English Liberties outside England: Floors, Doors, Windows, and Ceilings in the Legal Architecture of Empire

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Abstract: We tend to think of global migration and the problem of which legal rights people enjoy as they cross borders as modern phenomena. They are not. The question of emigrant rights was one of the foundational issues in what can be called the constitution of the English empire at the beginning of transatlantic colonization in the seventeenth century. This essay analyzes one strand of this constitutionalism, a strand captured by the resonant term, ‘the liberties and privileges of Englishmen’. Almost every colonial grant – whether corporate charter, royal charter, or proprietary grant – for roughly two dozen imagined, projected, failed, and realized overseas ventures contained a clause stating that the emigrants would enjoy the liberties, privileges and immunities of English subjects. The clause was not invented for transatlantic colonization. Instead, it had medieval roots. Accordingly, royal drafters, colonial grantees, and settlers penned and read these guarantees against the background of traditional interpretations about what they meant.

Soon, however, the language of English liberties and privileges escaped the founding documents, and contests over these keywords permeated legal debates on the meaning and effects of colonization. Just as the formula of English liberties and privileges became a cornerstone of England’s constitutional monarchy, it also became a foundation of the imperial constitution. As English people brought the formula west, they gave it new meanings, and then they returned with it to England and created entirely new problems.

Liberties and privileges claims fell into five functional categories. First, the claim that colonists abroad and their descendants enjoyed English liberties functioned as an open door, allowing overseas colonists to return home to England and be treated as equal English subjects. Second, the king or his colonial deputies might make positive grants of English liberties to subjects in a royal territory outside England as an inducement for English subjects to migrate there. Here, the grant of English liberties and privileges functioned as a window, a transparent promise of familiar and cherished rights to encourage settlement. Third, already by the time of the English Civil War and more frequently by century’s end, the colonists themselves sometimes claimed English liberties, privileges, and immunities abroad as a floor below which governors could not push. Fourth, in the reverse of the second, the claim that overseas subjects had to be governed according to English standards, including English liberties and privileges, could function as a ceiling on colonial innovation. It was a ceiling measured by metropolitan officials, especially the Privy Council as it reviewed colonial statutes and judicial cases to ensure that they were, in the familiar language of colonial grants, ‘agreeable’ with and ‘not repugnant’ to the laws.

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1 Charles Seligson Professor of Law, NYU School of Law. A draft was presented at the English Law and Literature 1500-1700 Conference, Princeton University, April 2015. The author is grateful for the comments of the conference participants and especially those of Lorna Hutson.
of England. Finally, colonial assumptions of English liberties functioned as a *mirror* through which colonists could see themselves as English, even when their colonial rights, such as their property rights, were viewed at home as peculiar. If for example a subject of the English king in an overseas dominion owned slaves in that dominion and wished to sojourn home, could he bring his slaves? Could he carry the rights of a Virginian or Jamaican with him to England and enjoy those rights there? Collapsing English and local liberties, slaveholders argued affirmatively. As Englishmen they should, they thought, be able to move around the empire with their property, including human property.

*I Reading Liberty: Legal Formulas and Imperial Projects*

We tend to think of global migration and the problem of which legal rights people enjoy as they cross borders as modern phenomena. They are not. The question of emigrant rights was one of the foundational issues in what can be called the constitution of the English empire at the beginning of transatlantic colonization in the seventeenth century. This essay analyzes one strand of this constitutionalism, a strand captured by the resonant term, ‘the liberties and privileges of Englishmen’. Almost every colonial grant – whether corporate charter, royal charter, or proprietary grant – for roughly two dozen imagined, projected, failed, and realized overseas ventures contained a clause stating that the emigrants would enjoy the liberties, privileges and immunities of English subjects. The clause was not invented for transatlantic colonization. Instead, it had medieval roots. Accordingly, royal drafters, colonial grantees, and settlers penned and read these guarantees against the background of traditional interpretations about what they meant.

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constitution. As English people brought it west, they gave it new meanings. The formula then returned home to create entirely new problems.

The resonant legal formula ‘liberties, privileges, and immunities’ was not, of course, limited, even in England, to claims of English liberties. It had many qualifiers and existed in countless royal grants, from grants of land and royal offices to trading companies, bridges, and ferries. An officer or land grantee, for example would receive in his grant all the liberties and privileges associated with that particular grant or office (and only partly denoted in the letters patent). 1 Similarly, a town or trading company might receive all the liberties, privileges and immunities characteristically enjoyed by similar towns or companies. 2 The keywords ‘liberties, privileges, and immunities’ were never, therefore, limited solely to clauses concerning the status of emigrants. The pervasiveness of these keywords, and the various primary nouns they qualified, made them accessible and pliable in new circumstances. Additionally, specific clauses varied slightly in ways that could be important or insignificant. For present purposes, variations on the operative terms like liberties, privileges, and immunities – and also rights, powers, duties, and so on – are not crucial. Some commentators attached different meanings to these individual terms, but generally they overlapped, and claimants often strung them together with deliberate redundancy to capture all possible connotations, traditional and potential. Briefly, a liberty was a grant of power that could not lightly, if ever, be restricted. Right sometimes connoted a pre-political freedom, but many times it was synonymous with liberty. Privilege was an allowance of certain behavior that otherwise would not be permitted, a kind of license to engage in activity usually reserved to a select few. Immunity was in turn a license to engage in activity typically forbidden and penalized. 3 Like most languages of governance, these keywords conveyed charged yet uncertain meanings, especially when applied to jurisdictions beyond England itself.
Although the charter formula concerning ‘English liberties, privileges, and immunities’ overseas had no single meaning, it was not an empty cipher. The general purpose of such language was to describe, advocate, or contest the legal status of the crown’s subjects who emigrated to or were born in royal territories outside England. This was not a new problem. For centuries people migrated from England to other real, imagined, and usually militarily contested dominions of the English king. When soldiers, merchants, and settlers left home to take up the crown’s claims on the European continent or in Ireland, they sought assurance that they were fighting for real territories of the English king, as a matter of English law. They also wanted the crown’s pledge that they, and their offspring born in those once and future overseas dominions, could return home and be treated equal subjects in England. They wanted protection while abroad, and an escape route back home.4

It could be called the problem of imperial subjecthood: What package of legal rights and liberties did royal subjects enjoy across the royal dominions and colonies outside England? This problem was not theorized coherently or regulated by the imperial parliament until the early twentieth century, a generation before the empire disintegrated. Even then the status was not as clear and uniform as some metropolitan officials had hoped it would be.5 That possibility – full theorization at the center, and agreement that it was a problem that a governing body in London could try to solve once and for all – was not available in the seventeenth century. The absence of an authoritative decision-maker was sometimes a problem for early modern actors. Imperial agents in the colonies, for example, routinely lamented the weakness of their government. However, it also created space for new institutional structures and creative claims-making. The extra-English legal world was from the beginning filled with juxtaposed claims of stable right and vast possibilities, of purported black-letter law along with fresh glosses and improvised
interpolations. Also from the beginning, some of the same people deployed alternative scripts when pursuing overseas projects, invoking traditional rights here and demanding special exceptions to fit new circumstances there. This was the way that English-speakers constructed the seventeenth-century empire.⁶

A lawyer or legal theorist might lament the failure, concluding that the historical actors lacked the ability to imagine a systematic solution. Even if they could have done so, seventeenth-century institutions of government would not have been able to deliver an unimpeachable answer to what key legal terms meant. A lawyer who is an advocate might react more sympathetically, knowing that ambiguity breeds opportunity: lack of settlement meant that alternatives remained available for contemporary advocates, while new ones awaited the legal imagination. Because the early modern constitution of empire was flexible, there was always the possibility of change.⁷ Complex political systems can flourish because of, rather than despite, uncertain powers and rights.

Historians of law need not lament or celebrate past uncertainties, but they can attune themselves to the difference between, on one hand, meanings that historical actors considered open and, on the other, those that were relatively settled or became so over time. They can then notice when actors tried to shift an issue from one category to another and established a new definitional equilibrium. Distinguishing among different uses of a single verbal formula illuminates both the range of ways people deployed that formula over time and also the range’s shifting boundaries. It also becomes possible to spot when a specific use appears for the first time and to explore the new function’s ramifications on the old.

This essay focuses less on the changing meanings of liberty in the seventeenth-century empire than on the accumulating functions of liberty claims.⁸ Looking at the historical uses of
legal discourse from a distance, it often appears as though there were fewer formulas available than problems to be solved. Some formulas got double work or more. Why do historical actors see those single scripts as candidates for development? How do they go about re-using them in new ways? Why use the same formula for different purposes? The object is not doctrinal taxonomy, to specify the correct historical meaning(s) of a legal formula. One reason historical actors deployed the same formula of English liberties and privileges for different purposes was to deny that it possessed conflicting meanings. In practice, the different functions were deliberately obscured, interactive, and volatile rather than hermetically separate. The goal is to notice the different ways that people used legal keywords as well as why, where, and how they bent its meaning. Yet the changing functions of invocations of English liberties and privileges outside England did influence the meaning of liberty more generally. Across the seventeenth century the formula increasingly suggested fundamental rights of the subject rather than a grants or delegations from the crown. Still these two meanings—grants versus deserts--coexisted in a productive ambiguity. While this ambiguity played out across the century, the argumentative context in which people claimed English liberties and privileges expanded in other dimensions and helped build out the architecture of the overseas empire.

The exercise of tracing the different function of liberties claims has value along two dimensions, analytical and methodological. First, the essay analyzes and categorizes the different ways that the formula of English liberties and privileges in seventeenth-century arguments concerning the rights allotted to or enjoyed by subjects outside England. 'Function' here does not entail sociolegal functionalism, or the notion that people adapt law to necessary social ends and that law lags and serves society. Instead, it means simply that people used the formula to construct and reconstruct the legal environment of the empire even before there was
an imperial society on the ground. In other words, they made liberty claims to shape that society in various and occasionally conflicting ways. However, liberty claims were more often mutually supportive than antagonistic and therefore helped build out the architecture of the early empire.

Liberties, privileges, and immunities claims involving English emigrants fell into five functional categories. First, the claim that colonists abroad and their descendants enjoyed English liberties functioned as an open *door*, allowing overseas colonists to return home to England and be treated as equal English subjects. Implicitly and later explicitly, the door was opened in all kingdoms and dominions of the English crown. Natural-born subjects, and their descendants, could step through those doors without fearing degradation: everywhere, in all royal territories, they would be treated equally with native subjects of the English king while in those territories.

Second, the king or his colonial deputies might make positive grants of English liberties to subjects in a royal territory outside England as an inducement for English subjects to migrate there. Here, the grant of English liberties and privileges functioned as a *window*, a transparent promise of familiar and cherished rights to encourage settlement.

Third, already by the time of the English Civil War and more frequently by century’s end, the colonists themselves sometimes claimed English liberties, privileges, and immunities abroad as a *floor* below which governors could not push. Colonists made this claim to oppose those who argued that the colonial constitution was fundamentally different than England’s, and that the crown’s prerogative had greater range and flexibility abroad than in England. This type of claim emerged soon after colonization and was prominent at moments of political struggle in England, especially as Parliament carved away the royal prerogative at home. This floor of rights was not stationary. It rose along with English liberties and Parliamentary power at home.
Fourth, in the reverse of the second, the claim that overseas subjects had to be governed according to English standards, including English liberties and privileges, could function as a ceiling on colonial innovation. It was a ceiling measured by metropolitan officials, especially the Privy Council as it reviewed colonial statutes and judicial cases to ensure that they were, in the familiar language of colonial grants, ‘agreeable’ with and ‘not repugnant’ to the laws of England. The ceiling’s height also rose and fell in different places and over time in response to metropolitan policies. The enduring function was to place limits on colonial experimentation.

Finally, colonial assumptions of English liberties functioned as a mirror through which colonists could see themselves as English, even when their colonial rights, such as their property rights, were viewed at home as peculiar. If for example a subject of the English king in an overseas dominion owned slaves in that dominion and wished to sojourn home, could he bring his slaves? Could he carry the rights of a Virginian or Jamaican with him to England and enjoy those rights there? Collapsing English and local liberties, slaveholders argued affirmatively. As Englishmen they should, they thought, be able to move around the empire with their property, including human property.

Again, these different functions often worked in tandem, but they could operate in tension. Together, these functions helped the English imagine the architecture of empire, providing a legal blueprint that they built upon (and later deconstructed).

The essays’ second, methodological dimension is to contribute an example by which historians can interpret historical actors’ use across the empire of resonant formulas such as the liberties and privileges of Englishmen. It is a shibboleth to stipulate that one cannot write historically about ideas like English liberties and privileges without grasping how they were understood by the historical actors. The shibboleth begs the question how we should go about
understanding the actors and their statements. Because so many actors used the script of English liberties and privileges outside England, it can appear as though it had no stable meaning. On such a premise, not only can there be no history of liberty; cannot be a coherent history of the discourse of liberties. Instead, there might be political and social histories of how such terms were employed in concrete circumstances. From this interpretive perspective, liberties, privileges, and rights were empty vessels into which people poured innumerable and changing hopes and interests. Legal text dissolves into historical context. Legal scholars influenced by reductionist brands of legal realism, or who treat doctrinal or intellectual arguments as covers for preexisting interests, come close to this position. Sometimes this is exactly the right way to interpret legal argument – but not all legal arguments. Historians without professional training in law, who are sometimes even more skeptical about law’s determinacy, often default into the same stance, seeing multiple legal arguments sharing similar vocabularies as undisciplined and scattershot claims-making.

In contrast to these instrumentalists are scholars afflicted with what might be called the treatise-authority complex. Against the prospect that liberty is an empty vessel, some scholars embrace supposedly authoritative texts and report as objective truth the definitions of contemporary and often self-nominated legal authorities. This official version then becomes a baseline against which to measure defection. This interpretive posture has the merit of supplying narrative arc and even drama, but it rests on the premise that all legal ideas have received orthodox, unitary definition. Expressions inconsistent with those definitions are then identified as heterodox. When and where there actually was consensus, the contested process by which an interpretive community bestowed authority on a given meaning is suppressed.
In between skepticism about the integrity of actors’ legal arguments and accepting legal notables’ statements of the law as authoritative, there lies a space in which people did things with legal keywords. Quentin Skinner's distinction between an argument that a speaker put forward and the purpose the speaker sought to accomplish by doing so helps illuminate the slippage between conventional and innovative uses of familiar early modern terms like English liberties, privileges, and immunities. To comprehend the political and dramatic functions of these keywords requires an understanding of the combinatorial formulas in which they were used and the ways and places those formulas were deployed.

Disentangling meaning and understanding is especially fraught in Anglo-American legal history, because the most prized authority in early modern English law was custom and convention, not innovation. To do things with words in the seventeenth century, one needed to deploy words that people thought they understood already. In legal argumentation the game often consisted of disguising change with convention, making it difficult for modern scholars to understand what contemporaries were trying to accomplish unless a contemporary spotted the innovation and identified it as such. Similarly, participants could invoke conventional formulas to resist attempts to open up their meaning, piling on stable meaning as a bulwark against redefinitions.

From a satellite view, as when perusing the dozens of colonial charters and statutes produced in the seventeenth century, it appears that drafters, metropolitan officials, imperial agents, colonial legislators, and petitioners used the same words about English liberties and privileges in similar ways, suggesting broad agreement about what these words meant and how they traveled outside England. The task becomes how to map lines that mark precisely which
liberties crossed which borders and when. Viewed from the participants’ perspective, however, the linguistic formula appears more volatile.

In between formulaic sameness and the scattershot deployment of liberties and privileges lay hard-earned serial development of a handful of purposes to which the liberty, privileges, and immunities formula was used. Categorizing such purposes shows that the use of such formulas ranged beyond the deceptively similar charter formulas, yet was not chaotic. There were boundaries to acceptable uses of the terms, and new borders were pushed out only after concerted effort and debate. Even then, the borders remained contested. Because people employed the scripts to work out the same general problem – what was the legal relationship between people in the overseas territories and England? –some purposes could blend into others. Rather than develop a model of legal language in the abstract, the rest of the essay analyzes the varied uses of the liberty script.

II Building Multiple Kingdoms: Liberty as Door and Window

Although the problem of the legal status of overseas emigrants had existed since the middle ages, it ripened quickly in the seventeenth century. Two related events raised the issue of extra-English subjecthood in newly stark terms that demanded analytical clarity. One was named James. The other was Jamestown.

After the death of Queen Elizabeth, the Scottish King, James VI, was crowned as King James I of England. Suddenly two kingdoms that for much of the Middle Ages had been at arms, now, after a short century of ‘perpetual peace’ and a dynastic marriage, shared one king as well as an island. The merger of crowns raised the question not only of the political relationship
between Scotland and England but also of the relationship between individual Scots and Englishmen. Political unions take time; institutions come slowly. In this case, a century passed between the compromises that accompanied the Union of Crowns and the legislative Union of Kingdoms in 1707.

People, on the other hand, did not wait. Scots in particular began flowing across the borders – not least all those in the train of King James, who left Scotland in April 1603 and never returned. He knew that England was the main chance. So did many of his Scottish subjects. The extent of their legal rights when moving from one kingdom to another was a pressing legal issue. If King James granted them land, for example, could they enjoy, defend, and leave those lands to their heirs? Or could they or their heirs be ousted as aliens, under the common law rule (a rule common across most of Europe) that aliens could not hold heritable title to land?

James sought a legislative solution. His Scottish Parliament was amenable and passed a statute making it clear that English subjects could hold and defend land titles in Scotland. The English Parliament, on the other hand, balked. It refused to enact a statute granting even Scots born after James’s ascension the liberties and privileges of English subjects when they came to England. English parliamentarians gave two reasons for their resistance. First, they also feared setting a precedent that would logically apply to other new royal territories. Scottish equality, argued M.P. Sir Edwin Sandys, ‘might give a dangerous example for mutual naturalizing of all nations that hereafter fall into the subjection of the king, although they be very remote, [because] their mutual commonalty of privileges may disorder the settled government of every of the particulars’. Each constituent nation of the king's expanding dominions, Sandys continued, had its own ‘privileges’ and ‘birthright’, which had been ‘acquired for patrimony by their [ancestors]’. Expansion was very much on everyone’s mind. Many parliamentarians favored
it. Sandys, for example, was a founding member of the Virginia Company and its leader from 1618 to 1624. But they sharply distinguished the realm of England from the other existing and future royal territories. In part, parliamentarians feared an influx of poor Scots, a theme that ran through English political culture for the next two centuries and was only partly overcome by a growing sense of British nationality. More generally, they believed that reciprocal subjecthood threatened to erase jurisdictional borders between the king's multiplying kingdoms. The periphery would exert reverse, negative influence on England and level down legal privileges throughout the king's lands: weak notions of liberty would drive out strong. The English were becoming convinced that they enjoyed exceptional liberties compared to other kingdoms, even in comparison to the English king’s other jurisdictions. They did not want to regress to what they perceived as an authoritarian royal mean when combined with the liberties of Scots or colonists elsewhere. That royal mean was not an abstract threat: Just five years before inheriting the English crown, King James had penned a pamphlet in defense of the divine right theory of kings and absolute power. The liberties of English national identity was sharpened and actually depended on this constitutional alterity with other lands, including other dominions of the crown. A Scottish king with Scots in train might import modes of governance hostile to English liberties and privileges.

In the debate over the legal consequences of Union, this Parliamentary conception of the liberties of Englishmen functioned as a door: a closed door that kept migrants out or at least, when they crossed the threshold, signaled entry into a different legal environment where they enjoyed fewer liberties than the native English. This was a nationalist conception of liberties that distinguished the territorial space of England, and its history, from other jurisdictions, even the king’s other dominions. Parliamentarians’ jealous resistance marked an early instance of
skepticism about accumulating extra-English possessions. They might share the same island and a political head, but they had different bodies politic along with different liberties, privileges, and immunities.18

In the absence of a legislative solution, the problem of Scottish rights inside England went to the courts in the famous collusive lawsuit known as Calvin’s Case. A majority of the royal judges held that Scots born after the accession of James I to the throne in England were subjects of the man who was king in both realms, and thus a subject in both kingdoms.19 So a Scot was entitled to the liberties of Englishmen when he moved down to England. In an opinion that circulated throughout the Atlantic world, Edward Coke maintained that the English common law recognized equality between king’s extra-English subjects and his English ones, at least when the former migrated to England. In this case, Scots could access the same common-law rights as native-born Englishmen. Presumably the reverse held as well, if English people migrated to Scotland (or other royal dominions). In Coke’s opinion, the English door swung wide open, welcoming migrants from the king’s other territories. The ruling recognized the movement occurring across borders and helped facilitate that mobility throughout the king’s territories.

Coke also added a host of dicta that shaped many governors’ conceptions of royal power to govern territories outside England. According to his custom-based method, extreme even by contemporary standards, his analysis looked backward at a trove of medieval precedents that he struggled to rationalize into jurisprudence for a complex monarchy. Coming in 1608, just two years the royal charter of the Virginia Company, it became a jurisprudential resource for empire.20 Coke famously distinguished between inherited territories, like Scotland and England, and conquered territories, like Ireland. He then subdivided conquered territories into Christian
and infidel. That triad was standard learning in what was becoming known as the European law of nations.\textsuperscript{21} The teasing out of domestic or intra-imperial consequences of expansion, however, was new. In each of these three types of land, Coke maintained, the king had different degrees of discretion, different degrees of freedom to rule under his prerogative: minimal discretion in inherited and conquered Christian territories; greater discretion in conquered infidel lands. Coke also penned some cryptic sentences suggesting that English emigrants to conquered Christian lands, at least, ought to have property rights, and in inherited lands there ought to be access to representation.\textsuperscript{22} All this was dicta. But in it he dredged up resources and framed rules that shaped arguments between those who wished to claim that the king governed his extra-English lands with great discretion as well as those who wished to construct floors beneath which he could not go.

At the same time that James and his court sought to facilitate migration between his island kingdoms, he granted renewed charters for Atlantic discovery. His Privy Council promised to restart and reenergize what Elizabeth and her court had struggled to begin: colonizing North America. In 1606, the Council approved a new charter to the legatees of Walter Raleigh’s Elizabethan charter, who reorganized as the Virginia Company. That charter, most probably drafted by Attorney General Edward Coke, just before he was elevated to Chief Justice of Common Pleas, seemed to address directly the question of what English liberties applied to people who migrated from England to Virginia. One clause provided that:

\begin{quote}
all Persons being our Subjects who dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children born within any of the Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.\textsuperscript{23}
\end{quote}
Many historians have read this clause as granting Virginians all the substantive rights of English subjects--whatever they were--and the right to enjoy them in Virginia. Colonists later cited the charter clauses too for the same point, though not immediately and with greatest frequency in the revolutionary era. In what became a familiar metaphor in the eighteenth century, the charter clause seemed to some give the colonists a license to 'carry' all the liberties, privileges, and immunities of Englishmen, or at least those fitting to the new circumstances, and enjoy them abroad.

This was not the original or main purpose of this provision. Instead of pointing ahead, across the Atlantic, the clause derived instead from the middle ages and continental Europe. The formula yoking liberties and privileges to nativity, in a pledge to those born abroad, was originally Anglo-French and Anglo-Irish, not Anglo-American. In several proclamations, charters, and letters patent over the course of the late medieval period, the crown had pledged that subjects who migrated to royal lands, or land claimed by the crown, and also their children born abroad, would retain the liberties and privileges of natural-born English subjects. The relationship of king to subject was undergoing great change in medieval Europe, as the king’s jurisdiction shifted from predominantly personal to territorial. As it did so, the personal relationship between king and subject became fraught as the subject migrated outside the king’s (uncontested) jurisdiction. The language featured in two theaters of royal expansion, or reclamation: in purported royal lands in western France, and in Ireland.

For centuries the English crown claimed dominions in France. These lands derived from Norman lands of the William the Conqueror, Henry II’s dynastic marriage to Eleanor of Aquitaine, and the conquests of the Hundred Years War. During that war, from the middle of the fourteenth to the middle of the fifteenth centuries, the crown tried to settle English subjects in
captured towns like Calais and Harfleur. King Edward III proclaimed after the conquest on Calais in 1347, for example, that all of his English subjects who emigrated to his French domains, and their children, would be treated as if they had been born in England. The point was to allay anxiety about the loss of English subjecthood by residing outside England. Denationalization was a rational anxiety to have in the middle ages. Just a few years after the capture of Calais, amidst doubt about whether even the king’s heir could inherit if born ‘outside the allegiance of England’ – for example, while en route but not yet in their Angevin dominions - - Parliament passed a statute providing such heirs could inherit the crown. The statute *De Natis Ultra Mare* included not only royal heirs but also any children of an Englishman and his English wife, providing that such children would have the right to inherit in England as if they were native-born English subjects. For generations commentators debated whether the statute merely confirmed a common-law rule or changed the common-law presumption that such children were not in fact equal to native-born subjects and could not inherit land in England, with the weight of the opinion favoring the latter position. In either case, the statute reflected anxiety about the consequences of migration for English subjects and their heirs. *De Natis Ultra Mare* seemed to settle the question for those born to English parents outside territories within the king’s ligeance, though it left open the seemingly easier problem of those born within overseas royal domains.

In the quite different political and demographic circumstances of the Tudor conquest of Ireland in the sixteenth century, the crown’s agents made similar pledges to English subjects who went to Ireland, thus guaranteeing continued English subjecthood for them and their offspring. Here the purpose was not only to guarantee a right to return to England. It was also to encourage
such migrants not to de-nationalize themselves culturally by adopting Irish language and religion.\textsuperscript{33}

Some of the earliest American patentees had cut their imperial teeth in Ireland. The half-brothers and Elizabethan courtiers Humphrey Gilbert and Walter Raleigh, for example, were involved in schemes to subdue and colonize Ireland.\textsuperscript{34} Their American grants in the 1580s were at once rewards for assisting the queen in Ireland and inducements to carry out the same work in new lands. In the words of letters patent to Humphrey Gilbert for Newfoundland in 1578, all those who traveled there, as well as their heirs ‘borne within our sayd Realmes of England or Ireland, or within any other place within our allegiance, and which hereafter shall be inhabiting within any the lands, countreys and territories, with such licence as aforesayd, shall and may have, and enjoy all the priveleges of free denizens and persons native of England, and within our allegiance: any law, custome, or usage to the contrary notwithstanding’.\textsuperscript{35} Emigrant settlers and their heirs would remain English subjects wherever born and no matter in which royal territory they lived. Similarly, the grant to Sir Walter Raleigh in 1584 for Virginia provided that emigrants and their heirs would have ‘all the privileges of free Denizens, and persons native of England, and within our allegiance in such like ample manner and form, as if they were borne and personally resident within our said Realm of England, any law, custom, or usage to the contrary notwithstanding’.\textsuperscript{36} This guarantee is best interpreted as a hedge or insurance provision in case of catastrophe. If the speculative project, in North America as earlier in France, went awry, the adventurers or their descendants would be able to return to England. The door home remained open. Almost every royal grant to the Americas that followed contained a similar clause.

Coke’s version of this clause in the Virginia Charter of 1606 was slightly different:
every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.\textsuperscript{37}

This clause is open to the facial interpretation that the adventurers enjoyed some quantum of familiar rights while abroad, and that the legal regimes in royal territories were therefore harmonized.\textsuperscript{38} Coke was a sly lawyer, and he might have been sowing seeds for full colonial equality. But only in retrospect can one transform his variation on the insurance provision into the original charter for commonwealth liberties. More plausibly, he was subtly transforming the insurance clause into a more hopeful and dynamic mobility provision. By clear implication, \textit{any} of the king’s subjects could move to \textit{any} of his kingdoms or colonies and be treated as an equal in those other places. There might be legal diversity among the royal dominions but not between the subjects born in any of them. People, not lands, were equated.

Immediately, the Virginia Company went ahead and violated all manner of what contemporaries would have agreed were English liberties. For example, its charter provided that land in the colony 'distributed and divided amongst the Undertakers for the Plantation of the said several Colonies, and such as shall make their Plantations in either of the said several Colonies, in such Manner and Form, and for such Estates, as shall be ordered and set down by the Council of the said Colony'.\textsuperscript{39} The company was not, in other words, required to grant land according to common law tenures. Instead, it held land in common, and it did not grant titles in fee. It also enacted a statute instituting a form of martial law (though it was under-enforced). Nobody complained that the company’s governance violated its charter. Contemporaries acted as if the
Virginia Company was not bound to respect English liberties overseas. Instead, the charter provision guaranteeing English liberties and privileges clarified the status of emigrants and their offspring and was an ex ante solution to the problem that Coke and his fellow judges tried to resolve two years later, in Calvin’s Case, after the merger of Scotland and England. It clarified the status of emigrants to Virginia. If Calvin’s Case was correct and English law already mandated equality between the subjects of different dominions when they came to England, then the charter provision might have been redundant. On the other hand, if some foundational document was necessary to ensure equal treatment upon return, then Calvin’s Case might be wrong, as parliamentarians thought it was. Did a charter’s liberties and privileges clause create the legal equality of subjects within each royal territory, or did it merely confirm background principle of English law? Quickly this question became moot. For centuries afterward, few doubted that the king’s subjects born in other territories and descended from English emigrants could come back to England and be treated as English subjects. The door was open at least for white settlers and their offspring. That was not true, at least not without controversy, for those born non-British and especially non-white parents in the overseas territories.

Among other problems facing the Virginia Company, the lack familiar of property rights generated few incentives for labour. Absent the carrot of private accumulation, the company used the stick and passed the Laws Moral, Martial, and Divine: Mostly Martial, as Edmund Morgan quipped. Subjecting civilians to martial law was deeply controversial in the seventeenth century; at the very least it was far from anyone’s conception of the liberties of Englishmen. Indeed, when Parliamentarians, including Edward Coke, drafted the Petition of Right of 1628, their opponents, representing the king, objected to the provision forbidding the use of martial law against civilians by invoking the example of the king’s other dominions, where martial law was
routinely employed. Coke quickly sacrificed the larger empire in favor of England: The common law, he assured the Stuart defenders, ‘meddles with nothing that is done beyond the seas’. It is possible for a lawyer to reconcile his dicta in Calvin’s case about property law, the ambiguous charter provision, and his statement twenty years later that the common law operated in England alone. Elements of tenure, for example, might travel abroad even if all the common law or the jurisdiction of the English common law courts did not. But the argumentative context of each statement is crucial: the first was an early attempt to answer a question that would be debated for centuries: what were the legal consequences of empire? The second, in 1628, was a strategic statement that, on its bare terms, was unassailable but that also seemed to trade off the colonies in favor of England. The door was open for returnees. But the common law, at least, never left with emigrants in the first place.

When finally the Virginia Company’s governors turned to tobacco as a cash crop, they also revised the company land policy. They proclaimed in 1619 that “those cruel laws” were abrogated and he replaced them with ‘those free laws which his Majesty’s subjects live under in England’. This was portrayed as a reward but also as an incentive for new workers who, after a period of labor, could gain land for themselves. In this instance, the ‘free laws . . . [of] England’ functioned as a window, a transparent promise to people in England that they would find some measure of Virginia law familiar, especially its property laws permitting individual holding, purchasing, and inheriting of land. For the frustrated Virginia investors as for Coke in Calvin’s Case, property law was the central attraction of English law, and it could be used to promote opportunity outside England. For centuries afterward colonial governments advertised elements of English law to attract English emigrants.
III Laying Floors: The Foundations of Colonial Liberty

Other colonial founders followed the Virginia Company’s example of granting English rights abroad as an inducement to settlement. A few built such guarantees into their founding documents. The first such case was Maryland. George Calvert, the first Lord Baltimore, drafted the letters patent to Maryland, which invested his son, Cecil Calvert, as its first proprietor. The 1632 grant largely followed the template of previous colonial charters and contained, for example, the standard guarantee of English liberties and privileges, which again it should be interpreted as a denization provision. However, Calvert included an innovative feature: Chapter VIII suggested, though did not require, that the proprietor govern with the advice of an assembly of 'Freeholders' or their 'Delegates or Deputies'. This was implied in a clause that empowered his governor to pass ordinances ‘for the Conservation of the Peace, as for the better Government of the People inhabiting therein’, as long as they were ‘consonant to Reason’ and ‘not repugnant nor contrary, but (so far as conveniently may be done) agreeable to the Laws, Statues, or Rights of our Kingdom of England’. In addition, and echoing the so-called due process clause of Magna Carta, his ordinances could not ‘take away the Right or Interest or any Person or Persons, of, or in member, Life, Freehold, Goods or Chattels’. This provision not only advised the proprietor to consult the settlers when making laws; it also assumed that they would have the chance to become freeholders. Another clause made this explicit: Baltimore would grant to ‘any person or persons willing to purchase the same . . . to have and to hold . . . in Fee-simple, or Fee-tail, or for Term of Life, Lives or Years’. Land would be held according to common law forms of estates. In contrast to the original Virginia Charters, though consistent with the Virginia Company’s legislated reforms, the Maryland proprietor would establish a landholding system modeled on England’s. Gradually, metropolitan English standards were
worked into the empire’s foundational documents. To the Calverts, these were windows that made the overseas legal environment clear and familiar.

Similarly, during the Restoration William Penn had a hand in drafting the letters patent for Pennsylvania and incorporated some degree of English law into the colony’s structure as a commitment to familiar law. The law of crime and of property, he promised, ‘shall be and continue the same as they shall bee for the time being, by the general course of the Law in our Kingdome of England, until the said Lawes shall be altered by the said William Penn . . .’

Going beyond that general commitment, and reaching down into the details of the proprietary government’s relationship to prospective settlers, Penn’s charter included a template for the habendum clause that was to appear in every land grant in his colony. The habendum clause was the ‘have and to hold clause’ that specified the tenure by which individual grantees held property. The options Penn laid out in his template were the core common law tenures of fee simple, fee tail, life estate, and the lease for years. He left himself the freedom to alter all this, but the advertised baseline for property and criminal law in the new colony was the English common law. For the next century, Pennsylvania was the most popular destination for free emigrants coming to North America. Many reasons account for that – not least Penn’s un-English commitment to religious liberty, which went well beyond the bare toleration in the metropole – but the familiar regularity of English property and criminal law played a role.

Guarantees of English liberties and privileges promised that doors remained open to home and could open windows showing colonies that looked legally familiar. Soon emigrants tried to add new features to the legal architecture of empire by demanding or simply declaring effective within the colony some domestic English liberties and privileges. Here the claim of English liberties functioned as a floor: baselines beneath which the proprietary government could
not descend, with rights that colonists must enjoy. The first example of this sort of invocation of English liberties in the Americas appears to have arisen in Maryland.

The Maryland grant, again, recommended that the proprietor govern with the advice of an assembly. Baltimore viewed the assembly as an advisory body that was supposed to ratify legislation proposed by his governor and council. That is not how the first members of the Maryland assembly saw their office. In 1638 they drafted a long bill designed to extend to English residents in Maryland ‘all the rights and liberties according to the Great Charter’. 52 Sometimes celebrated in the United States as the first American bill of rights, the legislators compiled rights from Magna Carta and other parts of England’s serial, documentary constitution, including the recent Petition of Right of 1628 (which Edward Coke had claimed was only for England). Immediately preceding it was the legislature’s first act, which compared the new Assembly to the English Parliament, and it was followed by statutes that claimed all manner of metropolitan liberties.53 The ‘Act for the Liberties of the People’, for example, provided that ‘all Christian Inhabitants (slaves excepted) [shall] have and enjoy all such Rights, Liberties, Immunities, Privileges and Free Customs, within this Province, as any natural Born Subject of England hath, or ought to have or enjoy, in the Realm of England by virtue of the Common Law, or Statute Law of England’. This sweeping incorporation of English common and statute law was followed by the qualification that this package could be ‘altered or changed by the Laws or Ordinances of this Province’.54 The Assembly, in other words, would judge which parts of the package fit their circumstances. The English law Marylanders carried to the colony was a genuine portmanteau: one compartment contained an assortment of metropolitan liberties and privileges; the other would be filled with emendations appropriate to the new environment.
The Maryland Assembly never passed this long-form act. The following year, however, it passed a shorter version again adopting the ‘great charter’, and the governor signed it, though it had a two-year sunset provision. The politics of this moment were complicated. Suffice to say that this local assertion of core English rights, to be enjoyed on the American periphery, marks an important moment in the career of the English liberties and privileges formula. Marylanders were acting on the eve of the English civil war and aligned themselves with the moderate Anti-Stuart faction that wanted to bolster Parliament and all representative institutions throughout the king’s dominions. It was not a radical or Puritan document like the New Model Army’s Agreement of the People a decade later. It was nonetheless radical in its importation of the best of English liberties by Marylanders, for Marylanders.

Here the liberties script functioned like a floor. The Assembly retained the power to legislate as they saw fit for their circumstances – to build up from the floor of ancient English liberties—but they would always have that firm floor beneath them. This connotation is perhaps the most well-known to historians. American colonists continued to invoke this version of the formula for the rest of the seventeenth century and increasingly in the eighteenth century. This creative appropriation was especially prominent at moments of struggle over the constitution of English government at home, and when it appeared that domestic forces like Parliament were succeeding in carving away the residual, always under-defined power of the royal prerogative. At such times, the colonists worked in tandem with reformers and revolutionaries at home. They were not following so much as sharing arguments, and along the way helped re-write the imperial constitution.

The colonial floor was not fixed. It rose along with the entrenchment of fundamental freedoms and Parliamentary powers in the metropole. Or so many American colonists claimed.
In 1683, for example, the New York Assembly passed what it called a Charter of Liberties and Privileges, claiming all kinds of canonical rights like the right to freehold tenure, county courts, trial by jury, and so on. It was a provincial statute masquerading as a great royal charter. The Duke of York was going to approve it for the same reason rulers had always capitulated to such presumptuous liberalism: he needed money. When he became King James II, however, he vetoed the act on the Privy Council’s advice. In 1691, after James had been dethroned, New York passed essentially the same statute. The new King William III also rejected it because the Assembly claimed ‘too great and unreasonable privileges’. Yet New Yorkers continued to have freehold tenure, county courts, jury trials, habeas and all manner of English liberties. What was the basis for these liberties and privileges? For New Yorkers it was their charter, which confirmed what they thought they were due as subjects of an English king. For the crown, they rested on permission: the crown instructed its governors to let New Yorkers have such those liberties and privileges.\textsuperscript{58}

Misinterpretations, willful appropriations, and adamant rejections were not confined to the continental colonies. Colonies in the British Caribbean experienced much the same from their founding to the American Revolution.\textsuperscript{59} Cromwell’s forces wrested Jamaica from Spain in 1655 and he planned to populate it with soldiers-turned-farmers. He issued a proclamation in October 1655 to encourage migration to the still war-torn island. Those who moved to Jamaica, he declared, would be ‘under the immediate protection of this State’, and all persons ‘born within the said Island, shall be, and shall be deemed, and accounted to be free Denizons [sic] of England, and shall have and enjoy all and every such benefits, privileges, advantages and immunities whatsoever, as any of the Natives or People of England born in England now have and enjoy’.\textsuperscript{60} It was clear immediately that Cromwell did not mean by this guarantee that
Jamaica would be governed exactly like the Commonwealth of England. Instead, he promised that Jamaican migrants would enjoy ‘such good laws and customs as are and have been exercised in colonies and places of the like nature’. Jamaica would be ruled like Virginia and Barbados, not like England. That might have suggested that there would be a representative assembly of some sort, as in most colonies. For a while, though, there was none. Jamaica was a battleground between England and Spain and served as a base for forays against Spanish possessions and ships. It was not a place where metropolitan rulers were as eager to establish representative institutions and English liberties. Instead, elements of martial law characterized Jamaica’s early legal environment.

Along with completing the conquest the restoration government of Charles II had grand plans for Jamaica. All reports were that the island was richer and more fertile than any of the existing American colonies. To reach its potential would take large emigration. However, Jamaica never received a charter and the guarantees that, elsewhere, served both the practical function of outlining governance and also publicized predictable governance. Instead, the crown operated by proclamation and instruction. This was not just a claim of some royal prerogatives. It was the retention of unrestrained royal discretion.

The Lords of Trade recommended to the king –in-Council that he offer land to soldiers in Jamaica who stayed on to farm, with additional land for those who brought wives and servants. Planters should also be relieved of paying import customs for seven years, and ‘as a further encouragement’, all children born of English parents, as well as ‘their children in any of the Foreign Plantations’, should be declared naturalized by act of Parliament.

The Lords of Trade then went further and recommended that the king announce his intention to govern the people of Jamaica ‘by the laws of England’. The full Privy Council
balked at this last suggestion. Instead of recommending statutory naturalization, it included in the proclamation a version of the denization clause. It is curious that the Council proceeded by proclamation rather than by charter or statute, as the Lords of Trade had advised. Denization typically required letters patent, the crown’s most formal instrument. The colonial charters and proprietary grants that contained blanket denization for colonists were themselves letters patent. The legal sufficiency of a royal proclamation to accomplish the task of denization was at least questionable, unless premised on the belief that it merely declared the legal fact that all subjects born in any royal territory were already English subjects. In any case, it provided that ‘all children of our natural born subjects of England, to be born in Jamaica shall, from the respective births, be reputed to be, and shall be, free denizens of England, and shall have the same privileges to all intents and purposes as our free-born subjects of England’. 65

The proclamation also promised that ‘justice shall be duly administered agreeably to the laws of England or such laws, not repugnant thereto, as shall be enacted by consent of the freemen of the island’. 66 This too was by 1661 a standard clause in colonial charters, a commitment that checked local experimentation and also as a window to entice emigrants to a familiar legal environment.

At the same time, the Privy Council considered and rejected the possibility of granting Jamaican colonists some part of ‘the laws of England’. Some Privy Counsellors believed that the guarantee of equality would create an incentive for emigration. 67 For these councilors, liberties and privileges would put a window on Jamaica, making the colony seem familiar and safe. Other Counsellors were skeptical because such a promise would infringe on the crown’s prerogative. They had an image of the colonies that was the converse of the Parliamentarians’ at
the time of Calvin’s Case. At that time, parliamentarians had been suspicious of the king and wary of foreign or experimental political environments on the periphery.

To the restoration Counsellors of the Stuart kings, the English revolution and its aftermath had compromised too much of the king’s prerogative at home. Newly conquered Jamaica, by contrast, was home to the purer prerogative. Indeed, most of the new proprietary grants and the revised corporate charters under the Stuart restoration reflected the royalist plan to keep the colonies in check, whether or not England could be similarly disciplined.68 These counsellors did not want to grant away the freedom that the king enjoyed under the doctrine of conquest.

When in 1675 the Jamaican Assembly passed what it called a 'Bill of Privileges', which ‘declar[ed] the laws of England in force’ in Jamaica, the Council disallowed it because it would disable the king from maintaining a standing army on the island.69 ‘The statutes here [i.e., in England] have taken away the power and authority of the Council Board’, continued the Council, referring to the loss of much of its domestic jurisdiction during the Civil War, ‘and several other things are enumerated, which considering the remoteness of that frontier place might leave all in confusion if everything that is law in the England should at the demand of every subject there be strictly put in execution’.70 Instead the Council drafted a new bill that explicitly reserved the Crown’s prerogative power.71 The Council undertook this review of legislatively-declared liberties and privileges to enforce the mandate that colonial law not conflict with the principles of English law.72 Paradoxically, from the Privy Council’s perspective, the Jamaican assembly’s wholesale incorporation of English law was itself repugnant to the laws of England--because the crown’s prerogative was part of English law too. The crown may have lost the capacity to veto certain laws in England as part of a domestic constitutional settlement, but it did not need to do
the same in its other dominions. There was therefore no conflict between the injunction that the colonies pass no laws repugnant to the law of England and the Council’s rejection of a colonial statute that claimed all the laws of England. For the Restoration Privy Council, English liberties and privileges included *royal* liberties and privileges. Here that formula functioned as a *ceiling* that closed in colonial legal development.

The Restoration Council still saw a clear distinction between the English liberties clause as it functioned in the charters – the open door provision that fostered mobility -- and the grant of English law and liberties to Jamaicans, or a floor in the colony that would prevent the laying of a firm royalist foundation. In between, there was the window, and the Council freely granted Jamaicans the right to *have* an assembly, if not to rule at pleasure, and also enjoy many elements of the common-law legal system. These were grants, however, not matters of right, from the crown’s perspective. To the Stuart Privy Council in the 1660s, floors, doors, and windows still appeared as distinct features in the architecture of empire.

The planters by contrast sought to collapse the ceiling into the floor: English liberties and privileges should be the starting point for colonial governance, not a goal. When notice of the disallowance of their statute reached Jamaica, the Governor’s Council argued that ‘the King may seem to have a greater power here than in England, and so a clause may be admitted to secure his prerogative’, while the Assembly responded that ‘His Majesty had given us here the same privileges as his subjects in England’. Ultimately the governor capitulated and signed a similar bill ‘declaring the laws of England in force in this Island’, making clear that this included ‘all the liberties immunities and privileges contained therein’, such as fair trial by jury and consent to taxation. For two generations, Jamaica’s assembly passed statutes appropriating domestic English liberties and privileges, and the Privy Council repeatedly disallowed them. Yet, as in
New York and elsewhere, Jamaican planters enjoyed many of those liberties and privileges in the colony. From the metropole, these liberties were grants, while on the west side of the Atlantic they were rights.

Jamaica was a creative matrix for the imperial constitution in yet another respect. Increasingly confident and also wealthy colonists who had built beneath themselves an assumed floor of English liberties and privileges, and of course seeing a door wide open that led back to England, looked at themselves in the mirror and believed that all the rights they enjoyed in their particular colony were rights they should also enjoy in England. In other words, rights created by colonial law should be protected also as rights in England. The only significant return from the colonies to England, at least after the reverse migration of Puritans in the 1640s, came when wealthy planters in the Caribbean returned home to enjoy their newfound riches and reap domestic power and prestige. The so-called 'sojourning planters' became a considerable political and social force, beginning in the late seventeenth century and cascading in Georgian England. Already at the end of the century a handful of cases arose in the English common law courts concerning the legitimacy of property in enslaved humans under English law. All the conflicting statements about the status of slavery in England that marked later debates were immediately in play. The courts rendered conflicting but usually found a way to vindicate the slaveholders’ claims, whether or not they believed slavery was legal in England. It was a usage of merchants to sell slaves, argued one lawyer invoking the law merchant just as that body of law was being incorporated openly into common law. Alternatively, it was plantation law, and the planters had the right to return to England with their property. Still again, the colonies had English law, either by proclamation, or settlement, or custom, so whatever was law there had to be considered consistent with English law. Therefore, slave property was protected in England. These claims
circulated for a century, and not until Somerset’s Case in 1772 did they encounter serious opposition. Somerset’s Case runs ahead of the story of the seventeenth-century imperial constitution, but it is remarkable for displaying the strong return of the original door of Calvin’s Case: the closed door. The most compelling argument against the slaveholder was that he was sneaking corrupt, prerogative-based law into England. It was the leading edge of degradation of hard-won English liberties in England. As the empire continued to expand in the late eighteenth century, the concept of an insulated and superior England at the center of it all returned with a vengeance.

IV Toward Settlement: From Multiple Kingdoms to Imperial Provinces

All was not the same at the end of the seventeenth-century as at the beginning. Two major changes were, first, in the nature of what counted as English liberties and privileges; and, second, the center of gravity of opinion had shifted about whether those liberties operated in the colonies. Three generations of argument about English liberties and privileges in America had shifted the consensus opinion at home and abroad. The curious compromise or constitutional detente is captured by the emergence of a third basis in legal theory for overseas colonies. Alongside conquest and inheritance arose the new notion of 'settlement': when English settlers emigrated to unoccupied or, in some formulations, under-occupied lands, they took English law with them – or at least as much of it as they could or wished to carry. For colonists trying to solidify foundation of the floor of the imperial constitution, every colony started to look like a settlement colony. Even obviously conquered colonies like New York and Jamaica received implausible makeovers as settlement colonies. Under this theory, the colonists determined what
English liberties meant and which ones they took with them. Colonial Whigs started claiming settlement circa 1700 and rarely looked back. What changed the gravity of opinion is that many legal thinkers at the metropole began to accept his third category, and some of them at least entertained the idea that some of the American colonies might fit into it. At this point, eighteenth-century readers started to reinterpret – or essentially re-write – those original liberties, privileges, and immunities clauses. Out of context, the formula suggested that settlement was the constitutional theory as well as the colonial reality from the beginning.

Still, in Whitehall the notion that the American colonies fit into this third category of settlement was always an outlier, never a serious contender. American lands, after all, were not unoccupied, and much of the land was actually conquered from the French, the Dutch, and the Spanish. The Privy Council did not accept it; Sir William Blackstone did not accept it; Lord Mansfield did not accept it; even imperial liberals like Edmund Burke did not accept it. But in 1774 the First Continental Congress could confidently proclaim the theory of settlement and declare that 'our ancestors, who first settled these colonies, were at the same 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.' Two years later, in the Declaration of Independence, the Second Congress claimed representative government, juries, freehold tenure, freedom from standing armies, and other canonical liberties of Englishmen as American rights, time out of mind.80


4 See text at notes 34-39 infra.


6 See also Daniel J. Hulsebosch, Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830 (Chapel Hill, 2005), 17-41.


8 For an attempt to catalogue the meaning(s) of liberty in British North America, see Elizabeth Mancke, ‘The Languages of Liberty in British North America, 1603-1776’, in Exclusionary Empire: British Liberty Overseas, 1600-1900, ed. Jack P. Greene (2009), 25-49; Michal Jan Rozbicki, Culture and Liberty in the Age of the American Revolution (Charlottesville, 2011).

9 For an influential conception of legal functionalism, see Karl Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method', YLJ, 49 (1940): 1355-__.


14 Hulsebosch, 'The Ancient Constitution', at 447-49


16 '[W]hat liberty can broiling spirits and rebellious minds claim justly to against any Christian monarchy', James wrote, 'since they can claim to no greater liberty on their part nor the people of God might have done . . . . [W]hat shameless presumption is it to any Christian people nowadays to claim to unlawful liberty which God refused to his own peculiar and chosen people?' *The True Lawe of Free Monarchies* (Edinburgh, 1598). Cf. Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (1996).
These parliamentarians were not anti-imperial but rather wished to insulate England from the rest of the empire. Therefore it would be wrong to identify the resistance as anti-imperialism akin later English skepticism about empire. See Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (2005).


See Hulsebosch, 'The Ancient Constitution'.

The actual drafting process of colonial charters is often opaque. Grantees sometimes penned a first draft; attorneys general usually participated as well. All drafters recurred to existing charters as templates and usually (though not always) hewed closely to them, as will be seen below.


Hulsebosch, 'The Ancient Constitution'.

Virginia Charter (1606).

See, e.g., A. E. Dick Howard, *The Road from Runnymede* (1968), 18 ('A Spaniard who settled in the colony of Spain, for example, did not enjoy the benefits of the laws and privileges he might have had in his homeland. But, according to the Charter of 1606, the English colonist was to carry with him the protections and privileges of the common law which were his in England.'); Christopher Tomlins, 'Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century', *Law and Social Inquiry*, 26 (2001): 315, 354 n.56 ('Charters generally guaranteed the "liberties" of the subject as existing in England (see, e.g., the first charter of Virginia . . . ).'); Library of Congress, 'Magna

25 The most extensive inquiry came in the Massachusetts General Court’s colloquy with Governor Thomas Hutchinson in 1773-1774. For the documents and commentary, see John Phillip Reid, *The Briefs of the American Revolution: Constitutional Arguments Between Thomas Hutchinson Governor of Massachusetts Bay, and James Bowdoin for the Council and John Adams for the House of Representatives* (New York, 1981), especially 18-19, 38-41, 56-57, 96.

26 One of the earliest uses of the luggage metaphor to express the claim that English colonists carried some portion of English liberties and common law with them to the colonies came in 1720. See George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence*, vol. I (London, 1814), 195.

27 Hulsebosch, 'The Ancient Constitution'.


'A Statute concerning children born overseas', (351).


Nicholas Canny, 'Raleigh’s Ireland'; Brady, *Chief Governors*, 250. Gilbert had briefly been Governor of Ulster. Audrey Horning has recently revisited the connection between Ireland and transatlantic colonization in Ireland in the Virginia Sea: Colonialism in the British Atlantic (Chapel Hill, N.C., 2013).

Gilbert’s Charter (1583).

Raleigh’s Charter (1584). An unusual feature of this familiar protection was that it would be offered only to those emigrants who recorded their names in an English court of record.
Virginia Charter (1606).

For an analysis of this provision in the Virginia Charter, see Hulsebosch, 'Ancient Constitution', 475-77.

Virginia Charter (1606). In another clause the crown granted the company any land held in Virginia 'as of our Manor of East-Greenwich, in the County of Kent, in free and common Soccage only, and not in Capite', which indicated common socage tenure rather than knights service, which were kinds of common law tenure. But this was the tenure by which the company held land of the king, not how individual landholders in Virginia held land. Historians routinely confuse these two dimensions. For clarification, see Viola Barnes, 'Land Tenure in English Colonial Charters', in Essays in Colonial History Presented to Charles McLean Andrews (1931; reprinted, Freeport, N.Y., 1966), 4-40.

Putting aside the possible legal differences between a kingdom and a dominion, plantation, or colony.

Edmund S. Morgan, American Slavery/American Freedom: The Ordeal of Colonial Virginia (1975), 79.


Ibid.


The charter provided that all emigrants and all their descendants born there already or in the future, 'shall be natives and liege-men of us, our heirs and successors, of our kingdom of England and Ireland; and in all things shall be held, treated, reputed, and esteemed as the faithful liege-men of us, and our heirs and successors, born within our kingdom of England, and our other dominions,
also lands, tenements, revenues, services, and other hereditaments whatsoever, within our kingdom of England, and other our dominions, to inherit, or otherwise purchase, receive, take, have, hold, buy, and possess, and the same to use and enjoy, and the same to give, sell, alien, and bequeath and likewise all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peace-ably to have and possess, and the same may use and enjoy in the same manner as our Liege-Men born, or to be born within our said Kingdom of England, without Impediment, Molestation, Vexation, Impeachment, or Grievance of Us, or any of our Heirs or Successors; any Statute, Act, Ordinance, or Provision to the contrary thereof, notwithstanding. . . .' Maryland Charter, cl. X (1632).

46 Maryland Charter, cl. VIII.

47 Maryland Charter, cl. XVII. This broad grant of authority to distribute land to 'all persons' became one of neighboring Virginia’s grievances about the new rival to the north. Charles McLean Andrews, The Colonial Period of American History: The Settlements, vol. 2 (New Haven, 1936), 284 n.2.


49 Penn Charter.

50 Penn Charter.

51 Tenants on New York’s manors, for example, often left to own land individually in Pennsylvania.

52 An Act Ordaining Certain Laws for the Government of this Province, 19 March 1638, in Laws of Maryland at Large . . .
An Act for Establishing the House of Assembly and the Laws to be made therein, in id. There had been a brief assembly in 1634-35, but its legislative output is unknown [check].

An Act for the Liberties of the People, in id. The Maryland assemblymen were keenly aware of the constitutional crisis at home. Andrews, *Founding of Maryland*, 89.

Baltimore did in fact grant land according to English tenures. 'Be it Enacted By the Lord Proprietarie of this Province of and with the advice and approbation of the freemen of the same that all the Inhabitants of this Province being Christians (Slaves excepted[)] Shall have and enjoy all such rights liberties immunities privileges and free customs within this Province as any natural born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England (saveing in such Cases as the same are or may be altered or changed by the Laws and ordinances of this Province). And Shall not be imprisoned nor disseised or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the Laws of this province saveing to the Lord proprietarie and his heirs all his rights and prerogatives by reason of his domination and Seigniory over this Province and the people of the same…'

The Agreement of the People, as Presented to the Council of the Army, October 28, 1647.


Hulsebosch, *Constituting Empire*, 49-54.

For an analysis of West Indian political culture that explores the similarities and differences between the islands and the continental colonies, see Andrew J. O’Shaughnessy, *An Empire Divided: The American Revolution and the British Caribbean* (2000).
Cromwell, A Proclamation Giving Encouragement to Such as Shall Transplant Themselves to Jamaica, 10 October 1655, Transactions and Collections of the American Antiquarian Society, 96, 97, 99. The proclamation is transcribed slightly differently in the Calendar of State Papers: 'All born within said Island to be accounted free denizens of England, and to enjoy all the privileges as any natives of England'. Calendar of State Papers, Colonial, America and the West Indies, Vol. 9: 1675-76 and Addenda 1574-1674, no. 229. See also Whitson, Constitutional History of Jamaica, 5.


Whitson, Jamaica.

Minutes of the Council of Foreign Plantations, 17 June 1661, C.S.P. 1661-1668, no. 107. This recommendation for denization captured two generations born abroad: offspring of the original settlers and also their children. Implicitly it would carry down through the generations to cover all descendants of English settlers.

Minutes of the Council for Foreign Plantations, 1 July 1661, C.S.P. Col. 166-1668, no. 122.

A Proclamation for the Encouragement of Planters in His Majesties Island of Jamaica in the West-Indies, 14 Dec. 1661, CO 139/1, TNA {various online sources}. See also Whitson, Jamaica, 15.


Minutes of the Council for Foreign Plantations, 1 July 1661, in C.S.P. 1661-1668, no. 122.

69 The Assembly passed a similar bill every session, but it was the 1675 act that provoked a reaction in London. Whitson, *Jamaica*, 61.

70 CSP Col. 1677-80, no. 226. Whitson, *Jamaica* 72.


72 The classic study is Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (1950).

73 Whitson, *Jamaica*, at 62.

74 *Exclusionary Empire*.


78 Hulsebosch, ' "Too Pure an Air"'.

79 Hulsebosch, *Constituting Empire*, 57-58.