

American Constitutional Thought: Colonial Charters and Early State Constitutions

C. Aaron Flynn
Woodrow Wilson Department of Politics
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In the 13th Query of Thomas Jefferson's *Notes on the State of Virginia*, he enthusiastically embarks upon a candid discussion of the Constitution of the Commonwealth. Tracing its lineage, Jefferson begins not with George Mason's *Virginia Declaration of Rights*, which served as "the basis and foundation of government," but instead locates its first utterance in 1584 with the issuance of Queen Elizabeth's Charter to Sir Walter Raleigh.¹ Why does Jefferson locate the germ of the Virginia State Constitution in a royal charter? Expanding further, is this unique to Virginia, or can we observe similar attributes in the constitutions of other postcolonial states?

Upon examination, it appears clear that Virginia's constitution was not a unique statement of new and innovative rights, but instead a measured and deliberate effort to reclaim the fundamental rights of Englishmen. Jefferson begins with the progression and development of Virginia's colonial charters because they function as the first iterations of constitutional thought in the American colonies. In written form, these charters transcend ordinary law and elevate common statute to that of the fundamental and "unalienable." In this paper I argue that early colonial Charters function as historical antecedents to postcolonial state constitutions (particularly as expressed through Bills of Rights). In substance, form, and theory, state constitutions arising out of the period post-independence draw heavily upon English constitutional theory, as expressed through functional medium of English Charters.

When considering individual state constitutions in relation to the United States Constitution we often may not appreciate that "before the surrender of Cornwallis at Yorktown, every American State had already achieved constitutional independence and had established its

¹ The Declaration of Rights was unanimously adopted by the Fifth Virginia Convention at Williamsburg on June 12, 1776. Jefferson was not present at the convention as he was away in Philadelphia charged with writing the Declaration of Independence. See State of Virginia. Constitution of Virginia: Together with the Bill of Rights. Richmond, VA: Office of the New Nation, 1867, see also Wakelyn, Jon L. America's Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance. Vol. 1. Westport, CT: Greenwood Press, 2006. At pages 21-27.

own organic law.”² In examining the constitutional orientation of a state’s expression of organic law, it is my hope that this research will help illuminate those dark corners of American federalism before the adoption of the United States Constitution. As each state was a sovereign and highly independent entity, the divesting of autonomy in entering the Constitutional compact is all the more remarkable.³

Additionally, as each state had already crafted and refined their own state government before the Constitutional Convention in 1787, they brought with them not only a functional rubric for the foundation of contemporary constitutional governance, but important experience in relation to its operation and implementation. With nearly a decade of independent control of matters of state, each state helped carve out certain areas of state autonomy in relation to the federal Constitution. This “compound republic” provided a space for states to remain active and independent agents in the direction of the newly united states.⁴ As such, it is my sincere desire that this research will help bring into focus the constitutional arguments (particularly those relating to the federal structure) that predate the creation of the United States Constitution.⁵

With a better understanding of the progression of constitutional thought through time, we can better understand and critically frame contemporary Constitutional arguments. In this inquiry I discovered a dearth of scholarship addressing this unique period of time in American constitutional development. The existing scholarship, primarily dating from the 1890’s, does not

² Morey, William C. *The First State Constitutions*. *The Annals of the American Academy of Political and Social Science*. 1893;4:1-32. At page 2.

³ Specifically in the 1787 federal arrangement, although the states were loosely aligned in a “league of friendship” under the Articles of Confederation.

⁴ See Federalist 51, Storing, Herbert J., ed. *The Anti-Federalist: Writings and by the Opponents of the Constitution*. Chicago, IL: University of Chicago Press, 1985. At page 320.

⁵ I should note that I position this paper as only a first cut at uncovering the relationship between the state and federal governments. Instead, here I attempt to elucidate the lineage of constitutional thought from the founding period into the frames of early American state constitutions.

seriously address the implications of colonial rule upon the state constitutional edifice.⁶ Renewed scholarship in this area is necessary to address the underlying causes of the changing nature of federalism in the United States. While it is somewhat difficult to suggest that research which focuses its inquiry upon the Founding is “dated,” the multitude of changes (historical, legal, and social) since the publication of the existing scholarship calls for a contemporary account of the events of American Colonization.

Case Study and Selection

The tracing of the evolution of constitutional thought through time merits a close qualitative examination of the available material. The theoretical advancement of constitutional thought does not lend itself well to quantitative modeling; the goals of which add little to the project. Instead, my method of inquiry seeks to probe the causal mechanisms which help produce American state constitutions. In order to accomplish this I employ systematic process tracing, as it better lends itself to examining the temporal progression of constitutional thought.

I divide the paper in two sections: *Constitutional Discourse in the American Colonial Experience*, and *Colonial Charters and American Constitutional Thought*. The goal of the first section is to discern the dominate themes of constitutional arguments by examining public discourse surrounding “rights” in the American colonial experience. “Rights,” properly understood, dominate the dialogue of early American political discourse. Thusly, I examine contemporaneous political and legal thought surrounding the rights of American colonists. Indeed, perhaps the best measure of the salience of certain rights to a people is reactions to the transgressions of those rights: as any student of American politics can attest, the founding period was heavily laden with examples.

⁶ See Hoadly, Charles J. *The Public Records of the State of Connecticut* (1894); see also Morey, William C. *The Genesis of a Written Constitution* (1894) and Webster, William C. *Comparative Study of the State Constitutions of the American Revolution* (1897).

Unexamined however is the location of those “rights.” From whence do the spring? From nature? From the people? Or perhaps they possess a formal legal basis? I locate the colonial expressions of rights as founded in the guarantees provided within a state’s original colonial charter.⁷ I examine three primary expressions of colonial rights (specifically those addressing a trespass of those rights): *The Resolutions of the Stamp Act Congress (1765)*,⁸ *A Summary View of the Rights of British America (1774)*,⁹ and *Common Sense (1776)*.¹⁰ These documents provide a not only a window into the colonial mind but also allow us the opportunity to trace the progression of constitutional thought through the colonial period.

I begin with the *Resolutions of the Stamp Act Congress* in 1765 as the Resolutions depict the views of the nation in concert. The Resolutions provide a general and holistic view of “rights,” as understood by the colonists, in the early founding period. This, a nationwide meeting was an important development in and of itself. After repeated attempts by individual state assemblies, their petitions were neither acknowledge nor addressed. As a result the individual colonies saw the need to gather together an act for the common good.

I proceed with an examination of *A Summary View of the Rights of British America*, authored by Thomas Jefferson in 1774. Written as instructions to the Virginia Delegation at the First Continental Congress, Summary importantly depicts the views of an independent state – embodying the views of the colonial elite. Given Virginia’s position in the original colonies, its prowess in trade and production, and tradition of independent colonial government, Summary merits careful consideration.

⁷ Specifically, colonial charters contain specific textual provisions which extend the “Rights of Englishmen” to the American colonists as well as their progeny.

⁸ See Perry, Richard L, ed. *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights*. Chicago, IL: American Bar Foundation, 1978. At page 270-271.

⁹ See Jefferson, Thomas. *A Summary View of the Rights of British America (1774)*. A facsim. reproduction / Delmar, N.Y.: Scholars' Facsimiles & Reprints, 1976.

¹⁰ See Paine, Thomas. *Common Sense*. New York: Barnes and Noble 1995.

I end my examination of colonial rights discourse with Thomas Paine's *Common Sense* and the Second Continental Congress's call for the creation of independent state governments. *Common Sense* represents, in plain terms, the sentiments of the people of the colonies. *Common Sense* was a crucial element in the rhetorical battle for independence. Viewing each of these documents and their relationship to the concept of colonial rights provides us sufficient variance in the views and development of colonial constitutional thought. Take as a whole, they represent the views of the people, the colonial elite, and finally the collective needs of the state assembled. Moreover, the discourse relates to colonial location of "rights" as derived from both colonial charters and English constitutional thought.

In the second section I seek to systematically examine the textual and structural similarities of an individual state's founding charter juxtaposed against their pursuant state constitution's bill of rights. I turn an eye to the use of colonial charters as they relate to the systematic progression of colonial rights. For this project, I have chosen to examine the Charters and Constitutions of the Commonwealth's of Virginia and Massachusetts. Each represents divergent economic and foundational objectives in relationship to England. Virginia began as an economic enterprise charged with the bold task of creating an extension of the British Empire in the New World. Whereas Massachusetts began, under the guise of incorporation, as a colonial exercise in unencumbered religious expression. Given the unique trade structure provided for in Virginia's charter it was initially dependent upon England for commercial success, whereas Massachusetts was, from the outset, functionally independent from England.

Thus I consider Virginia's 1606 charter for the Virginia Company of London as well as the 1776 Virginia Declaration of Rights. For Massachusetts I look at the 1629 Charter for the Massachusetts Bay Colony, as well as the 1780 Declaration of Rights.

Constitutional Discourse in the American Colonial Experience

Resolutions of the Stamp Act Congress (1765)

The Resolutions of the Stamp Act Congress in 1765 clearly represent the emergence of a distinctly American form of constitutional thought. Moreover, these resolutions represent the reified views of the nation as a whole. The rights discussed therein are paramount to understanding the early development of American constitutional thought. Couched in traditional English liberties, as provided for the colonists in their operational colonial charters, they derided the degradation of what they considered to be fundamental rights.

At the conclusion of the French and Indian War in 1763, British national debt had nearly doubled; resultantly, Parliament sought both new and innovative measures to raise additional tax revenue. Naturally, Parliament turned an eye to the prospering American colonies, of whose borders the war was intended to secure. Beginning in 1764 with the adoption of the Sugar Act, followed in 1765 with the passage of the Stamp Act, Parliament began to exercise de facto taxation power over the American colonies. In contrast with English law, which provides that subjects of the Crown may not be taxed without their express consent through the medium of Parliament (of which the colonists elected no members) the acts were therefore viewed as violating the colonists constitutional rights.

Outraged at Parliament's flippant abuse of power, the Massachusetts General Assembly circulated a resolution to the legislatures of the individual colonies seeking a meeting to "consult together on the present circumstances of the colonies."¹¹ This meeting, held in October of 1765 in New York City, was known as the Stamp Act Congress.¹² The resulting resolutions are important in that they represent one of the first organized actions on behalf of the embattled

¹¹ Niles, Hezekiah. *Principles and Acts of the Revolution in America*. Baltimore: W. O. Niles, 1822. At page 156.

¹² The colonies of Georgia, New Hampshire, South Carolina, and Virginia elected not to send delegates.

colonists. The concepts and ideas set forth herein would begin to lay the foundation for the American Revolution, and importantly, American constitutional thought.

Reacting to a series of acts that had the “manifest tendency to subvert the rights and liberties of the colonists,” the Stamp Act Congress petitioned the King and Parliament for redress of these repeated constitutional trespasses. The resolutions naturally recognize allegiance to the Crown and subordination to “that august body the Parliament of Great Britain.” Importantly, the resolution reiterates that as subjects of the Crown they “are entitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain.”

Further, the resolutions located the transgressed rights in the discourse of English constitutional law, and thus, as subjects of the Crown, they sought only to enjoy those protections. The resolutions claimed 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.” As no such colonial representatives existed, the resolutions charged that “the people of these colonies are not, and from their local circumstances cannot be, represented in the House of Commons in Great Britain.” These claims help to establish a minimum standard of local democratic self-control in the American colonies.

The resolutions question the extension of Parliamentary authority and boldly proclaim that “the only representatives of the people of these colonies, are persons chosen therein by themselves.” The delegates continue that “no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.” The resolutions also call for increased economic independence as well as the right to trial by jury. In examining the Stamp Act Congress Resolutions it becomes clear that, from the very beginning, the colonists employed

constitutional arguments in their efforts to retain self-control of the affairs of state, as well as an avenue in which seek legal redress from trespassed rights.

A Summary View of the Rights of British America (1774)

In 1649, after the execution of Charles I in England, Parliament temporarily assumed the responsibility of governing the American colonies.¹³ Parliament however continued to tax the colonies as if they had enjoyed representation in the House of Commons. A series of acts, commonly known as the *Intolerable Acts* prompted the American colonies again to action: the calling of the First Continental Congress in September of 1774.

In preparation for the convention, Thomas Jefferson drafted *A Summary View of the Rights of British America* as set of instructions to send with the Virginia Delegation to the Continental Congress.¹⁴ Jefferson's Summary took upon a more candid and stern tone, "penned in the language of truth and divested of those expressions of servility which would persuade his majesty that we are asking favours, and not rights." The document was is itself styled as a treatise tracing the legal extrapolation and investiture of English rights to subjects in colonial America. Juxtaposing the rights and liberties of Englishmen against repeated Parliamentary transgressions thereof, Jefferson derides the "unwarrantable encroachments and usurpations...upon those rights which God and the laws have given equally and independently to all."

Jefferson's *Summary* effectively represents the collective views of the early colonial elite. Much of the content deals specifically with economic concerns – including land titles, taxation, and the mercantile trade structure under which the colonists operated.¹⁵ Aside from purely

¹³ Interestingly, Charles I was disposed by a progressive Parliament seeking to curb royal prerogatives in favor of a more balanced government.

¹⁴ Georgia did not however send delegates to the First Continental Congress.

¹⁵ Jefferson, an adroit attorney, skillfully argues that lands held in the colonies were done so under allodial title (as opposed to feudal) and thus that the people of the colonies (specifically Virginia) owed no taxes or fees to the Crown for the use thereof.

economic considerations, Summary also touches topics of standing armies, the quartering of soldiers, trial by jury and the dissolution of colonial legislative assemblies.

Summary highlights the acts of Parliament which restrict free trade amongst the colonies; making the bold assertion that the colonists are exempt “from the jurisdiction of the British parliament.” Further, Jefferson argues, the “true ground on which we declare these acts void is, that the British parliament has no right to exercise authority over us.” Such strong language was ultimately rejected at the Continental Congress, though much of the content remained.¹⁶ Perhaps the most grievous of the acts considered in Jefferson’s Summary was an act suspending the legislature of New York, inveighing Parliament’s tendency to meddle in “the regulation of the internal affairs of the colonies.” Incredulous, Jefferson writes:

One free and independent legislature hereby takes upon itself to suspend the powers of another, free and independent as itself; thus exhibiting a phenomenon unknown in nature... Not only the principles of common sense, but the common feelings of human nature, must be surrendered up before his majesty's subjects here can be persuaded to believe that they hold their political existence at the will of a British parliament. Shall these governments be dissolved, their property annihilated, and their people reduced to a state of nature, at the imperious breath of a body of men, whom they never saw, in whom they never confided, and over whom they have no powers of punishment or removal, let their crimes against the American public be ever so great?

The missive also highlights colonial concerns over the existence of a strong English military presence.¹⁷ Jefferson recognized the onerous implications as colonists were required to provide for the quartering of the soldiers; which, in effect “was taxing them to the amount of their recognizance.”¹⁸ Further, concerning the military presence, the colonists lamented that those soldiers sent among the colonists were “not made up of the people here, nor raise by the

¹⁶ See the Declaration and Resolves of the First Continental Congress. Perry, Richard L. Ibid at pages 442-447.

¹⁷ Consider the sanctions placed upon the City of Boston following the “Tea Party” in 1773. Two Parliamentary Acts, one forcibly closing the ports, and another to quell insurrections, required a large number of English troops, of whom the colonists were expected to quarter.

¹⁸ It should be noted that this quote is associated with the Colonial Governor’s ability to require a trial take place before the King’s Bench, as opposed to colonial judiciaries – the expenses, travel and otherwise, were to be borne by the accused. I employ it here to similar ends, to suggest that the cost associated with quartering troops was akin to a de facto tax upon the colonies.

authority of our laws.” Perhaps worse yet, the colonists feared the extension of martial law under certain acts of Parliament. Jefferson objects that “his majesty has expressly made the civil subordinate to the military.”

Jefferson concludes in equally somber tones, reminding King George III that the document was submitted as “a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate.” Representing the learned political elite, Jefferson, like the members of the Stamp Act Congress, basis his arguments solidly within English law – as provided to the colonists by their original charters.

Thomas Paine’s Common Sense (1776)

Everything that is right or reasonable pleads for separation. The blood of the slain, the weeping voice of nature cries, ‘tis time to part. Even the distance at which the Almighty hath placed England and America is a strong and natural proof that the authority of the one over the other, was never the design of Heaven.¹⁹

Thomas Paine was a most unlikely champion of American independence. Born in England, he had only resided in the American colonies for a mere fourteen months before the publication of *Common Sense*. Anonymously published in 1776, it was an immediate sensation.²⁰ An adopted son of the American Revolution, he signed the epistle as “written by an Englishman,” underscoring the true nature and location of the debate over monarchical and Parliamentary transgression of colonial rights.

And while many of the colonial elite thought in terms of recreating a more perfect English constitution, Paine was less convinced. He wrote of the “much boasted Constitution of England,” that “it was noble for the dark and slavish times in which it was erected...but that it is imperfect, subject to convulsions, and incapable of producing what it seems to promise...” He mused that “[s]ociety in every state is a blessing, but Government, even in its best state, is but a

¹⁹ Paine, Thomas. *Common Sense*. New York: Barnes and Noble 1995.

²⁰ Paine published anonymously as the content of his message amounted to treason.

necessary evil; in its worst state an intolerable one...government, like dress is the badge of lost innocence.”

However, as Paine does not fully engage constitutional arguments as to the structure of government, or the protection of certain enumerated rights, I do not treat this piece as a large component of early constitutional thought. I include *Common Sense* as a contrast to the elite or continental view of American rights – the work illuminates an important segment of colonial thought: the masses. Representing the ideas of the average colonists, *Common Sense* allows us insight into the progression of rights from formal legal guarantees, to structural and rhetorical necessities in the proper conduct of government.

The text was incredibly influential in creating the conditions for people to mobilize and move the beyond legal and economic arguments condemning monarchical encroachments, and to focus instead upon communal responsibility and the creation of a new nation. He warns that “until an independence is declared the continent will feel itself like a man who continues putting off some unpleasant business from day to day, yet knows it must be done, hates to set about it, wishes it over, and is continually haunted with the thoughts of its necessity.”

The Development of Independent State Governments

After the skirmishes at Lexington and Concord in April of 1775 the now recalcitrant colonies called for the convening of the Second Continental Congress in Philadelphia in order to address the inescapable conflict with English military forces.²¹ Shortly before the issuance of the Declaration of Independence, the delegates thought it “irreconcilable to reason ... to take the oaths and affirmations necessary for the support of any government under the Crown of Great

²¹ While lacking the formal authority to govern, upon their dissolution in October of 1774, the First Continental Congress provided for reconvening at a later date if circumstances required it. The large military contingency stationed outside of the City of Boston, coupled with the battles at Lexington and Concord provided the impetus for the calling of a second Continental Congress.

Britain,” and thus passed a resolution urging the creation of independent state governments. The resolution read:

Resolved, That it be recommended to the respective assemblies and conventions of the United colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.²²

Having effectively been at war with England for nearly a year, the delegates at the Continental Congress adopted the Declaration of Independence on July 4, 1776. The document formally affirmed the newly United States dissolution of “the political bands which have connected them with [England], and to assume[d] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them.” While laden with the language of natural rights, the Declaration, much like a legal brief, enumerates the several trespasses of the King against colonial constitutional rights.

Among those grievances the Declaration notes the suspension and dissolution of representative assemblies, the quartering of troops and keeping a standing army in times of peace, taxation without appropriate representation, and the abolition of a “free system of English laws.” It is important to note that the rights of which the King is accused of disregarding each have a constitutional basis in the English tradition: thus the abolition of a “free system of English laws,” is paramount to understanding the process by which the colonists sought to ensure that these transgressions were not to occur again.

When pressed “with respect to our rights, and the acts of the British government contravening those rights,” Jefferson later wrote that the object of the Declaration of Independence was:

²² Pole, Jack R. *The Revolution In America, 1754-1788: Documents and Commentaries*. Stanford, California: Stanford University Press, (1970). At page 30.

Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion.²³

Colonial Charters and American Constitutional Thought

The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal charters, whereby the earliest English settlements in America were created.²⁴

It might appear peculiar, at least to modern sensibilities, to consider that the foundations for our first individual state constitutions would be so heavily indebted to the very power from which the people rebelled. I look to colonial charters, as I believe they represent the first theoretical and structural foundations of early American constitutional thought. Each of the aforementioned developments, The Resolutions of the Stamp Act Congress, A Summary View of the Rights of British America, Common Sense, and The Declaration of Independence, point to the transgressed “rights and liberties of Englishmen.”

From whence do these “rights” and “liberties” spring? In the American colonial experience, those rights are guaranteed in the colony’s individual founding charters. When Englishmen traveled to the New World, they brought with them the royal patents and charters which bestowed upon them, and their progeny, the right to “have and enjoy

²³ Letter to Henry Lee, May 8, 1825 in Jefferson, Thomas, Adrienne Koch, and William Peden. *The Life and Selected Writings of Thomas Jefferson*. New York: Modern Library, 1946. At page 719.

²⁴ Bryce, James Vis. *The American Commonwealth: The National Government – The State Governments*, Vol 1. London: MacMillan and Company, 1891. At page 431.

all liberties, franchises, and immunities” of free and natural English citizens.²⁵ Colonial charters typically couple those rights with a clause “which empowers the chartered company or proprietors to make laws [for the operation of the colony]...restricted by a provision that these laws shall conform to the laws of England.”²⁶

Thus, in the repeated petitions to the King and Parliament, the structural and legal claims that animate the discourse of conflict and transgressions of endowed rights, are to be first and foremost located in the charter of the individual state claiming such rights. In this respect, the American Revolution is quite unique. A.E. Dick Howard writes that “the American Revolution is a kind of oddity among revolutions. It was fought to preserve old values – indeed to preserve values which had sprung from the very country rebelled against, but which that country had somehow forgotten.”²⁷

Charters as Constitutions

In order to understand my postulate that colonial charters serve as the foundation for independent State constitutions, it is important to operationalize the concept of a “constitution.” What are the relevant components that make a document function, if not as a formal constitution, but in a constitutional manor? The relevant components that I identify are as follows: a statement of sovereignty, recognition of the constitutors, the documents purpose/aspiration, the structure of the government, limitation upon the power thereof, and finally a provision for alteration or amendment of the document.²⁸

²⁵ First Charter of the Virginia Company of London, April 1, 1606 printed in Thorpe, Francis N. *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*. Vol. 6. Washington, DC: United States Government Printing Office, (1909).

²⁶ *Colonial Courts and the Common Law*, printed in Flaherty, David. *Essays in the History of Early American Law*. Arlington, TX: Texas A&M University Press, 1969. At page 56.

²⁷ Howard, A. E. Dick. *The Road from Runnymede: Magna Carta and Constitutionalism in America*. Charlottesville: University of Virginia Press, 1968. At page 203.

²⁸ I borrow and modify this rubric from A.E. Dick Howard. See Howard, 2007.

Following the issuance of the Declaration of Independence, nearly every state in the newly formed republic drafted formal written constitutions. Connecticut and Rhode Island, in contrast, chose to continue to govern under their original colonial charters. The General Assembly of Connecticut passed a resolution providing that the state “shall continue to be as established by Charter received from Charles the Second, King of England, so far as an adherence to the same will be consistent with an absolute independence of this State on the Crown of Great Britain.”²⁹

And while the 1662 Charter provided for a great deal of democratic self-governance, such themes were the leitmotif of early colonial charters. The First Charter of the Virginia Company of London is unique in its colonization function; however the use of letters patent, royal charters, and joint-stock ventures is not.³⁰ Beginning as early as 1581, with the creation of the Levant Company, which granted exclusive trading rights (in particular Asiatic regions), subsequently the use of charters had become an important tool in the English economic arsenal. “In the era of settlement and colonization, the Crown’s use of charter companies was a strategy to create a colonial empire by harnessing the capital and goals of private investors.”³¹

The East India Company provides an appropriate theoretical framework from which to view subsequent English charters.³² As a formal letter of incorporation, made between private investors in concert with the Sovereign of England, the practical and operational concerns of the company were necessarily addressed. The 1600 charter provided that the Company shall be “one corporate and body politick.” It also provided for a governor, deputy governor, and a council.

²⁹ Hoadly, Charles J. *The Public Records of the State of Connecticut*. Hartford: Press of the Case, Lockwood & Brainard Co., 1894. At page 3.

³⁰ I exclude Elizabeth’s Charter to Sir Walter Raleigh in that it retained a feudal element absent in the new “democratic” joint-stock charters.

³¹ Howard, A.E. Dick. *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*. University of Richmond Law Review. 2007;42:9-36. At page 11.

³² Cite location of the text of the Charter.

While the first governor was named by the charter, the subsequent governors were to be selected by the investors who “from time to time, to elect, nominate, and appoint” a new governor “in court.”

In congress this body was authorized “to make, ordain and constitute, such and so many reasonable, Laws, Constitutions, Orders and Ordinances, as to them, or the greater part of them...shall seem necessary and convenient, for the good Government of the of the same Company” as well as imbued with the ability to “fine, punish, or imprison...all Offenders, [acting] contrary to such Laws.” The company was then, in effect, an organized democratic body politic, receiving its sanction from the Monarch.

The East India Company was however restricted in its trade to the Asiatic coasts. Around this time new opportunities were becoming available in the Americas.³³ Such new enterprises provided a host of new complications; paramount amongst them was the absence of any permanent English settlement. Thus the first company seeking profit in the New World was also charged with the creation of an American settlement. Meeting this challenge was The Virginia Company of London, chartered in 1606. The Virginia Company was “concerned, not only with 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.”³⁴ This unique intertwining of trade and government gave rise to a host of problems disused in the previous section.

The First Charter of the Virginia Company of London (1606)

On the first of April, 1606 King James I granted the Virginia Company of London an exclusive “license, to make habitation, plantation, and to deduce a colony of sundry of our

³³ Given the commercial success of the Spanish, it was little wonder that England soon sought the reap its share of profits in the New World.

³⁴ Howard, 2007. Ibid at page 12.

People into that part of America commonly called Virginia.”³⁵ Due to the unique nature of The Virginia Company’s undertaking its charter reads more like an early constitution than a formal article of incorporation.³⁶ As a result one will discover, next to statutory provisions specifying that “all the Lands, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Waters, Marshes, Fishings, Commodities, and Hereditaments, whatsoever” shall be retained for the use and pleasure (profit) of the colonial proprietors, we also find provisions that provide for the more practical concerns of establishing a new community. Within this framework, what is most striking about the Virginia Company Charter is that it provides for a remarkable measure of self-governance.

The Charter called for the creation of a council endowed with the power to “govern and order all matters...which shall arise, grow or happen to or within [the colony]... according to such laws ordinances, and instructions... under the Privy Seal” of England.³⁷ This council is further endowed with the power to regulate commerce, levy tariffs, coin money, and provide for the defense of the colony. The introduction of the Privy Council to review the actions of the Virginia Assembly is a great example of an English style of “soft” institutional check upon a largely autonomous legislative body. While noteworthy in its own time, the Charter was immensely practical, as a result, the structure (and content) of the Virginia Company Charter became a rubric for proceeding chartered colonies.

Further, as colonies received no financial support from England, the colonial assemblies would lay and collect their own taxes for the maintenance of the colonies.³⁸ Keeping with

³⁵ Thorpe, Francis N. Ibid.

³⁶ This is remarkable as in England there existed no written Constitution. The dual nature of the Virginia Company’s directive, to inhabit and profit, necessitated a unique charter that provided, explicitly, for both tasks.

³⁷ The only material restriction upon the lawmaking process of the Council was the provision that all laws be made in accordance with the laws of England; any law contrary to an Act of Parliament would be considered void.

³⁸ Save perhaps for the Georgia Colony, chartered on April 21, 1733, by King George II, the colony received financial subsidies from Parliament during the first two years of colonization.

England's commitment that no taxes are to be levied without "good will and assent" of both Houses in Parliament, it is little wonder that early colonists rejected Parliamentary control over taxation in the colonies.

The First Charter for the Massachusetts Bay Colony (1629)

When considering the early governing documents of the colony Massachusetts, it is important to decide where to begin, and where to limit your inquiry. Certain geographic portions of the state were subject to different charters at different times from 1620-1629: The New England Charter³⁹ and May Flower Compact (1620) and the Massachusetts Bay Colony (1629).⁴⁰ I examine the 1629 iteration as it deals specifically with the present-day geographical boundaries of the Commonwealth of Massachusetts.

In March of 1629, King Charles granted to the Massachusetts Bay Company. The charter granted to the Company the right "to have and to houlde, possess, and enjoy all and singular the aforesaid Continent, Landes Territories, Islandes, Hereditaments, and Precincts, Seas, Waters, Fishings, with all, and all manner their Comodities, Royalties, Liberties, Prehemynences, and Proffits that should from thenceforth arise from thence." Interestingly, the inhabitants of the colony were more concerned with escaping religious prosecution in England than creating a thriving colonial trading hub.

The Mayflower Compact, a deft legal sleight-of-hand, is certainly worth mentioning. Having no legal authority (or Royal sanction) to land in Plymouth, those onboard the Mayflower combined themselves into a "civil body politick, for our better ordering and preservation." Borrowing from the language of similar corporate charters, those individuals also empowered themselves with the ability to "enact, constitute, and frame, such just and equal Laws,

³⁹ Which included portions of present-day Connecticut, Maine, Massachusetts, New Hampshire, and Rhode Island.

⁴⁰ Following the English Restoration in 1660 the charter was revoked in 1684 and eventually reinstated again in 1691.

Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the General good of the Colony.”

Thus, from its first historical utterance, the shores of Massachusetts were unprecedentedly democratic and free from royal oversight. Such organically developed democratic tendencies continued in the issuance of the 1629 Charter for the Massachusetts Bay Colony. The Charter retained much of this independent character. In like form, the charter organized colonial governance, providing “one Governor, one Deputy Governor, and eightene Assistants of the same Company,” who from “from tyme to tyme...[shall be] elected and chosen out of the Freemen of the saide Company.”

Additionally, the governing council was then given the authority “to make Lawes and Ordinances for the Good and Welfare of the saide Company... [as long as] such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Statuts of this our Realme of England.” As well as the ability to punish those whom transgress those laws, with “full and Absolute Power and Authoritie to correct, punishe, pardon, governe.”

Given the unique nature the language of the original charters, it is little wonder then, that we discover important textual and theoretical links between the “rights of Englishmen” and their incorporation of those rights into State constitutions. One of the commonly employed techniques in laying out the framework for a new system of governance was a Bill of Rights. Before examining the relationship between bills of rights and colonial charters, I should note that the “the direct influence of the English Constitution, even in the colonial period, is seen not so much in the frame of government

which came to be adopted, as in the legal guarantees by which the colonists sought to be fortified.”⁴¹

Resultantly, I do not wish to make the claim that individual state constitutions are not expressions of organic law. It is not the legal codification of the customary law of England, but instead, the principal reliance on written law, originating from colonial charters and certain English constitutional documents, that separate American constitutional thought from their English predecessors. Examining constitutional development in England simultaneously with the American colonial enterprise, we witness the emergence of markedly different patterns, not the least of which is the written tradition of American constitutional governance.

Bills of Rights: England, Virginia and Massachusetts

In American governance, bills of rights represent an important “link in a long chain of institutional development, running back through the English Bill of Rights and Petition of Rights, to Magna Charta,” which were themselves recapitulations of previous institutional developments.⁴² Bills of rights established two important consequences in constitutional governance: they asserted the sovereignty of the people over that of the government, and elevated certain rights to the status of fundamental law.

This break with the English tradition (as technically any act of Parliament is considered a fundamental expression of the will of the people) created for the unalterable legal status of certain rights – the expression of the will of the people in a formally codified bill of rights. Considered the “platform of this great movement” bills of rights signal certain preferences in

⁴¹ Morey, William C. The Genesis of a Written Constitution. The Annals of the American Academy of Political and Social Science. 1891;1:529-557. At page 532.

⁴² Ibid. At page 68.

constitutional arrangements.⁴³ Interestingly, bills of rights are not unique to the American experience. Following the overthrow of James II during the Glorious Revolution of 1688, the incoming Monarchs, William and Mary, agreed to adopt the English Bill of Rights.⁴⁴

Largely a statement of positive rights, the Bill provided a series of 13 resolutions guaranteeing individual and collective rights. Among those rights included the prohibition of taxation without the consent of Parliament, the right to free elections for Parliament, the right to petition the King, the right to trial by jury (and along with it the prohibition of excessive bail, fines, or punishments). This seminal document marks a fundamental shift in the progression of English rights. By an act of Parliament, the people of England transcended their role as basic subjects under the plenary authority of the Crown, into a nation of citizens imbued with certain fundamental rights.

The Bill of Rights states that “the rights and liberties asserted and claimed the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed.”⁴⁵ Such provisions and weight of law were necessary in the formation of a new government. Thus, following the English tradition, the people of the individual states sought to begin their constitutional journey by laying a solid foundation for fundamental law, unalterable by the vicissitudes of the people and their representatives.

In form and function, the respective bills of rights in both Virginia and Massachusetts mirror those concerns expressed through public discourse, as enshrined in the English Bill of

⁴³ See Webster, William C. Comparative Study of the State Constitutions of the American Revolution. The Annals of the American Academy of Political and Social Science. 1897;9:64-104.

⁴⁴ Formally: *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*. See also Perry, Richard L, ed. Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights. Chicago: American Bar Foundation, 1978.

⁴⁵ Ibid. At page 248.

Rights. Paramount to, and the substantive departure from English Constitutional thought, is the bold assertion that the people are the foundation of government, and that their “magistrates are their trustees and servants, and all times accountable to them.”⁴⁶ More prominently, that “all men are by nature equally free and independent, and have certain inherent rights:” life, liberty, and the unencumbered pursuit and enjoyment of property.⁴⁷ Massachusetts takes their bill of rights one step further in providing for the incontestable right to “reform, alter, or totally change” their form of government when it becomes destructive to those inherent rights.⁴⁸ Additionally, the state bills of rights also provided for the free exercise of religion and the press.⁴⁹

Their English foundations, the transgressions thereof were above documented, are equally clear. The bills prohibit the suspension of the laws,⁵⁰ taxation without appropriate representation,⁵¹ excessive bail, fines, or punishment,⁵² the quartering of troops and provide for the right to bear arms,⁵³ free election of representatives,⁵⁴ and the separation of the independent branches of government.⁵⁵ These freedoms provided for the functional “basis and foundation” of the subsequent constitutions. While the Massachusetts Declaration of Rights, authored in 1780, is more inclusive than the Virginia Declaration, each are fundamentally similar.

Conclusions and Further Research

As I continue to study early American colonial charters, I am becoming more comfortable with making the stronger claim that colonial charters *are* the first, most complete

⁴⁶ Section 2, Virginia Declaration of Rights, 1776.

⁴⁷ Ibid, Section 1.

⁴⁸ Article 7, Massachusetts Declaration of Rights, 1780. See also Chapter 63, of Magna Carta; see Howard, A.E. Dick. Magna Carta: Text and Commentary. Charlottesville, VA: University of Virginia Press, 1998. At pages 23-25 and 54.

⁴⁹ Section(s) 12, 16, Virginia Declaration of Rights, and Article(s) 3,16 respectively.

⁵⁰ English Bill of Rights, Item 1; Virginia Declaration of Rights, Section 7; Massachusetts Declaration of Rights Article 20.

⁵¹ English Bill of Rights, Item 4; Virginia Declaration of Rights, Section 1; Massachusetts Declaration of Rights Article 23.

⁵² English Bill of Rights, Item 10; Virginia Declaration of Rights, Section 9; Massachusetts Declaration of Rights Article 26.

⁵³ English Bill of Rights, Item(s) 5,6; Virginia Declaration of Rights; Section 12, Massachusetts Declaration of Rights Article(s) 17,27.

⁵⁴ English Bill of Rights, Item 7; Virginia Declaration of Rights; Section 6, Massachusetts Declaration of Rights Article 9.

⁵⁵ English Bill of Rights, Item 9; Virginia Declaration of Rights; Section 5, Massachusetts Declaration of Rights Article 30.

iterations of constitutional governance in the American experience.⁵⁶ By looking at Charters through time, we can begin to see a more democratic form of self governance emerge in the American colonies. While the structure of the charters provide for a certain degree of independence, it was particularly the investiture of the rights of Englishmen in the American colonies that open the door for a flood of constitutional development.

Sharing a long tradition from the Magna Carta (1215) to the 1701 Act of Settlement, constitutional developments in England colored the view of governance in the American colonies and subsequently led to the refinement and codification of those rights into written documents. Where we may find the most benefit from this type of research is to examine the changing role of federalism in the early American context. Again, charters may help illuminate this mode of thought: specifically the 1606 Charter for the Virginia of London provides two councils, one in England and the other in Virginia that were charged with governing the colony. The charters were subject to the laws of England, and often, laws passed in the colony also required the Seal of the Privy Council in order to be enacted.

In this paper I examined Constitutional discourse in the American colonial experience as well as the relationship between English Charters and American constitutional thought. It is clear through a careful examination of the discourse surrounding the transgressions of certain rights, that early colonists placed a great deal of faith in the guarantees and protections provided to them in their English charters. The debates over those rights led to the reification and subsequent codification of certain rights above others. The prohibition against taxation without representation, excessive bail, cruel and unusual punishments, suspension of the laws, and the provision for the separation of powers and trial by jury are all by products of American colonial

⁵⁶ Though I am not yet prepared to make the claim that colonial charters are the first written constitutions.

thought as they relate to their English counterparts as expressed through the “rights of Englishmen” guaranteed in colonial charters.