constitutional in nature, that is, they asserted constitutional limits on Parliament’s powers to legislate for the colonies in such areas as taxation and internal polity. Constitutional supremacy is clearly stated in the United States Constitution’s declaration that the Constitution and all laws enacted in pursuance thereof “shall be the supreme Law of the Land . . . .”<sup>64</sup> Any lingering doubts about constitutional supremacy were laid to doubt in Chief Justice John Marshall’s opinion in *Marbury v. Madison*.<sup>65</sup> It is beyond the scope of this essay to sketch out the Supreme Court’s frequent use of its power to enforce the Constitution, but that story—reminding state legislators, members of Congress, government officials, and even the President of the constitutional limits upon their authority—is a familiar one.

## VI. WORLD CONSTITUTIONALISM

Boosters in Tidewater Virginia like to talk of the “Historic Triangle”—the area that encompasses Jamestown, Williamsburg, and Yorktown. Jamestown, of course, is where the first permanent colony was planted. Williamsburg was Virginia’s capital during the revolutionary era. And Yorktown was the scene of the decisive battle where a British army, its band playing “The World

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61. See HOWARD, *supra* note 1, at 24.

62. See LEVELLER MANIFESTOES, *supra* note 40, at 409 (Article XXX).

63. 5 Thorpe, *supra* note 11, at 2548.

64. U.S. CONST. art. VI. The article goes on to bind state judges, notwithstanding the provisions of a state’s constitution or laws.

65. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Turned Upside Down,” surrendered to the Americans. The visitor to these three places is stirred by physical evidence of history—the remarkable archaeological excavations on Jamestown Island, the reenactments on Williamsburg’s Duke of Gloucester Street, and the trenches where American troops laid siege to the British at Yorktown.

Most visitors to that area, however, will probably pass through with only the vaguest notion of these sites’ relation to world constitutionalism. The Jamestown settlers arrived in 1607 under the aegis of the Virginia Charter, a bridge between constitutionalism in the Old World and the New. In Williamsburg, the convention of 1776 drafted the first American state constitution and declaration of rights, the latter having its sequels in the other American states and influencing France’s 1789 declaration. At Yorktown, the American victory could not have been achieved without the aid of the French fleet; it is ironic that France’s aid to the American cause was part of the financial drain that was a factor in the downfall of the ancient regime. Soon after the 1787 Philadelphia Convention drafted the United States Constitution, Poland and France, both in 1791, set in motion Europe’s age of written constitutions.

The modern age has been marked by a lively traffic in constitutional ideas among nations. America’s early state and federal constitutions show the influence of Enlightenment thought, the writings of such thinkers as Locke and Montesquieu, and the accumulated insights of British constitutionalism. While a student at Princeton, James Madison studied under James Witherspoon, giving Madison a direct link to the Scottish Enlightenment. Later, in preparing himself for the Philadelphia Convention, Madison read deeply, making notes on what the experience of the “ancient and modern confederacies” had to teach the Americans.<sup>66</sup> To what they took from European sources, Americans, of course, added much that was drawn from their own experience. Ideas that were not unfamiliar to the Old World— notions such as popular sovereignty, separation of powers, and federalism—took on new meaning in American hands.

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66. See James Madison, *Notes on Ancient and Modern Confederacies*, in 9 THE PAPERS OF JAMES MADISON 3, 4–24 (Robert A. Rutland ed., 1975).

There has also been a reverse flow—the influence of the American constitutional experience on other countries. Sometimes the use of American ideas has been voluntary, as when the French drafted their Declaration of Rights of Man and the Citizen. Other times American ideas have been imported in association with colonization (the Philippines) or military conquest (Japan after World War II). Sometimes American ideas have been accepted (the growth of judicial review). Other times American practices have been rejected (the French rejected bicameralism in 1791). In any event, American constitutionalism has been a powerful force in shaping constitutional debate from the earliest days to our own time. A few brief examples will give the flavor of this influence.

#### A. *The Founding Era in France*

Even before the revolution broke out in France, many people in that country, especially intellectuals, paid close attention to what was happening in the United States. To the philosophes, those events were proof that ideals could become reality. Benjamin Franklin and Thomas Jefferson, as American ministers in Paris, were glad to spread news of American developments, including seeing to the publication and dissemination of the texts of American constitutions. France's Declaration of Rights of Man and the Citizen shows the influence of the Virginia Declaration of Rights. When the National Assembly debated France's first constitution, the moderate faction, advocating bicameralism, pointed to such American precedents as Massachusetts's 1780 Constitution, while the more radical faction looked to Pennsylvania's 1776 document. France embarked on a constitutional course ultimately quite different from that of the United States, but it is significant that America's founding documents helped frame the debate in France.<sup>67</sup>

#### B. *Nineteenth-Century Europe*

Liberal reformers in nineteenth-century Europe looked to the United States as proof that liberalism and democracy could work. The revolutions of 1848 brought conventions at which drafters

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67. On the debates in France, see R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800: THE CHALLENGE* 479–502 (1959).



closely examined the American experience. Already Tocqueville's *Democracy in America* offered rich insights into American life and practices, and the *Federalist Papers* had been translated into accessible languages. At Frankfurt's Paulskirche [St. Paul's Church], the professors, lawyers, and others who assembled to draft a constitution for Germany referred frequently to such American institutions as federalism and judicial review. The Paulskirche Constitution was not ultimately implemented (it offended the more conservative powers in the German states), but its principles, especially federalism and judicial review, survive in Germany's Basic Law of 1949.<sup>68</sup>

### C. *The United States in the Philippines*

Late in joining the colonizing game, the United States found itself in possession of the Philippines as a result of the Spanish-American War. President McKinley called for a policy of "benevolent assimilation." The American program for the Philippines included a gradual move toward self-government, the creation of a system of public education (modeled on American schools), and the wholesale transfer of American-style law and courts. In 1935, a constitutional convention drafted a constitution which, while it drew upon many sources, reflected pervasive American influence. Then, in 1946, the Philippines gained independence. Politics and society in today's Philippines are a mix of Iberian and American ideas (the country was, after all, a Spanish colony for 300 years and under American control for only a half century).<sup>69</sup>

### D. *Woodrow Wilson and Making the World Safe for Democracy*

The United States' participation in World War I brought perhaps the most famous American effort to plant an idea in other countries—making the world "safe for democracy." Wilson sketched out his goals in broad terms. Seasoned by his years

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68. On the Paulskirche convention, see FRANK EYCK, *THE FRANKFURT PARLIAMENT 1848–1849* (1968); Bernd J. Hartmann, *How American Ideas Traveled: Comparative Constitutional Law at Germany's National Assembly in 1848–1849*, 17 *TUL. EUR. & CIV. L.F.* 23, 30–34 (2002).

69. On the American era in the Philippines, see STANLEY KARNOW, *IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES* (1989); GLENN ANTHONY MAY, *SOCIAL ENGINEERING IN THE PHILIPPINES: THE AIMS, EXECUTION, AND IMPACT OF AMERICAN COLONIAL POLICY, 1900–1913* (1980).

teaching constitutional law at Princeton, he did not think other countries were obliged to adopt constitutions modeled on that of the United States. He emphasized instead general themes—self-determination, free elections, the rule of law, a bill of rights, and an independent judiciary.<sup>70</sup> The father of post-war Czechoslovakia, Thomas Masaryk, spent part of the war in the United States, where he issued a Declaration of Independence whose rhetoric was meant to appeal to Wilson in particular and Americans more generally.<sup>71</sup> Until it fell into Nazi hands in 1938, Czechoslovakia was the most successful democracy of the post-imperial states of Europe.

### E. *Japan and Germany after World War II*

After Japan's surrender in 1945, General MacArthur was the Allied Supreme Commander in Tokyo—in effect, Japan's shogun. It was clear that Japan must scrap its 1885 Constitution (heavily inspired by the Prussian model) and institute a more democratic order. Concerned that the Japanese were inclined to tinker rather than undertake wholesale reform, MacArthur put his military government team to work on a new constitution. In seven days, a draft appeared which, despite Japanese reservations, was the basis for the constitution that ultimately was adopted.<sup>72</sup> That constitution remains in force today, but Japanese politicians and scholars debate whether the constitution was imposed or whether it has been domesticated and is effectively Japanese.<sup>73</sup>

It was but a short time between the events in Japan and the Germans' drafting and adoption of their Basic Law of 1949. The allied powers were, of course, in occupation in Germany, as they had been in Japan. As events unfolded, however, the Germans

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70. See generally THOMAS J. KNOCK, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* (1992).

71. THOMAS GARRIGUE MASARYK, *THE MAKING OF A STATE: MEMORIES AND OBSERVATIONS, 1914–1918*, at 294–95 (1927).

72. On the drafting of Japan's Constitution, see 1–2 DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* (2001); THEODORE McNELLY, *THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION* (2000); RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* (2002).

73. See generally J. M. Maki, *Japan's Commission on the Constitution: The Final Report*, in *JAPANESE LEGAL SYSTEM* 484–92 (Meryll Dean ed., 2d ed. 2002) (discussing the debate over the voluntariness or involuntariness of the enactment of the Japanese Constitution).

had a much freer hand in deciding on the shape of their Basic Law than the Japanese had in adopting their constitution. Lucius Clay, the American commander in Germany, was of a different temperament than General MacArthur. But the greatest difference was that, with the fall of Czechoslovakia, the Berlin blockade and the Berlin airlift, the Truman Doctrine (of containing communism), and the Marshall Plan, the Cold War was fully underway. Thus it is fair to say that the Basic Law produced in 1949 was more authentically a German document than the Constitution of Japan was Japanese. The Basic Law has aspects quite familiar to Americans, such as federalism and judicial review, but they took on a distinctively German texture.<sup>74</sup>

#### F. *The Post-Soviet World*

In 1989, the Berlin Wall came down, and communism collapsed throughout the former Soviet domain. A new era called for new constitutions. Advice came from lawyers and scholars in the West, especially from Europe and the United States. Free to chart their own course, constitution-makers in Central and Eastern Europe invariably wrote constitutions that look more like those of Western Europe than that of the United States. This is not to say that American influence was negligible. Rather, it reflects the fact that Poles, Czechs, and others in the region, having endured the communist era, wanted to return to the family of Europe and to join its institutions, especially the European Union.

### VII. CONCLUSION

One should not be surprised that the influence of American constitutionalism in other countries is more diluted today than it was in the founding era. In the early years of the American republic, the United States was the great beacon of hope to liberals and reformers in other lands. Then, as more countries adopted constitutions, other models for constitution-makers appeared. Other ideologies, such as nationalism and socialism, competed with liberal constitutional democracy. International politics, es-

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74. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 30-45, 205-23 (2d ed. 1997); EDMUND SPEVACK, *ALLIED CONTROL AND GERMAN FREEDOM: AMERICAN POLITICAL AND IDEOLOGICAL INFLUENCES ON THE FRAMING OF THE WEST GERMAN BASIC LAW GRUNDGESETZ* 405-55 (2001).

pecially the attitudes of powerful states, influenced the making of constitutions. Human rights, in the form of international and regional covenants became a source for drafters of constitutions. Moreover, there are practical limits on the extent to which today's constitution-makers can use the text of the United States Constitution, drafted as it was, under eighteenth-century assumptions and whose modern understanding requires extensive knowledge of judicial opinions and other usages.

A constitution must ultimately be grounded in the traditions and culture of the country for which it is designed. Even so, there are constitutional principles that transcend national boundaries. If the goal is constitutional democracy, then there are basic ideas in American constitutionalism that, in one form or another, serve to bolster that goal. These include limits on power (such as separation of powers and checks and balances), respect for local differences (reflected in federalism, devolution, or subsidiarity), protection for individual rights, the place of civil society (to provide buffers between the individual and the state), an independent judiciary, and constitutional supremacy. All of these are features of American constitutionalism, and, adapted to a country's own needs, they can do yeoman's service in myriad countries.

Where does the Virginia Charter of 1606 fit into this narrative? Does Jamestown deserve to be noted alongside Runnymede, Westminster, Philadelphia, and other foci of world constitutionalism? History gives us constitutional moments—events and documents that shape and inform the development of constitutionalism, democracy, and the rule of law. Among these events and documents one may include Magna Carta, the English Bill of Rights, the Virginia Declaration of Rights, the Declaration of Rights of Man and the Citizen, the Philadelphia Constitution, the United Nations Charter, and the European Convention on Human Rights.

The Virginia Charter of 1606 may be seen as a bridge. First, it spans the distance between the Old World and the New World. It is a bridge that begins the process by which subsequent documents, including the charters of other colonies, draw upon earlier principles and add yet new dimensions. Second, the 1606 Charter is a bridge in time. Reaching back to medieval constitutionalism as embodied in Magna Carta, the Virginia Charter helps put in play forces which, with the passage of time, have yielded the world of modern constitutionalism.

Thomas Jefferson offered the precept that “[t]he earth belongs always to the living generation.”<sup>75</sup> Jefferson’s admonition is echoed in George Mason’s Declaration of Rights for Virginia, which calls for a “frequent recurrence to fundamental principles.”<sup>76</sup> We inherit a constitutional legacy; we ponder revisions to reflect changed times; we pass the legacy along to future generations. The “adventurers” who wrote the Virginia Charter of 1606 may well have had their eye on the profits they would extract from their endeavor, but they also helped shape our constitutional destiny. For this we thank them.

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75. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776–1826*, at 631, 634 (James Morton Smith ed., 1995).

76. This language appears today in VA. CONST. art. I, § 15.