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PARTICIPATORY GOVERNMENT AND COMMUNAL PROPERTY: TWO RADICAL CONCEPTS IN THE VIRGINIA CHARTER OF 1606

*Finbarr McCarthy**

On April 26, 1607, about one hundred English men landed on the Atlantic shore of North America near Jamestown, Virginia. There they established the foundation for what would become the first permanent English colony in America. These men, and the men and women who followed in the next decade, left as their legacy a society that combined a rudimentary form of popular government with a system of private property. But these settlers established that society only after conducting seventeen turbulent years of social experiments. Had those experiments conducted in that Virginia swamp turned out differently, we might now live under a very different governmental regime.

Until the Virginia Company was dissolved in 1624, settlers tried four radically different ways of governing their colony and arranging property relations within it. Initially, in accordance with their charter, the settlers pursued radically participatory schemes. A local council chosen from among the settlers governed both civil and criminal affairs. The settlers held property communally. Nobody could own private property. However, with the survival of the colony threatened, a second charter, issued in London in 1609, replaced the local council with an autocratic governor. Property still remained communal. A third regime

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appeared in 1614 which retained an autocratic local government but permitted limited private ownership of land. Only in the final phase of initial colonization did a popular assembly and the concept of private property concurrently appear. This fourth combination endured, serving as the template for the development of the English North American colonies.

In this paper, I explore the legal, political, and economic forces that explain the truly radical choice for the first regime--government by local council and communal property.¹ I do not trace the evolution of the four regimes that characterize the period 1607-1624. Instead, I focus on the background to colonization and the positive law enacted for the colony. My analysis concentrates on what the proponents of colonization wanted to happen as opposed to what actually did happen in Jamestown.

Besides enriching the story of America's roots, a study of this nature has both theoretical and practical consequences. Case studies serve to ground legal theory, as Robert Ellickson has noted.² They provide historical evidence that may inform theoretical debates on government and property that too often occur in an ahistorical context. Such studies might, for instance, indicate how, within an economic system or individual enterprise, particular allocations of property rights affect the organization's ability to achieve its goals.

Case studies may also aid in discussions of problems in Eastern Europe and South Africa.³ For example, the Jamestown venture experimented with ownership structures. This venture may, therefore, indicate the advantages and limitations of various property systems in organizing and motivating people to achieve common objectives. The insights gained may be useful to emerging democracies in Eastern Europe struggling to structure property relations within participatory systems of government. The insights may also be useful to South African commu-

1. The primary materials relied on throughout this article are collected in 1-2 JAMESTOWN VOYAGES UNDER THE FIRST CHARTER, 1606-1609 (Phillip L. Barbour ed., 2d ser. 1969) [hereinafter JAMESTOWN VOYAGES] and in 1 THE GENESIS OF THE UNITED STATES 206-37 (Alexander Brown ed., 1964) [hereinafter GENESIS]. Note that in quotations to the original sources I have modernized the spelling and punctuation.

2. Robert Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1319 (1993).

3. *Id.*

nities concerned that communal rights established under customary law may disappear in the new republic.

In the first part of the article, I sketch the broad background against which planning for colonization occurred. By analyzing the documents drafted for the venture, I explore how their legal and imaginative elements projected the reassuring vision of an ordered world in Virginia. I also discuss the role of legal figures in initiating colonization.

In the second part, I examine the novel two-council structure used for governing the venture. I argue that the drafters thought of the colony as if it were a municipal borough for two potentially conflicting purposes. First, to attract settlers a local council assured potential settlers that they could influence matters most immediately affecting them. Second, to protect investors a local council, chosen by a council in London, permitted greater control of colonial affairs than the political climate in England would otherwise have tolerated.

Finally, in the third part, I explain that the planners chose a communal property regime because they thought it best protected the interests of the investors. The communal format was, however, likely to encounter difficulties because in selecting it, the planners inadequately considered the settlers' interests. Moreover, the communal format conflicted with the emerging conception of property relations, particularly in land, that most English people possessed.

I. GENERAL BACKGROUND

Most English people who ventured abroad in the sixteenth and early seventeenth centuries did so for commercial or religious reasons.⁴ They were traders, diplomats, privateers and sailors. Some were pilgrims; others were fleeing religious persecution. Few journeyed for pleasure, curiosity, or knowledge.⁵

4. 1 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 45-65 (1934).

5. Learned men such as Francis Bacon, Lord High Chancellor from 1617 until 1621, increasingly advocated foreign travel for educational purposes. "Travel," declared Bacon, "in the younger sort, is a part of Education; in the elder, a part of experi-

Typically, they travelled to fairly populous parts of the globe that Western Europeans knew well. English trading companies, for instance, had focused almost exclusively on countries in Europe or along the African coasts.⁶ Certainly many of these ventures had been expensive and often dangerous. Voyages in the small wooden vessels of the period were extremely hazardous.⁷ In addition, travel increased exposure to diseases.⁸ Finally, pirates posed a threat to safe voyage.⁹

For those sailing to "Virginia" in 1606, all these dangers were magnified.¹⁰ In committing "to make habitation, plantation and

ence." Francis Bacon, *Of Travaile*, in *THE ESSAYS OR COUNSELS CIVIL AND MORALL* 73 (Walter Worrall ed., 1900) [hereinafter *THE ESSAYS*].

6. Susan M. Kingsbury, *A Comparison of the Virginia Company with the Other English Trading Companies of the Sixteenth and Seventeenth Centuries*, in 1 *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1906*, at 161, 162-63 (1908).

7. On a voyage to Virginia in 1609, thirty-two people died and had to be thrown overboard. Letter from M. Gabriel Archer (1609), in 2 *JAMESTOWN VOYAGES*, *supra* note 1, at 279-80.

8. Within eight months of establishing the colony at Jamestown, 66 of the 104 original settlers died. Most died from diseases such as dysentery and typhoid fever. See WYNDHAM B. BLANTON, *MEDICINE IN VIRGINIA IN THE SEVENTEENTH CENTURY* (1972); JOHN DUFFY, *EPIDEMICS IN COLONIAL AMERICA* 215, 223 (1953).

9. One author described the threat posed by pirates:

For a very long period after English commerce began to penetrate the Mediterranean, those who wished to trade successfully in the region could do so only to the degree that they could command the naval power to ward off the attacks of successive generations of predators, from the Turks and Barbary pirates in the middle of the sixteenth century, to the Spanish in the latter part of the sixteenth century, to the North Africa-based multinational pirate communities in the first half of the seventeenth century.

ROBERT BRENNER, *MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON'S OVERSEAS TRADERS, 1550-1653*, at 47 (1993); see also RICHARD S. LAMBERT, *THE FORTUNATE TRAVELLER: A SHORT HISTORY OF TOURING AND TRAVEL FOR PLEASURE* 42 (1950).

10. The charter of 1606 defined Virginia expansively as the land between the thirty-fourth and the forty-fifth degrees of north latitude. 1 *JAMESTOWN VOYAGES*, *supra* note 1, at 24. In other words, it covered roughly the area between today's Canadian border and the Cape Fear River in North Carolina.

However, when the text in this section uses the name Virginia, it means, unless the context clearly indicates otherwise, the "first" or more southern colony which was to inhabit between 34 and 41 degrees north latitude.

All those who sailed in 1606 were male. Moreover, the records indicate that only men were involved in planning the venture. Consequently, I use "men" and the male pronoun throughout my article.

to deduce a colony," aspiring settlers exposed themselves to more physical dangers.¹¹ Creating a colony also dramatically increased the organizational, financial, legal, and emotional burdens imposed upon all participating in the venture. It called for greater organizational abilities than did mere trading voyages. Colonization required greater skill in long-term planning and it demanded a larger initial outlay of capital than did the usual expedition. Colonizing also required a continuous flow of substantial capital for an undefined period thereafter. Because immediate profits were unlikely, it also demanded great patience from reluctant investors. Furthermore, unlike the usual overseas ventures of the time, colonizing also involved recruiting, selecting, outfitting, transporting and supplying settlers. From the settlers it demanded both courage and fortitude. But one feature, in particular, distinguished colonizing from other expensive overseas ventures. Colonization required a plan of governance for ordering affairs not only in the colony, but also between the colony and England.

A. *The Initiating Documents*

The plan for governing the venture appears in what I term the initiating or enabling documents. These documents included the "Letters Patent" of April 1606 (the first charter) and the closely related "Articles, instructions and orders . . . for the good order and government of the two several colonies . . ."

11. *Id.* An earlier attempt to found a colony at Roanoke (present-day North Carolina) failed. See generally 1-2 THE ROANOKE VOYAGES 1584-1590: DOCUMENTS TO ILLUSTRATE THE ENGLISH VOYAGES TO NORTH AMERICA UNDER THE PATENT GRANTED TO WALTER RALEIGH IN 1584 (David B. Quinn ed., 1952) [hereinafter THE ROANOKE VOYAGES]. Earlier expeditions had to bear the financial burden of building residences abroad. 1 WILLIAM R. SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 22 (1912). However, that burden hardly compared to the ones colonizing imposed.

At the time, "plantation" meant "the settlement of persons in some locality; especially the planting of a colony; colonization," or "a settlement in a new or conquered country, a colony." 11 THE OXFORD ENGLISH DICTIONARY 976 (1989). For a discussion of what the English meant by plantation in Ireland in the late sixteenth and seventeenth centuries, their model for Virginia, see R.F. FOSTER, MODERN IRELAND 1600-1972, at 59-78 (1988). See generally Francis Bacon, *Plantations*, in THE ESSAYS, *supra* note 5, at 144-48, and in BARON OF VERULAN VISCOUNT SAINT ALBANS, CIVIL AND MORAL OF FRANCIS BACON 110-13 (1994).

which the Crown issued on November 20, 1606.¹² In the history of this earliest period of colonial Virginia, only one aspect of these documents has received more than scant attention. That aspect is the claim in the charter that the English were legally and morally entitled to Virginia.¹³ Otherwise, most historians only perfunctorily mention the existence of the documents. Some occasionally quote a provision. However, such treatment implies that these initiating documents were mere formulaic restatements of conventional legal strategies. This view underestimates the complex context of their writing. Such treatment also ignores the significance of the documents in attempting to shape behavior in the colony. Finally, this treatment underestimates how legal institutions shape history, particularly Virginia's history.

Like most legal constructs, the initiating documents served as instruments for imposing a particular vision of order. They authorized who could travel,¹⁴ to what destination, by what

12. 1 JAMESTOWN VOYAGES, *supra* note 1, at 24-44; see also 1 GENESIS, *supra* note 1, at 46-85. Two other important documents were also issued late in 1606 in the wake of the "Letters Patent" and the "Instructions." The King's Council of Virginia, which the "Letters Patent" directed be established for the "superior managing and direction" of affairs in the colony, issued the "Certain Orders and Directions . . ." and the "Instructions given by way of advice. . . ." 1 JAMESTOWN VOYAGES, *supra* note 1, at 45-54.

13. For works that discuss these claims, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Wilcomb E. Washburn, *The Moral and Legal Justification for Dispossessing the Indians*, in *SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY* 15-32 (James M. Smith ed., 1959); Nicholas Canny, *The Ideology of English Colonization: From Ireland to America*, 30 WM. & MARY Q. 575, 579 (1973); Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983).

14. The provisions in the documents were not the only legal impediments to travel. Within England, the changing nature of property relations was a factor generating movement in pursuit of better economic opportunities. That movement sparked great fear of unemployed vagrants. Seeking to address this fear, legislation such as the Statute of Artificers, enacted in 1563, required people to stay "in the locality and in the work into which they were born." B.A. HOLDERNESS, *PRE-INDUSTRIAL ENGLAND: ECONOMY AND SOCIETY, 1500-1750*, at 194 (1976). "[L]aborers and artisans" who left their parish had "to have testimonials from their last employers . . . and they could not obtain fresh employment without presenting such letters." W. CUNNINGHAM, *THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE IN MODERN TIMES* 29 (1912). Most of these statutes failed for reasons that I will discuss later in the text.

Since the reign of King Richard II, travel abroad required permission of the monarch. Though King James I rescinded that requirement, he could prevent any

route, with what goods, and for what purposes.¹⁵ They sought to fix relationships in the colony among the colonists and between them and the Indians. Like all legal instruments, the documents established privileges, rights, claims, and duties. They sought to direct behavior in certain preferred channels. They provided mechanisms to settle disputes. They declared how to punish transgressors. They also addressed the broader relationships among the colonists, the Crown, and the investors in England. Consequently, the initiating documents substantially determined who confronted the dangers of colonizing and who would ultimately profit from the undertaking. They also determined who was entitled first to construct and later to interpret the reality that the journey became. In short, the initiating documents provided the framework within which the entire venture and its story played.

But the documents were more than legal constructs. Their content, form, and language reflected the considerable extent to which the documents were also instruments of their drafters' imagination. Circumstances forced the documents to be imaginative since the English knew little about colonizing or of America. They could draw upon their largely unsuccessful experience with Irish plantations under Elizabeth I.¹⁶ They could also draw upon lessons learned from the Spanish¹⁷ and the

emigration "on grounds of public safety." Harold Laski, *The Early History of the Corporation in England*, 30 HARV. L. REV. 561, 585 (1917).

15. To trade overseas, a subject needed a royal license. JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 512 (1990). "By 1603 all the regions of trade to which the English sailed were subject to company regulation." HOLDERNESS, *supra* note 14, at 185. Only merchants allied with the chartered companies to which the Crown had granted a monopoly could trade with, for instance, Russia, Turkey, Venice, the Levant, and the East Indies. BRENNER, *supra* note 9, at 92.

That legal barriers excluded many potential merchants can be deduced from the consequences of their removal. When the trading privileges of the Merchant Adventurers were suspended from 1624 to 1634, "independent producers flooded into the trade, resulting in a threefold increase in the total number of traders." *Id.* at 85.

16. See ANDREWS, *supra* note 4, at 68-72; Canny, *supra* note 13, at 575, 597; E.P. Cheyney, *Some English Conditions Surrounding the Settlement of Virginia*, 12 AM. HIST. REV. 507, 514-22 (1907).

17. The Spanish had established a presence in North America as early as the second decade of the sixteenth century. WESLEY F. CRAVEN, *THE SOUTHERN COLONIES IN THE SEVENTEENTH CENTURY, 1607-1689*, at 4 (1970). As early as 1514, Ponce de Leon was granted a patent for Florida, where he died in 1521, trying to establish a settlement. *Id.* at 4. Additionally, Francisco de Garay was granted a patent to the

French¹⁸ experiences in America. They could also draw upon their own failed attempts to establish colonies in North America, notably at Roanoke Island in the 1580's.¹⁹ They could fur-

northern shores of the Gulf of Mexico. *Id.* In 1526, Lucas Vázquez de Ayllon tried to colonize the Carolina coast. *Id.* In 1528 Panfilo de Narvaez received the patents once granted to de Leon and Garay. *Id.* at 5. In 1540, De Soto was in the Carolinas. *Id.* at 6. In that same decade the Spanish explored Texas and New Mexico. *Id.* at 6-8. Between 1559 and 1561 the Spanish attempted settlements on the Alabama River and around Santa Elena on the Carolina coast. *Id.* at 7-8. By the 1560's, they had established a series of posts in Florida, leading to the spread of Jesuit missionaries in the south. *Id.* at 16-17. In fact, by 1572, the Jesuits had apparently been to the Rappahannock River in Virginia. *Id.* at 17. By the late sixteenth century, the Spanish had withdrawn to Florida, where they established a flourishing colony. *Id.*

Craven is a useful source for citations to the Spanish and French texts which were available to English readers in the sixteenth century.

Alexander Brown believed that the first charter "apparently concedes to Spain all the mainland south of 34 [degrees], and to France all north of 45 [degrees] north latitude." GENESIS, *supra* note 1, at 56 n.1.

18. The French briefly established a settlement at Port Royal in present-day South Carolina in 1562, and another, under Laudonniere, at Fort Caroline, Florida, in 1564. CRAVEN, *supra* note 17, at 9.

The proponents of the Virginia colony closely studied Laudonniere's account. *Id.* at 9. In 1587 Richard Hakluyt published a translation of Laudonniere's account. A NOTABLE HISTORY CONTAINING FOUR VOYAGES MADE BY CERTAIN FRENCH CAPTAINS UNTO FLORIDA (Richard H. Hakluyt & T. Dawson trans., 1587). Laudonniere's account reappeared in RICHARD HAKLUYT, VIII THE PRINCIPAL NAVIGATIONS VOYAGES TRAFFIQUES & DISCOVERIES OF THE ENGLISH NATION 439-86 (1965) and in Volume IX of the same book at pages 1-100. Volume IX was also published in 1965.

19. For the primary documents relating to the colony at Roanoke Island in present-day North Carolina, see generally 1 ROANOKE VOYAGES, *supra* note 11. The colony—the famous Lost Colony—was abandoned when all the original settlers disappeared.

Two other attempts to colonize North America had also failed. First, Sir Humphrey Gilbert had attempted unsuccessfully to colonize eastern North America, especially Newfoundland between 1578 and 1584. *See generally* THE HAKLUYT SOCIETY, NO. 2, THE VOYAGES AND COLONISING ENTERPRISES OF SIR HUMPHREY GILBERT 181-236 (David B. Quinn ed., 1940). Gilbert had also taken part in the efforts to colonize Ireland between 1566 and 1567. FOSTER, *supra* note 11, at 33. Second, Captains Bartholomew Gosnold & Bartholomew Gilbert had attempted to plant in New England in 1602. *See generally* WARNER F. GOOKIN & PHILIP L. BARBOUR, BARTHOLOMEW GOSNOLD: DISCOVER AND PLANTER (1963). Gosnold was later named vice admiral of the first fleet to Virginia and became a member of the first council in Virginia. 1 JAMESTOWN VOYAGES, *supra* note 1, at 13.

Despite these failures to establish an English colony in America, the 1606 charter granted a license to plant in "parts and territories in America either appertaining unto us or which are not now actually possessed by any Christian prince or people." *Id.* at 24. The meaning of "appertaining" is puzzling. It could not have meant mere discovery as the king required actual possession by other European powers before he would concede those powers a right. By actual possession, the English meant, as Raleigh's 1584 patent had described it, "to have, hold, occupy and enjoy." 1

ther draw upon the trading experience of such English companies as the Levant Company and the fledgling East India Company. The ability to draw on these experiences was possible because some of the same men were prominent in all of these ventures.²⁰ Nevertheless, despite all the knowledge gleaned from other sources, Virginia ultimately remained unknown to the English. Many colonizers expected to confront barbarity and savagery there.²¹ They assumed an unstructured, chaotic world. The colonists could only presuppose and hope that existing English institutions and concepts would suffice to impose order.

These uncertain circumstances necessarily compelled the drafters of the enabling documents to project a particular vision, a specific story, of order in Virginia. That story declared what life should be in the colony, filtered by representations of how others in putatively similar circumstances had lived. Additionally, the story strongly reflected the English world from which the story originated. Merely by reflecting that world, the resulting instruments played a crucial role in colonizing Virginia. They implied the known in the unknown, the familiar in the strange, England in America. For all involved, the documents sought to imply in content, form, and language, the psychologi-

THE ROANOKE VOYAGES, *supra* note 11, at 82. Perhaps in using "appertaining," the drafters were alluding to the possibility that the lost colony of Roanoke had somewhere established itself and was waiting to be found.

For the more liberal Spanish concept of legal possession, see the discussion in STEPHEN GREENBLATT, MARVELOUS POSSESSIONS: THE WONDER OF THE NEW WORLD 167 n.7 (1991) (citing an unpublished paper by Patricia Seed).

20. For instance, the first governor of the East India Company, and also a governor of both the Levant and Muscovy Companies, Sir Thomas Smith, was a member of the first royal council for Virginia in London and was later treasurer of the Virginia Company. BRENNER, *supra* note 9, at 21, 96. Smith was at one time Lord Mayor of London. *Id.* at 98.

Two members of the first King's council were also associated with the East India Company. Sir William Rumney was a governor, and John Eldred was a member of its first court of directors. Rumney [Romney] was one of the original promoters of the East India Company, one of its incorporators, and one of its first directors. He was elected a governor in 1606. He was also a governor of the Merchant Adventurers' Company, a ward alderman and a sheriff of the City of London. See XVII DICTIONARY OF NATIONAL BIOGRAPHY 200-01 (1967-1968) (discussing Romney); VI DICTIONARY OF NATIONAL BIOGRAPHY 592-93 (1967-1968) (discussing Eldred).

21. See generally ROY H. PEARCE, THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION (1965).

cally reassuring prospect of an ordered world where most English believed one did not exist.²²

The legal and imaginative elements of the documents reinforced each other as early as the preamble to the first charter.²³ The Preamble formally demarcates "that part of America commonly called Virginia," to which the charter lays claim.²⁴ It is situated "all along the sea coasts between four and thirty degrees of northerly latitude from the equinoctial line and five and forty degrees of the same latitude and in the main land between the same four and thirty and five and forty degrees and the islands thereunto adjacent or within one hundred miles of the coast thereof. . . ."²⁵ Having formally described the claim, the charter did not need to refer to the area by name.²⁶ Moreover, only the English called the area Virginia, and whether they "commonly" did so is debatable.²⁷ Nevertheless, naming the area Virginia after Elizabeth I, the virgin Queen of England, implied a perfect correspondence between England and Virginia to which proponents of colonization aspired.²⁸ Further-

22. *See id.*

23. 1 JAMESTOWN VOYAGES, *supra* note 1, at 24.

24. *Id.*

25. *Id.* The charter restricts the first colony to a portion of that area. The settlers "may begin their said first plantation and seat of their first abode and habitation at any place upon the said coast of Virginia or America where they shall think fit and convenient between the said four and thirty and one and forty degrees of the said latitude." *Id.* at 25-26. From the point of "first abode," it then further restricted the colony to fifty miles "west and southwest" along the coast, fifty miles "east and north-east" along the coast, and one hundred miles inland. *Id.*

26. As a name delineating a place, the name had little evidentiary value. Even if English people commonly called an area in North America, "Virginia," they did so without knowing its boundaries. "Virginia" primarily expressed a desire.

27. The "Letters Patent" to Walter Raleigh in 1584 do not mention "Virginia." 1 THE ROANOKE VOYAGES, *supra* note 11, at 82-89. Arthur Barlowe in his "Discourse of the First Voyage" writes that in 1584 the "discovered part of the country [is] now called Virginia." *Id.* at 92. Elsewhere Raleigh notes that it is called "Wingandacon." *Id.* at 116-17.

Among the names later promoters called Virginia were Nova Britannia and Virginia Britannia. *See* ROBERT JOHNSON, NOVA BRITANNIA: OFFERING MOST EXCELLENT FRUITS BY PLANTING IN VIRGINIA. EXCITING ALL SUCH AS BE WELL AFFECTED TO FURTHER THE SAME. (London, 1609); WILLIAM STRACHEY, THE HISTORY OF TRAVAIL INTO VIRGINIA BRITANNIA (Louis B. Wright & Virginia Freund eds., 1953).

28. For insight into how naming a place creates a history of a place and its people and how renaming erases a history, see BRIAN FRIEL, TRANSLATIONS: A PLAY (Samuel French, Inc. 1981).

more, "commonly" had a reassuring air that suggested to potential settlers that such correspondence already existed.

The charter constantly reinforced the correspondence between England and Virginia. Like other English charters of the period, it listed in generic terms the resources to which the patentees are entitled upon successful occupation, including: "all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishings, commodities and hereditaments whatsoever. . . ."²⁹ In form this list is a familiar product of the legal mind. It defined the charter's scope, and it aimed to be all-inclusive within that scope. Furthermore, it anticipated issues while reassuring investors that it protected their source of income. However, those compiling the list did not know whether such resources and objects existed. An encompassing term, like the acquisitive "whatsoever" that ends the list, would have protected the patentees' claims. But in detailing familiar objects at length, the list implied a reassuring similarity between Virginia and England. In short, the list told the potential colonists what they wanted to hear.

Likewise, the language of the list reassuringly insinuated the possibility of order. Its formal tone implying order, control and reflection is typical of legal instruments. The entire passage, like the documents generally, was notably devoid of the claptrap, emotion, and exaggeration that characterized the promotional material for the colony.³⁰ Directed in part to committed colonists, the language of the documents sought to temper any heightened expectations that the promotional material might have generated in advertising for prospective colonists.

Particularly for the settlers, the initiating documents were a comforting mark of civility. For men who might have had to stay in Virginia without their families, indefinitely if not permanently, the documents were almost as essential a part of their baggage as were their provisions and armaments. To the

29. 1 JAMESTOWN VOYAGES, *supra* note 1, at 26.

30. See Samuel Purchas, Description of Virginia, 1613, in *THE OLD DOMINION IN THE SEVENTEENTH CENTURY: A DOCUMENTARY HISTORY OF VIRGINIA, 1606-1689*, at 303-04 (Warren M. Billings ed., 1975) (providing a typical example of promotional material).

collective psyche, the documents served a role akin to the role played by the religious exhortations and invocations that preceded the voyages. They were as reassuring as was the presence of a preacher on the first fleet. They were essential precisely because they implied order where the English believed it did not exist. The presence of the documents alone offered a psychologically reassuring connection to England.

B. *Proponents of Colonization*

One way to examine the forces in England shaping the plan of government and of property relations that the initiating documents provided for Virginia is to focus on the proponents of colonization and the drafters of the documents. Discussion of the proponents has concentrated on the role of the merchant and emerging capitalist classes, particularly in London, but also in Bristol, Plymouth, and other western ports.³¹ Economic motives largely explained their interest in America.³² Many merchants were seeking reliable sources of imports.³³ Some were seeking the elusive northwest passage to India to gain easier access to Asia's exotic products.³⁴ Virginia was a place where a search for the route could be organized.³⁵ Others were seeking new markets for English exports, particularly wool and cloth.³⁶

31. See ANDREWS, *supra* note 4, at 27-52; CRAVEN, *supra* note 17, at 60.

32. Almost any text that discusses the early history of this country will list the economic factors that motivated colonization. I have especially relied upon BRENNER, *supra* note 9, at 92-112 (challenging accepted generalizations about the economic forces behind colonization) and CRAVEN, *supra* note 17, at 27-59.

33. Merchants were growing weary of the "periodical physical disruption of their traditional trade routes—especially those to the Antwerp and Iberian entrepôts. These disruptions compelled certain merchants interested in imports to seek better access to the ultimate sources of supply." BRENNER, *supra* note 9, at 5.

34. For brief discussions of how the search for this mythical passage shaped English contact with America, see ANDREWS, *supra* note 4, at 20-21 & n.1 and CRAVEN, *supra* note 17, at 31-33.

35. The London Council's "Instructions given by way of advice" to the planters provided that "[y]ou must observe if you can whether the river on which you plant doth spring out of mountains or out of lakes; if it be out of any lake the passage to the other sea will be the more easy & it is like enough that out of that same lake you shall find some spring which run the contrary way toward the East India Sea." 1 JAMESTOWN VOYAGES, *supra* note 1, at 49-51.

36. According to Brenner, by the early seventeenth century the "north European cloth markets were not expanding, and were plagued by certain chronic difficulties."

Some hoped to acquire land in order to develop its resources. Others believed that, as in South America, gold, silver and copper would be discovered.

However, economic motives alone did not motivate all of those involved in the North American venture. Perhaps influenced by propagandists such as Richard Hakluyt,³⁷ some merchants undoubtedly responded to patriotic appeals.³⁸ In establishing an American colony, those who had an imperialist view wanted a base in the southern part of North America from which to challenge Spanish power in the region.

In the drive to colonize Virginia, merchants and capitalists were undoubtedly important figures. But men trained and active in the law were, arguably, just as important in successfully initiating, planning and promoting the Virginia enterprise of 1606. Moreover, they certainly influenced this venture more than they had any previous English effort in North America.

1. Legal Proponents

Men with rich experience in the law were involved in all initial phases of the venture. They were among those who instigated the effort, joined the petitioners and patentees, drafted the initiating documents, sat on the King's Council in London, gave advice to the chief proponents, invested in the venture, and were appointed to the first Council in Virginia. The pervasive influence of men with legal knowledge and experience contributed to the original character of the colony's government and the structure of property relations.

Many of the legal figures were also experienced in trade, in plantation schemes, and even in privateering.³⁹ So the economic impulses that motivated the merchants and investors also influenced the legal group's advocating an American colony.

BRENNER, *supra* note 9, at 23.

37. See generally RICHARD HAKLUYT, *DISCOURSE OF WESTERN PLANTING* (David B. Quinn & Alison M. Quinn eds., 1993).

38. Sir Thomas Smith appears to have been one such merchant. See BRENNER, *supra* note 9, at 92-112.

39. See *infra* text accompanying note 137.

Economic trends and occupational experiences inevitably tempered the degree to which they approached their roles as drafters of the documents and proponents of colonization. But at least in the initial planning stage their legal education and experience undoubtedly influenced their view of how to govern.

Those who played pivotal roles in devising a scheme of government included the most powerful men in the English legal system. Key players included the Lord Chief Justice, the Solicitor General, the Attorney General and, perhaps, the King's counsel. So situated, these men influenced the drafting of both the petition for a license to plant in Virginia and the accompanying charter.⁴⁰ They also contributed to revisions and oversaw the charter's passage to enactment. They were well situated to undermine opposing schemes to colonize Virginia.⁴¹

Of these influential legal men, the most active in the Virginia enterprise was the Lord Chief Justice of the King's Bench, Sir John Popham. Popham had previous experience with plantations.⁴² In the mid-1580's he had invested heavily in transporting laborers to land assigned him in the Irish plantations. But Popham encountered difficulties and soon abandoned his direct involvement in the Irish plantations. Popham did, however, observe the plantation process when he was appointed to examine claims to escheated lands in Munster during the plantation period.⁴³

His Irish experience seems not to have tainted Popham's view of plantations, and events in 1605 restimulated his interest. George Waymouth had returned from an exploratory voyage to "Virginia" with five Native Americans. Waymouth then agreed to help Sir John Zouche establish a settlement in Virginia.⁴⁴ The publicity surrounding Waymouth's return and

40. The petitioners typically included a draft with their petition. But, lacking extant evidence, we do not know whether a draft actually accompanied the petition of 1606. For descriptions of the process and for further speculation on this matter, see ANDREWS, *supra* note 4, at 81-82, 85; 1 GENESIS, *supra* note 1, at vi-vii; 1 JAMESTOWN VOYAGES, *supra* note 1, at 14.

41. See generally *infra* text accompanying notes 201-14 (discussing the "jockeying" that occurred in determining the type of system that would be enacted).

42. XVI DICTIONARY OF NATIONAL BIOGRAPHY 148 (1967-1968).

43. Popham spent about 12 months in Ireland from 1588 to 1589. *Id.*

44. The agreement appears in 1 GENESIS, *supra* note 1, at 32-35.

Zouche's scheme aroused Popham's commercial instincts. To forestall Zouche's effort, Popham had to act promptly. Nevertheless, Popham's motives were not purely commercial. Popham opposed Zouche's scheme because he disliked Edward, Lord Zouche, who had married Popham's daughter.⁴⁵ So in 1605, Popham played an instigatory role in "interest[ing]" many of the lords and others to be petitioners to his Majesty for his royal authority, for setting two Plantations upon the coasts of America, by the names of the First and Second Colony."⁴⁶

Popham's influence extended beyond encouraging petitioners. Among those he interested in petitioning the Crown were two relatives including his nephew, the ex-privateer George Popham and his grandson, a lawyer named Thomas Hannam.⁴⁷ Both men were subsequently included among the eight men whom the charter specifically named patentees.⁴⁸

Popham involved two other relatives in the enterprise, his only son, Sir Francis Popham, and another grandson, Thomas Warre. These men were among those whom the King appointed

45. 1 ANDREWS, *supra* note 4, at 80.

46. Sir Ferdinando Gorges, *A Brief Narration of the Original Undertakings of the Advancement of Plantations into the Parts of America*, in 1 GENESIS, *supra* note 1, at 50.

Barbour writes that Popham "took some sort of 'great pains' about the plantation of a colony in Virginia, and declared himself ready to call all interested parties before him and 'by their advices set down the best manner of project.'" 1 JAMESTOWN VOYAGES, *supra* note 1, at 14 (footnote omitted).

47. 1 JAMESTOWN VOYAGES, *supra* note 1, at 16.

48. The charter stated that "diverse others of our loving subjects" were also petitioners. *Id.* at 24.

Four petitioners, later patentees, associated with the City of London, sought a license to plant the "first" or more southern colony. *Id.* at 15-16. The Jamestown colony resulted from their efforts. These four patentees were Sir Thomas Gates (later a governor of Virginia), Sir George Somers (a member of Parliament and a former privateer), Richard Hakluyt (author of *THE PRINCIPAL NAVIGATIONS: VOYAGES TRAFIQUES & DISCOVERIES OF THE ENGLISH NATION*), and Edward M. Wingfield (first president of the colony and former soldier in the Netherlands). *Id.*

The other four patentees, associated with the ports of Plymouth and Bristol, sought a license for the "second," and more northern colony. *Id.* at 24. These patentees included Raleigh Gilbert, son of Sir Humphrey Gilbert and nephew of Sir Walter Raleigh, Thomas Hannam, William Parker, and George Popham. *Id.* at 16. Most studies of the Jamestown colony do not examine the influence of these men on that colony and of those associated with them who were promoting a more northern colony.

in late 1606 to the first "King's Council of Virginia."⁴⁹ That council was to be responsible for "the superior managing and direction . . . of and for all matters that shall or may concern the government" of the colony.⁵⁰ Francis Popham had received some legal education at the Middle Temple and was a member of Parliament.⁵¹ Thomas Warre was a councilor at law.⁵²

In addition to promoting the venture, Sir John Popham probably drafted the version of the first charter, the letters patent, that almost certainly accompanied the petition for a license to plant.⁵³ He also probably helped draft any revisions. The Solicitor General, John Dodderidge, and the Attorney General, Sir Edward Coke, may have aided Popham in drafting the charter.⁵⁴ Dodderidge was appointed later in 1606 to the King's Council of Virginia.⁵⁵ The Lord Chancellor, Lord Ellesmere (Thomas Egerton), who affixed the great seal on the charter, may also have played a role in drafting it.⁵⁶ Circumstantial

49. *Id.* at 35.

50. *Id.* at 28.

51. XVI DICTIONARY OF NATIONAL BIOGRAPHY 143 (1967-1968).

52. CONWAY W. SAMS, THE CONQUEST OF VIRGINIA: THE SECOND ATTEMPT 44 (photo. reprint 1973) (1929).

53. 1 JAMESTOWN VOYAGES, *supra* note 1, at 14. Andrews writes that Popham was "doubtless, the chief author" of the patent. ANDREWS, *supra* note 4, at 89. Alexander Brown also speculates that Popham drew up the first draft of the proposed charter annexed to the petition. 1 GENESIS, *supra* note 1, at vi.

54. 1 JAMESTOWN VOYAGES, *supra* note 1, at 14. Brown states that before the perfected charter was signed and sealed, the first draft had to pass for inspection, revision, and legal drawing through "the hands of the King, the Privy Council, the Secretary of State, the Attorney-general, the Solicitor-general, the Lord Chancellor, etc." Brown adds that Coke and Dodderidge "prepared," the "charter itself." 1 GENESIS, *supra* note 1, at vi-vii. Andrews asserts that Coke and Dodderidge "undoubtedly scrutinized" the text of the charter. ANDREWS, *supra* note 4, at 85.

55. 1 JAMESTOWN VOYAGES, *supra* note 1, at 35. The charter required that the Council of Virginia be established for "the superior managing and direction . . . of . . . all matters that shall or may concern the government" of the colonies. *Id.* at 28; see also 1 SUSAN KINGSBURY, THE RECORDS OF THE VIRGINIA COMPANY OF LONDON 11 (1906).

Although the charter specified that the council have thirteen members, fourteen were initially appointed. Barbour suggests that the fourteen were equally divided between the London and West Country groups. 1 JAMESTOWN VOYAGES, *supra* note 1, at 20. For the names of those appointed to the Council, see *id.* at 35.

Fulfilling its responsibility, the Council issued "Certain Orders and Directions" late in 1606 to those traveling on the first fleet to Virginia. *Id.* at 45-48. It also issued "Instructions given by way of advice." *Id.* at 49-54.

56. Andrews implies that Egerton played this role. ANDREWS, *supra* note 4, at 85.

evidence suggests that the king's counsel, Sir Francis Bacon, may have also exerted some influence over the drafting of the charter.⁵⁷ He subscribed to the Virginia Company stock in 1609,⁵⁸ and became the second treasurer of the Company.⁵⁹ He may also have "prepared" both the second and third charters for Virginia.⁶⁰

Among both the patentees and the members of the King's Council of Virginia, experience in legal matters was not lacking. Of the eight named patentees, two had legal experience other than Thomas Hannam, Popham's grandson. Sir Thomas Gates attended Gray's Inn in 1598⁶¹ and Sir George Somers had been elected a member of Parliament in 1604.⁶² Of the members of the King's Council, at least two other members, besides Dodderidge and Popham's son, also had legal educations. These members were the recorder of the City of London,⁶³ Henry Mountague and the Lieutenant of the Tower of London, Sir William Wade. Another member of the Council, Sir William Rumney, had been an alderman and a sheriff of the City of London.⁶⁴

Egerton appears to have been interested in the colony from the start as implied in a letter from the Spanish ambassador to London, Don Pedro de Zuniga, to his King in 1609. According to Zuniga, Egerton had allegedly stated that "[w]e always thought at first we should send people there little by little, and now we see that the proper thing is to fortify ourselves all at once." 1 GENESIS, *supra* note 1, at 259; see also 1 JAMESTOWN VOYAGES, *supra* note 1, at 260.

57. See generally BAKER, *supra* note 15, at 142 (describing the powers of the king's counsel). The king's counsel was not an office that would necessarily have involved Bacon in matters involving the charters. *Id.*

58. 1 GENESIS, *supra* note 1, at 209-29. Charles Andrews declared Bacon to be "influential in securing the patent for the London and Bristol Company for the planting of Newfoundland in 1610." ANDREWS, *supra* note 4, at 72. Bacon was also actively interested in the Irish plantations, submitting plans for the settlement of the country. Cheyney, *supra* note 16, at 517.

59. SAMS, *supra* note 52, at 48.

60. 1 GENESIS, *supra* note 1, at vii. For Bacon's mature views on plantations, see the essay "On Plantations" that he published in 1625. FRANCIS BACON, *On Plantations*, in BACON'S ESSAYS AND COLOURS OF GOOD AND EVIL 139-43 (W. Aldis Wright ed., London, MacMillan 1872).

61. SAMS, *supra* note 52, at 19.

62. *Id.* at 21. Somers remained in Parliament during the time the charter was drafted. He had also been a privateer.

63. The recorder was the chief advisor and advocate of the City Corporation. The Court of Aldermen of the City elected the recorder for life. See THE OXFORD COMPANION TO LAW 1044 (David M. Walker ed., 1980).

64. As an alderman, Rumney belonged to an "oligarchic body" largely composed of

At least nine of the fourteen Council members were members of Parliament, and a tenth Council member was a former member of Parliament.⁶⁵ A majority of the Council had, therefore, had some experience in law-making.⁶⁶ The task of law-making probably attracted the more thoughtful and ambitious of them in envisioning the sort of society they desired for England. Moreover, members of Parliament typically came from the same class as justices of the peace. So even if council members had not been justices of the peace, they would have had frequent contact with such men. These men possessed "first hand knowledge of the problems of local government, and of the sort of measures which were best fitted to solve them."⁶⁷

In summary, among those involved in all initial phases of the Virginia venture of 1606 were men who were accustomed to contemplating the structure of society from the perspective of its legal institutions. Many of these same men were experienced in making and interpreting laws. Others were experts in pragmatic matters of local government. These rich resources, which earlier ventures to America had merely tapped, were mined in 1606.

II. GOVERNING THE VIRGINIA ENTERPRISE

The charter mandated a novel and short-lived bifurcated governmental structure. The charter provided that two councils,

top company traders "that essentially governed the City." BRENNER, *supra* note 9, at 89.

65. Barbour states that ten men on the Council were members of Parliament at the time of the charter, and that an eleventh was a prior member. 1 JAMESTOWN VOYAGES, *supra* note 1, at 20. Conway W. Sams names nine as members: Sir Walter Cope, Sir George Moor, Sir Francis Popham, Sir John Trevor, Sir Henry Montague, John Dodderidge, Thomas James, James Bagge and Sir William Wade. SAMS, *supra* note 52, at 43.

66. 1 JAMESTOWN VOYAGES, *supra* note 1, at 20.

67. W.S. Holdsworth, *The Elizabethan Age in English Legal History and its Results*, 12 IOWA L. REV. 321, 324 (1927); see J.H. GLEASON, *THE JUSTICES OF THE PEACE IN ENGLAND: 1558 TO 1640 A LATER EIRENARCHA* (1979) (a comprehensive work on the role of justices of the peace in England during the early 1600's); DAVID T. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS, ESSEX COUNTY, 1629-1692*, at 13-16 (1979) (briefly summarizing the role of justices of the peace in early seventeenth century England).

one in London, the other in Virginia, would jointly govern the colony. A king's council in London was to be responsible for "the superior managing and direction only of and for all matters that shall or may concern the government" of the colony.⁶⁸ For this royal council, the charter mandated thirteen members whom the King was to appoint and whom he could replace at will.⁶⁹ A council residing in the colony was to "govern and order all matters and causes which shall arise grow or happen to or within" the colony "according to such laws, ordinances, and instructions as shall be in that behalf given and signed with [the King's] hand."⁷⁰

A. *The Royal Council in London*

Because King James I could appoint to the council in London those who represented his interests, ultimate authority in colonial affairs resided with him. Therefore, he could immediately affect the activities of those organizing the venture. Perhaps for that reason many merchants among the proponents and the West Country petitioners initially opposed the royal council provision.⁷¹ However, merchants and petitioners needed royal consent to transport goods and people out of England and to import the colony's products into England. Ultimately, they agreed to accept the idea of a royal council.

Lawyers among the proponents of colonization, particularly Popham, Coke, Dodderidge and, perhaps, Bacon, were probably instrumental not only in providing a royal council, but also in providing one in an institutional context acceptable to all involved.⁷² Popham, for instance, may have supported the council as an alternative to private exploitation of North America⁷³ because he favored public companies.⁷⁴ By spreading cost and

68. 1 JAMESTOWN VOYAGES, *supra* note 1, at 28. Responsibility for the idea of the council "is far from clear." ANDREWS, *supra* note 4, at 84-85.

69. 1 JAMESTOWN VOYAGES, *supra* note 1, at 28, 35-36.

70. *Id.* at 27.

71. ANDREWS, *supra* note 4, at 84-85; 1 JAMESTOWN VOYAGES, *supra* note 1, at 18. No such council had appeared in the earlier grant to Walter Raleigh. 1 THE ROANOKE VOYAGES, *supra* note 11, at 82-89.

72. ANDREWS, *supra* note 4, at 85-86.

73. 1 JAMESTOWN VOYAGES, *supra* note 1, at 14.

74. See 1 GENESIS, *supra* note 1, at 37-42 (referring to a paper titled, *Reasons or*

risk among all investors, public companies increased the likelihood of a venture's success.⁷⁵ Such companies were less susceptible to "delays, jealousies and unwillingness to back that project which succeeded not at the first attempt."⁷⁶ Moreover, as public companies brought greater diversity of skill and industry to an enterprise, they could better adapt to circumstances and capitalize on initial gains.⁷⁷ Popham also knew that if a private venture succeeded it would provoke "the jealousy of [the] state."⁷⁸ The state would, therefore, most likely intervene when a private venture was "at the greatest height of fortune."⁷⁹ For these reasons, Popham opposed private undertakings and supported public companies.⁸⁰ The political climate at that time, however, was not fully conducive to public companies. Consequently Popham had to advance some other form of non-private involvement.⁸¹

Popham's advocating public companies indicates that he also accepted some Crown involvement in colonization. Merely in acquiring their public status, such public companies inevitably conceded the Crown a role.⁸² Moreover, the companies depended upon the king for the continued protected status of their privileges.⁸³ Consequently, the king could control these companies. But these reasons do not adequately explain why Popham and the other lawyers accepted the potentially far more intrusive royal council. Those like Coke who might other-

Motives for the Raising of a Public Stock to be Employed for the Peopling and Discovering of Such Countries). Brown believes that Popham wrote this paper and that it appeared before the granting of the charter. *Id.* at 42 n.1. This document may have been a plea to parliament to raise a public stock. *Id.* at 36. However, Brown believes that "it was written in the interest of a public company or companies, and against private enterprises." *Id.* at 42 n.1.

75. 1 GENESIS, *supra* note 1, at 37.

76. *Id.*

77. *Id.* at 40.

78. *Id.* at 38.

79. *Id.*

80. As I have already indicated, Popham's opposition to private undertakings may also have stemmed from personal motives. See *supra* text accompanying notes 44-46. Popham had other reasons for advocating public participation. 1 GENESIS, *supra* note 1, at 37-42; see *supra* note 74.

81. For a discussion of this climate, see *infra* text accompanying notes 175-93.

82. See 1 GENESIS, *supra* note 1, at 42 n.1.

83. Because of this dependence, Crown-sanctioned commercial corporations tended to support royal government. BRENNER, *supra* note 9, at 83.

wise have opposed the royal council may have accepted it because the charter provided for popular control in Virginia and provided that settlers would enjoy the same "liberties, franchises, and immunities" in the colony as they would in England.⁸⁴ Perhaps others accepted it because, as Popham's "Reasons" hints,⁸⁵ they feared a breakaway colony. If a breakaway colony materialized, investors would be denied a financial return, and England would be without a source to furnish imports on favorable terms. A breakaway colony may have seemed less likely under a royal council than under a public company. Providing the former implied that King James might assist and protect the venture. Assistance and protection were important considerations because other European powers were also interested in Virginia. Providing a royal council also counterbalanced the grant to the council in Virginia of broad powers pregnant with subversive possibilities. A popular council provision for Virginia raised the possibility of an independent "popular state."⁸⁶ Royal supervision undercut that possibility in a way that company supervision might not have. Under company supervision, private commercial concerns could dominate company supervision of the colony. Ultimately, perhaps, all accepted the institutional scheme provided in the charter because it resembled that governing affairs in England. This resemblance gave the scheme a familiar, reassuring air.

Although ultimate authority for the Virginia venture resided with King James I, he, in fact, left overall control and direction to those most interested in the venture. Proponents of the scheme and their associates dominated those whom he appointed to the council.⁸⁷ Merchants, for instance, were well represented as they numbered five of the fourteen council members.⁸⁸ The full burden of financing and advertising the adven-

84. 1 JAMESTOWN VOYAGES, *supra* note 1, at 31. Coke, for instance, with his common law predisposition and his House of Common's leanings would have protected the privileges of the colonists.

85. 1 GENESIS, *supra* note 1, ¶ 8, at 38, ¶ 11, at 39.

86. The fear of a popular state existed at the time. See 1 GENESIS, *supra* note 1, at 37-42; see also *supra* note 74.

87. For those appointed, see 1 JAMESTOWN VOYAGES, *supra* note 1, at 35.

88. *Id.* at 20. The merchants were Sir Thomas Smith, Sir William Romney, John Eldred, James Bagge and Thomas James. Smith, Romney and Eldred were associated

ture, acquiring and outfitting ships, bringing people to the colony, and supplying the colonists' provisions fell on the proponents of the plan.⁸⁹

Such a passive stance with respect to colonizing America was not unusual for English monarchs.⁹⁰ Queen Elizabeth I, for instance, had granted several patents, but she had taken no further role primarily because her finances were limited.⁹¹ For the same reason King James I did not intervene. He had neither the desire to organize nor the resources to finance or control colonization. Furthermore, he could not underwrite investment in overseas trade because his treasury was depleted.⁹² However, because of his depleted resources King James I encouraged the proposal to colonize Virginia. Having limited authority to tax land in England, he relied, as the monarchy traditionally had, upon commerce, particularly upon customs duties and imposts, as a source of income.⁹³

King James' stance, and particularly his appointments to the royal council, must have reassured risk-averse potential investors. As proponents of colonization knew, attracting investors

with the East India Company. *Id.* Since the protected status of the East India Company trade depended upon the charter that the Crown granted these merchants, King James probably assumed that he could trust these merchants.

89. Particularly in settling the colony, the proponents lacked experience. They did not begin to attract settlers until they formally incorporated a joint-stock company in 1609. In the middle of the next decade when the Company finally permitted some immediate private use of land, Virginia began to attract a far greater number of settlers. Edward P. Cheney estimated that the following numbers "left England for Virginia: 1606-1609, 300; 1609-1618, 1,500; 1618-1621, 3,570." Cheney, *supra* note 16, at 522-23.

90. CRAVEN, *supra* note 17, at 42-43. Extremely limited state participation continued to characterize the English colonial effort in America. Without the state to organize, proponents and entrepreneurs had to seek alternative instruments. English reliance on private instruments was not unusual. At the start of the seventeenth century, only the Spanish national government had the resources to develop overseas trade and colonization. ANDREWS, *supra* note 4, at 43 n.1. "The French, Dutch, Danish, and English East India companies were all private affairs. . . ." *Id.*

91. For figures on the Crown debt and a discussion of how that debt affected trading expeditions in the mid-sixteenth century, see SCOTT, *supra* note 11, at 23-33.

92. ANDREWS, *supra* note 4, at 43 n.1. For a discussion of the state of Crown finances for the five years following the accession of King James I, see SCOTT, *supra* note 11, at 133-37.

93. BRENNER, *supra* note 9, at 46. For a further discussion of taxation from 1587 to 1603, see SCOTT, *supra* note 11, at 93-97.

was likely to be a considerable problem. Far more lucrative opportunities were open to merchants.⁹⁴ Colonization necessitated that the merchants wait longer for profitable returns than if they had invested in simple commercial ventures. The London merchant community, the best source of capital for investment,⁹⁵ had traditionally been averse to colonizing because it was a high-risk, fixed-capital investment.⁹⁶ The most powerful merchants preferred to "[operate] under restricted, corporately controlled conditions designed to regulate competition, to minimize risk, and to ensure profits."⁹⁷ In fact, few merchants had participated in the 1570's and 1580's when Gilbert and Raleigh had tried to colonize.⁹⁸ Instead, the landed class led and financed both of these ventures.⁹⁹

We can deduce the general attitude of London investors toward colonization at this time by looking at the experience of the East India Company. Until 1606, East India Company investors constantly resisted advancing funds for a new venture until they had recovered on a previous one.¹⁰⁰ The merchants who backed the company did not permit it to become involved in any colonizing or plantation ventures, even though this refusal endangered their privileges.¹⁰¹ The East India Company preferred to operate in the highly profitable conditions of their established trades and avoid the risks that developing new trades generated.¹⁰²

In an effort to attract reluctant and cautious investors, the charter informed investors that the Crown had granted a virtual monopoly on trade to the patentees and their associates.¹⁰³

94. Many in England believed Ireland offered better opportunity. ANDREWS, *supra* note 4, at 72.

95. BRENNER, *supra* note 9, at 96.

96. *Id.* at 106.

97. *Id.*

98. *Id.* at 108-09.

99. *Id.* at 108.

100. *Id.* at 96.

101. *Id.* at 106.

102. *Id.*

103. The charter did not grant a pure monopoly on trade in Virginia. Instead, the treasurer of the colony was allowed to impose a levy of 2.50% on English traders and 5.00% on foreign traders plying there without permission of the patentees and their associates. 1 JAMESTOWN VOYAGES, *supra* note 1, at 30. The Crown gave the company

The appointments to the royal council could then assure investors that men with values similar to their own would dominate the royal council.¹⁰⁴

B. *The Council in Virginia*

To the Virginia Council, the charter of 1606 allocated a rare degree of self-governance. To the settlers, it offered the novel prospect of participation in government. The Council was permitted to remove and elect its thirteen members,¹⁰⁵ even though the royal council in London originally chose its initial members.¹⁰⁶ A majority of the councilors in Virginia could, "upon any just cause," remove a councilor from office and elect another in his place.¹⁰⁷

The allocation to a local council of the power to remove and elect its members was unusual in English colonial affairs. Neither preceding nor subsequent patents offered colonists control of their own affairs on such generous terms. Earlier patents, such as Walter Raleigh's of 1584, had granted proprietary rights to one individual.¹⁰⁸ Raleigh had "full and mere power and authority to correct, punish, pardon, govern and rule by . . . good discretions and policies as well in causes capital or criminal as civil."¹⁰⁹ He was empowered to devise "statutes, laws and ordinances" provided that these "may be as near as conveniently they may be agreeable to the forms of the laws, statutes, government or policy of England."¹¹⁰ Later patents gave local control to governors, who were essentially military figures with corresponding powers. For instance, the second

a seven-year break on customs subsidies and duties on items imported into the colony from England, Ireland and all its other dominions. *Id.* at 31. In return, it required one-fifth of the gold and silver and one-fifteenth of the copper found in the colony. *Id.* at 28.

104. *Id.* at 35-36.

105. *Id.* at 27.

106. *Id.* at 36.

107. *Id.* The Council in Virginia also had the authority to choose a president from among its members. *Id.* The president had the authority to cast the deciding vote "in all matters of controversy and question." *Id.* at 47.

108. See 1 THE ROANOKE VOYAGES, *supra* note 11, at 82-89.

109. *Id.* at 86.

110. *Id.* at 87.

charter, granted in 1609, abolished the Council in Virginia.¹¹¹ The second charter incorporated the Virginia Company,¹¹² appointed the initial members of the King's Council,¹¹³ and authorized it to appoint a governor for the colony.¹¹⁴ The second charter thereby replaced a participatory form of governance with a far more rigid and hierarchical one.

In contrast to these charters, the 1606 charter granted colonists, collectively, extremely broad freedom to manage their own affairs.¹¹⁵ Previously, the fate of colonists had been closely tied to that of the individual to whom the patent had been granted. To recognize the dangers of that precarious tie, potential settlers only had to recall the fate of the lost colony established under Raleigh's grant but left stranded in Roanoke twenty years earlier.¹¹⁶ Greater authority to manage their own affairs consequently aimed to reduce the settlers' sense of dependence and to promote their commitment to the venture. It aimed to forge a sense of community. But for organizers and investors in the venture, delegating authority in this manner increased the risk of not recovering their investment because it rendered a breakaway colony likely. It also increased the difficulty of ensuring that the settlers pursued the best interests of their financial backers in England.

To reduce the incentive for settlers to breakaway or pursue more self-interested policies, the enabling documents declared that settlers were to be treated under colonial law as they would be in England. They were, for instance, granted the same "liberties, franchises, and immunities" as they would enjoy in England.¹¹⁷ For example, after initially working for the common stock, the colonists could possess and inherit land as they would in England.¹¹⁸

111. GENESIS, *supra* note 1, at 234.

112. *Id.* at 229.

113. *Id.* at 231-32. Members of the company were to choose future members of that council. *Id.* at 232-33.

114. *Id.* at 233.

115. See 1 JAMESTOWN VOYAGES, *supra* note 1, at 27.

116. See 2 THE ROANOKE VOYAGES, *supra* note 11, at 593.

117. 1 JAMESTOWN VOYAGES, *supra* note 1, at 31.

118. *Id.* at 33.

Seeking other means to minimize the risks to their interests, the backers of colonization strove to create a homogeneous group of settlers.¹¹⁹ Achieving homogeneity, especially initially, in that potentially hostile environment, was an important consideration in planning the venture. The first settlers had to depend on each other to survive and would continuously be in close contact.¹²⁰ Reducing the possibility of dissension among the settlers was essential if they were efficiently to establish a colony.¹²¹ Dissension is less likely in a homogeneous group whose members subscribe to common values and aspirations. Moreover, a homogeneous group has a better chance of developing and enforcing effective and informal means for resolving disputes because the group would share many assumptions about life and goals.

To forge such a homogeneous group, the enabling documents limited the right to travel to Virginia.¹²² The patentees had the right to transport to Virginia as many English subjects as were willing to go.¹²³ However, to prevent a breakaway colony,

119. The first settlers, all male, included a preacher, gentlemen, carpenters, bricklayers, sailors (to remain in Virginia), laborers, boys, a drummer, a blacksmith, a tailor, a barber, and two surgeons.

For a list of the first planters, with a contemporaneous description of their social standing or occupation, see SAMS, *supra* note 52, at 821-23; JOHN SMITH, THE GENERAL HISTORY OF VIRGINIA, NEW ENGLAND AND THE SUMMER ISLES (1624), reprinted in 2 THE COMPLETE WORKS OF CAPTAIN JOHN SMITH 140-42 (Phillip L. Barbour ed., 1986); THOMAS STUDLEY, THE PROCEEDINGS OF THE ENGLISH COLONY IN VIRGINIA (1612), reprinted in 1 THE COMPLETE WORKS OF CAPTAIN JOHN SMITH 207-09 (Phillip L. Barbour ed., 1986).

Of the 67 names that Studley provides, he labels 29 "gentlemen." These do not include the seven councillors who would otherwise fall under the title. Among the gentlemen Studley includes, one, Thomas Wotton, as a surgeon. Interestingly, one of the "labourers," William Wilkinson, is also described as a surgeon. STUDLEY, *supra*, at 208-09.

Craven remarks that "[w]hatever that designation [gentlemen] may have implied regarding their social standing at home, it undoubtedly indicates some difference in the kind of employment these men expected in the colony." CRAVEN, *supra* note 17, at 71.

120. For a brief discussion of the relationship between successful participatory government and the homogeneity of a group of concurrent land owners, see Ellickson, *supra* note 2, at 1348-60.

121. For instance, a Catholic presence in the colony might have contributed to dissension. See *infra* notes 126-28 and accompanying text.

122. 1 JAMESTOWN VOYAGES, *supra* note 1, at 29.

123. *Id.*

the Crown reserved and exercised the right to restrain those who refused to take the oaths of allegiance and supremacy.¹²⁴ In reciting the oaths before leaving England, settlers acknowledged and submitted to the authority of the Crown in the colony as a condition of traveling to Virginia. The ritual aimed to reinforce the link to England and to make breaking away psychologically difficult.¹²⁵

As the oath of supremacy denounced the Pope's right to remove kings, Catholics were specifically excluded from the colony. To ensure that no Catholics would travel, all emigrating to Virginia were required to produce "a certificate from the Minister of the Parish where they last dwelt and from two Justices of the Peace, or the Mayor of their town, of their conversation and conformity to the orders and discipline of the Church of England, that is, proof that they were Protestants and not Roman Catholics."¹²⁶ The presence of Catholics in the colony might prove divisive. In England, anti-Catholic sentiment was rampant because some leading Catholics were implicated in the Guy Fawkes affair, a plot to blow up the houses of parliament.¹²⁷ In January 1606, Guy Fawkes was executed after being convicted of high treason before Sir John Popham.¹²⁸ Because of their treatment in England, Catholics in the colony might have an incentive to collaborate with the Spanish and sever the link with England. Barring Catholics from the colony, therefore, protected the investors' interests.

The documents further curtailed the right to "abide and inhabit" in Virginia.¹²⁹ Both the patentees and the "colony" had

124. *Id.* The "Instructions" restrained from abiding and remaining in the colony those who refused to take "not only the usual oath of obedience to us, our heirs and successors, but also the oath which is limited in the last session of Parliament held at Westminster, in the fourth year of our reign, for their due obedience unto us, our heirs and successors." *Id.* at 42-43.

125. *See, e.g., id.* at 43.

126. SAMS, *supra* note 52, at 83-84. The second charter again required the Oath of Supremacy of all going to Virginia. 1 GENESIS, *supra* note 1, at 236-37.

The principle that no Catholics should live in Virginia was "maintained in more or less vigor for the first century" of the colony's existence. SAMS, *supra* note 52, at 83.

127. SAMS, *supra* note 52, at 82, 109.

128. *Id.* at 109.

129. 1 JAMESTOWN VOYAGES, *supra* note 1, at 29.

the authority to grant a license to those seeking to inhabit the area.¹³⁰ Both groups could "expulse, repel and resist as well by sea as by land by all ways and means whatsoever" those without license to inhabit.¹³¹ Colonists who attempted the "hurt, detriment or annoyance" of the colony could be expelled.¹³² Those colonists who wanted to return home had to get permission.¹³³

To ensure that dissension in Virginia would not distress investors in England, the backers took further steps to bolster the image of homogeneity. The London Council imposed upon the council in Virginia the task of providing "a perfect relation . . . of all that is done."¹³⁴ The council was to "suffer no man to . . . write any letter of any thing that may discourage others."¹³⁵ In other words, events were to conform to expectations.

Also to protect the investors' expectations during the dangerous initial period, the London Council was granted the authority to appoint the first council in Virginia. The council used its authority to select a group of seven councilors who were bound to reassure investors.¹³⁶ Five councilors had military experience and had commanded men. Captain John Smith was probably chosen because of his experience in exotic places. Captains Christopher Newport and Bartholomew Gosnold, respectively admiral and vice-admiral of the first fleet to Virginia, had privateering experience in the Atlantic.¹³⁷ Captain John

130. *Id.*

131. *Id.*

132. *Id.* at 30.

133. *Id.* at 53.

134. *Id.*

135. *Id.* at 53-54.

136. The Council for Virginia was selected before the expedition set sail. Its composition was to be revealed "within four and twenty hours next after the said ships shall arrive upon the said coast of Virginia and not before." *Id.* at 46. We do not know why the London Council selected only seven of thirteen councillors. Presumably, it intended that those selected would choose the remaining members upon landing in Virginia. Given those whom the London Council did choose (particularly a named patentee and the admiral and vice-admiral of the fleet to Virginia), anyone they picked would clearly have been subordinate.

137. Thad W. Tate, *Bibliographical Directory to PHILIP L. BARBOUR 1 THE COMPLETE WORKS OF CAPTAIN JOHN SMITH* xxvii, xxxvi (Philip L. Barbour ed., 1986).

Ratcliffe, of whom we know little, was master of one of the three ships to make the voyage. The fifth member of this group, John Martin, was closer in background to the remaining appointees and bridged the two groups. Martin was the son of Sir Richard Martin, the Master of the Mint and Lord Mayor of London, and the brother-in-law of Sir Julius Caesar, the Master of the Rolls.¹³⁸ John Martin originally trained as a lawyer, but opted instead to pursue a military career.¹³⁹ The remaining two appointees directly represented the interests of the patentees. Edward Maria Wingfield was a named patentee.¹⁴⁰ He "came from a family long noted for distinguished public service."¹⁴¹ The last member, George Kendall, was a relative of the Earl of Pembroke and of Sir Edwin Sandys, an important parliamentary leader.¹⁴²

C. *The Municipal Corporation as a Model for Governing the Colony*

Did proponents of colonization favor participatory government solely because a homogeneous group granted self-governing powers could better respond to investors' interests? Experienced businessmen seeking stricter control and seeking to minimize administrative and transactional costs might have preferred a

138. *Id.* at xl.

139. SAMS, *supra* note 52, at 29.

140. 1 JAMESTOWN VOYAGES, *supra* note 1, at 24.

141. X DICTIONARY OF AMERICAN BIOGRAPHY 388 (1967-1968).

142. Barbour, *supra* note 137, at lxvii. Being from the upper reaches of the social hierarchy did not guarantee a place on the Council in Virginia. (For those appointed to the Council, see ANDREWS, *supra* note 4, at 99). Nor did a legal education guarantee a place on the Council. The London Council notably omitted George Percy from the Virginia Council. As the younger brother of the ninth Earl of Northumberland, Percy was a member of one of the great houses of England. 1 JAMESTOWN VOYAGES, *supra* note 1, at 128. Likewise the Council did not appoint Captain Gabriel Archer who had legal training. *Id.* at 3, 126.

Men such as Percy and Archer might have anticipated initial membership. But even on landing in Virginia, Percy and Archer were not added immediately to the Council. Those originally selected did not elect anyone to fulfill the mandated thirteen members on the Council. 1 TRAVELS AND WORKS OF CAPTAIN JOHN SMITH 91 (Edward Arber ed., 1910). Failure to appoint further members at that time did not seem to generate much controversy. Later, however, failing to replace dead or removed members caused considerable dissension. See, e.g., for instance, Edward M. Wingfield, *Discourse*, in 1 JAMESTOWN VOYAGES, *supra* note 1, at 218.

more hierarchical operation. The public company that many of the chief proponents advocated for managing the Virginia venture may have better addressed these economic concerns. A public company would have most likely relied upon a representative, such as a governor, to manage its affairs in the colony. But a public company was not incorporated in 1606. Proponents opted instead for a more participatory structure, in part, for the reasons discussed above. In addition, they also eschewed incorporating because of the political climate in England.¹⁴³ Despite the political climate, the proponents, by choosing a council, managed to acquire greater privileges than incorporated companies had traditionally acquired. As long as they could influence the composition of the council and control access to the colony, proponents may have believed that they were acquiring tighter control of colonial affairs.

The legal means of achieving greater privilege and control was to consider the "colony" as a corporate entity having the legal status typically ascribed to an incorporated municipality, a borough.¹⁴⁴ But this character of the colony has eluded many historians. Typically scholars have focused on the commercial forces propelling colonization and, more particularly, on the role of the Virginia Company.¹⁴⁵ Consequently, historians have de-

143. See text *infra* accompanying notes 175-80.

144. For my discussion of incorporation, I have drawn upon the following texts: JOSEPH ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (Armo Press 1972) (1882); SCOTT, *supra* note 11, at 441-42; Laski, *supra* note 14, at 561; Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105 (1888).

According to Samuel Williston, "the first English book devoted wholly to the subject of corporations" was THE LAW OF CORPORATIONS, published anonymously in 1702. Williston, *supra* at 105, 110 n.2. Before the 1702 publication one has to rely on what can be extracted from such primary sources as the charters and from other sources such as law cases. Fortunately for purposes of this discussion, Coke in the 1612 case of *Sutton's Hospital* enumerated the following as

the essence of a corporation: 1st, Lawful authority of incorporation, and that may be by four means, viz., . . . by the King's charter. . . . The 2d . . . are persons to be incorporated. . . . 3d, A name by which they are incorporated. 4th, Of a place, for without a place no incorporation can be made. 5th, By words sufficient in law, but not restrained to any certain, legal, and prescript forms of words.

Williston, *supra* at 113 (citations omitted).

145. That historians would have this focus is not surprising. Commercial developments were generally so exciting at that time that Jamestown was just one further

scribed the first Jamestown colony in terms of that company's relationship to the colony.¹⁴⁶ For instance, Wesley F. Craven, an eminent historian of the Southern colonial period, wrote that the charter "recognized" the "London Company" as a "company of adventurers" that shared dual authority with the royal council over the colony's functions.¹⁴⁷ Alexander Brown, who collected most of the original source material on the Jamestown colony, asserted that the first charter "incorporated . . . two companies for planting colonies in South and North Virginia."¹⁴⁸ Echoing Brown, Charles Andrews agreed that the charter "incorporat[ed] two Virginia Companies, one for London and one for Plymouth."¹⁴⁹

These historians have mischaracterized the legal nature of the "colony." They have implied that a proprietary colony existed from 1606.¹⁵⁰ Perhaps because the Virginia Company played such an important role after 1609, historians have been apt to link "company" when it appears in the 1606 documents with the Virginia Company. To a degree, the link is justified.

instance of those developments.

146. I argue below that the Virginia Company was in 1606 nothing more than a loose assemblage of men interested in the venture.

147. CRAVEN, *supra* note 17, at 61-63.

148. 1 GENESIS, *supra* note 1, at 52 n.1.

149. ANDREWS, *supra* note 4, at 82-83. Not all historians, however, asserted that the Virginia Company was incorporated in 1606. In his treatise on joint-stock companies, William Scott wrote that the Virginia Company was "first formally constituted by the second charter." SCOTT, *supra* note 11, at 250. Scott declared, however, that "a corporate character had been assumed three years earlier, as is shown by the opening of the first court book on January 8th, 1606/7." *Id.* More recently, Phillip Barbour described the broad framework for the venture as one in which "[i]nvestment was solely by individuals, in the corporate form of joint-stock companies, one for each colony, to be privately managed under the supervision of a council in London . . . directly responsible to the Crown." 1 JAMESTOWN VOYAGES, *supra* note 1, at 15. Both of these historians were discussing the role of the "company" in managing the commercial, or private, aspect of the venture. Neither was discussing its role in governing the colony between 1606 and 1609.

Robert Brenner's detailed discussion of the role of the Virginia Company in colonial development begins with its incorporation in 1609. BRENNER, *supra* note 9, at 93. Brenner very briefly alludes to the company's earlier existence. *Id.* at 93-94.

150. The charter of 1609 created a proprietary colony. It declared that it was "erecting" the company for Virginia into a "corporation." 1 GENESIS, *supra* note 1, at 208. That body, it stated, "shall be known, called and incorporated by the name of, *The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony in Virginia.*" *Id.* at 229.

The commercial figures who were major influences before the Company incorporated in 1609 continued to play major roles afterwards. From 1606 to 1609, these men formed an unincorporated company to organize commercial matters in conjunction with a local council. After 1609, these same men, having incorporated their company, organized matters without the aid of that council. They centralized power in order to conduct affairs more efficiently. From an analytical perspective that focuses on the role of important commercial players, not much appears to have changed after the second charter. From this perspective, the precise character of the company and of the colony in the original documents could interest only legal archaeologists sifting through technical documents to determine a precise definition. But to dismiss the legal character of the company and the colony in 1606 as an arcane matter understates how legal institutions shaped the development of this country.¹⁵¹

1. The Meaning of "Company"

In the initiating documents, "company" and especially "colony" had meanings intended to influence the Virginia venture in the interests of investors. The term "company," which appeared twice in the charter,¹⁵² directly addressed the private commercial aspect of the venture. Nothing in the "Letters Patent" indicated that "company" referred to anything other than the patentees and their "associates." These groups would combine, under the aegis of the colony, to engage in the pursuit of a common end.¹⁵³ The end was trade, as the "Instructions" later clarified.¹⁵⁴ The "Instructions" also required the "adventurers" to

151. A reciprocal relationship seems to exist between the legal system and the larger social system in which it is embedded. Social and economic forces influence the nature and development of the law and its institutions. But the law and its institutions also influence the nature, the direction and the pace of social change. Here I emphasize that latter influence because the history of Colonial Virginia has ignored it.

152. 1 JAMESTOWN VOYAGES, *supra* note 1, at 24, 29.

153. *Id.* To eight named individuals and "divers others" of the King's subjects who were "desirous to divide themselves into two several colonies and companies," the Charter granted a license. *Id.* at 24. This language indicates that the King did not recognize a company as an existing legal entity at the time.

154. *Id.* at 42.

"elect and choose out of themselves one or more companies" to "take charge of the trade" to and from the colony.¹⁵⁵ The enabling documents, consequently, permitted some limited competition among the backers of the colony. Efficiency in transporting goods to and from the colony and in marketing colonial imports in England would result in economic benefit for those investing in a particular company. Furthermore, future investors would then be attracted to that company. Moreover, competition among companies would reduce prices in England for items imported from the colony and stimulate demand. The venture could thereby deflect many of the criticisms that granting a monopoly to an incorporated company would generate. The limited competition scheme could counter parliamentary critics who argued that monopolies pursued their own economic interests at the expense of the public interest.¹⁵⁶

The "company" of the first charter was not a legal corporate entity.¹⁵⁷ The charter granted practically none of the normal privileges of a corporation to the patentees and their associates.¹⁵⁸ Furthermore, unlike a charter of incorporation, the

155. *Id.*

Our will and pleasure is, and we do hereby ordain, that the adventurers of the said first colony, and plantation shall and may during the said term of five years elect and choose out of themselves one or more companies, each company consisting of three persons at the least, who shall be resident at or near London, or such other place, and places, as the council of the colony for the time being, or the most part of them, during the said five years, shall think fit, who shall from time to time take charge of the trade . . . and other things, which shall be sent from thence, to the company of the same colony or plantation in Virginia, and likewise of all such wares, goods, and merchandises, as shall be brought from the said colony, or plantation, unto the said place within our realm of England, and of all things concerning the managing of the affairs and profits concerning the adventurers of that company, which shall so pass out of or come into that place or port.

Id.

156. For further discussion of this matter, see *infra* text accompanying notes 175-80.

157. An unincorporated company lacked coercive authority to enforce its rules and regulations. It could neither transfer privileges when its members died nor transfer land to successors without making frequent and inconvenient conveyances.

158. The charter did permit the patentees and their associates—if they had a company—to transport people to Virginia. 1 JAMESTOWN VOYAGES, *supra* note 1, at 29. Contrast the first charter with the second charter: The latter declared that those it names and all others who later join them "shall be one body or commonalty perpetu-

charter specifically did not denominate any company as a legal being.¹⁵⁹

2. The Meaning of "Colony"

If "company" might be taken to suggest the Virginia Company, "colony" might seem initially to suggest either a quasi-geographical entity or an administrative area. But the drafters thought of the "colony" as having a corporate personality,¹⁶⁰ similar to an incorporated municipality. Certainly, the charter did not expressly incorporate the colony. However, precise words of incorporation were not deemed necessary at the time.¹⁶¹ Charters to inhabitants of towns did not always need a clause of incorporation for the towns to be considered incorporated.¹⁶² The charter granted most of the privileges and immunities associated with boroughs to the "colony."¹⁶³ Many have misinterpreted these privileges as having been granted in 1606 to the "company." The charter authorized the colony to act through its council to "govern and order all matters and causes which shall arise, grow or happen to or within" the colony.¹⁶⁴

al, and shall have perpetual succession, and one common seal." GENESIS, *supra* note 1, at 229.

159. In defining a corporation, Kyd, in his 1793 treatise on corporation law, states that it "is a collection of many individuals united in one body, under a *special denomination*." ANGELL & AMES, *supra* note 144, at 1.

At the time, trading corporations typically had lengthy official titles. These titles included "a specified class of persons, formed to carry on a certain enterprize, and to this a local designation was added, either as applying to the persons or to the object they had in view." SCOTT, *supra* note 11, at 150. For instance, the title of the joint-stock company incorporated in 1609 was *The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony in Virginia*. 1 GENESIS, *supra* note 1, at 208, 229.

However, not all official names included all of these elements. The matter is not of purely academic interest. A body incorporated might arguably have ceased to exist if the local designation mentioned in its title was itself incorporated into a larger body.

160. I borrow the phrases "administrative area" and "corporate personality" from Laski, *supra* note 14, at 561, 567.

161. ANGELL & AMES, *supra* note 144, at 45.

162. *Id.* at 16.

163. For a general discussion of privileges and immunities granted boroughs see SUSAN REYNOLDS, AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS, 91-181 (1977).

164. 1 JAMESTOWN VOYAGES, *supra* note 1, at 27.

To enable the colony to govern itself, the Crown subsequently issued "Instructions."¹⁶⁵ This instrument authorized the council and its president to "constitute, make and ordain such constitutions, ordinances and officers, for the better order, government and peace of the people" of their colony.¹⁶⁶ The colony thereby had the juridical authority, necessary to boroughs and private corporations, to enable them to execute their functions. The Council and the president had full judicial "power and authority to hear and determine all and every . . . [offense],"¹⁶⁷ and "wrongs, trespasses, offenses, and misdemeanours."¹⁶⁸ They could inflict corporal punishment including death, order imprisonment and fines, and award damages.¹⁶⁹ And, as if to reinforce the colony's authority, the charter granted the council a seal (the usual though not necessary mode of indicating a body's collective assent).¹⁷⁰ Like boroughs, the colony was subject to the superior authority of the Crown. Its Council had to conduct affairs "according to such laws, ordinances and Instructions as shall be in that behalf given and signed with our hand or sign manual and pass under the privy seal of our realm."¹⁷¹

The charter of 1606 granted to the "first colony," and not to a company, other attributes of an incorporated entity. It specifically named a group as grantees. Such a denomination usually indicated the incorporation of a body. Gates, Sumers, Hakluyt, Wingfield and "all such others as are or shall be joined unto them of that colony," the letters patent declared, "shall be called *the first colony*."¹⁷² By entitling unnamed parties, the

165. The "Instructions" were to be read as if incorporated into the charter. It had declared that the "Instructions" would subsequently be published. *Id.*

166. *Id.* at 43.

167. *Id.* at 38.

168. *Id.* at 39.

169. *Id.*

170. *Id.* at 27. The matter of a seal became an issue in 1623. Sir Thomas Smythe was accused of not having had a public seal made for the Virginia Company. Until 1619, the company apparently used the seal made for the King's Council of Virginia. 1 GENESIS, *supra* note 1, at 57 n.1.

171. 1 JAMESTOWN VOYAGES, *supra* note 1, at 27. Scott notes that the charter is "wanting in precision, and is to be construed in close relation to the "Instructions." 2 WILLIAM R. SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1740 at 246 (1912) [hereinafter 2 SCOTT].

172. 1 JAMESTOWN VOYAGES, *supra* note 1, at 25 (emphasis added).

charter also suggests another characteristic that attaches to an incorporated legal being—perpetual succession.¹⁷³ A grant only to named patentees expired upon the deaths of those patentees. The “first colony” to which the named patentees belonged would be unable to transfer privileges and immunities to others. Nor, for instance, without frequent and inconvenient conveyances would the patentees be able to transfer land that they had received as an unincorporated body to successors.¹⁷⁴ Furthermore, limiting the grant to named patentees would have made financing the Virginia venture more difficult.

3. The Influence of the Monopoly Controversy on the Enabling Documents

Why did the proponents of colonization model the colony upon a municipal corporation? Why, in 1606, did they not incorporate as the Virginia Company? To understand the strategy that the charter implemented, one needs to place it within the context of the great monopoly controversy of the period.¹⁷⁵ The charter was granted when the theory of English corporations was striving to reconcile an older, essentially medieval, conception of the legal status of a corporation with the emerging conception.¹⁷⁶ The older theory regarded corporate status as a form of property. A corporation was entitled to certain monopolistic and exclusionary rights that medieval theory held to be inherent in property. The emerging concept did not rely on the

173. For a brief discussion of perpetual succession, see ANGELL & AMES, *supra* note 144, at 6-8.

174. The charter granted “all the lands, woods” and so on in a specified area between latitudes thirty-four and forty degrees north to the “first colony.” 1 JAMESTOWN VOYAGES, *supra* note 1, at 25-26. The King also “grant[ed] and agree[d] to and with the . . . first colony” that he and his successors “upon petition in that behalf to be made shall . . . give and grant unto such persons, their heirs and assignees as the council of that colony or the most part of them shall for that purpose nominate and assign all the lands, tenements and hereditaments which shall be within the precincts limited for that colony.” *Id.* at 33.

175. See generally SCOTT, *supra* note 11, at 105-28; William L. Letwin, *The English Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954) (both sources presenting background for the monopoly controversy).

176. For these two concepts, I am indebted to Morton Horwitz's discussion of their role in eighteenth-century English legal theory. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 109-10 (1992).

property theory to justify granting monopolistic and exclusionary privileges to a corporation. Instead, it emphasized the public character of those privileges. Consequently, the theory defined corporate status as the limited grant of a public privilege.

For several decades before the drafting of the charter, critics had stridently attacked chartered monopoly companies.¹⁷⁷ Critics, especially in Parliament, charged Queen Elizabeth I with freely dispensing charters to monopoly companies.¹⁷⁸ Critics objected primarily to the arbitrary "political power which the Crown exercised in granting" monopolies.¹⁷⁹ Additionally, they objected to the economic effects of monopolies. Parliamentary critics accused monopoly companies of vigorously pursuing profits for their members and ignoring the public purpose of managing the trade in which they were engaged for the benefit of the public.¹⁸⁰ In that climate, refusing a charter to the company seemed a prudent policy to both the King and the proponents of colonization.

From the King's perspective, the structure chosen was not as likely to provoke a dispute over whether the King or Parliament had the authority to grant charters.¹⁸¹ Parliament was unlikely to raise the issue of prerogative on the highly speculative matter of possible trade with a largely unknown place.¹⁸² From the perspective of backers of the venture, the structure,

177. For a discussion of an even earlier instance of such criticisms, see Laski, *supra* note 14, at 561, 587.

178. Letwin, *supra* note 175, at 363.

179. *Id.* at 359.

180. For the role of the early corporation as a "public agency," see Williston, *supra* note 144, at 110-11.

181. The notion that authority rested with parliament had been established by 1605-1606, when the first charter was being drafted. In 1603, the "Case of Monopolies," *Darcy v. Allen* established the principle that a monopoly granted by royal patent would be invalid. Letwin, *supra* note 175, at 363 (citing *Darcy v. Allen*, 74 Eng. Rep. 1131 (K.B. 1602)); see also *id.* at 359; SCOTT, *supra* note 11, at 105-06. In his *Introduction to English Legal History*, J.H. Baker says that *Darcy* was decided in 1602—the difference may be in the use of old or new style of dating. BAKER, *supra* note 15, at 512-13.

182. Because the venture was so speculative, many members of Parliament probably would not have objected to a monopoly for a limited time. They regarded opening up a new area of foreign trade "as resembling an invention, and as such, entitled to a monopoly for a number of years." SCOTT, *supra* note 11, at 124.

consisting of a local council in Virginia and limited competition among companies, enabled them to avoid in England the charge of narrow self-interest. When the privileges of mere trading monopolies were under attack, the charter could not have granted broad concessions to a company motivated by greater ambitions than trade without generating considerable controversy.

Ironically, the structure that the charter provided applied more broadly than it would have had it merely been incorporated as a company. In contrast to an incorporated monopoly, the charter directly affected more people and activities. Just as charters had enabled municipal corporations to exercise "a minute supervision over the inhabitants" of towns,¹⁸³ the first charter permitted the colony to exercise a similar control. Even a casual reading of the charter and the "Instructions" reveals the means.¹⁸⁴ The constitution, laws, and ordinances of that colony bound all individuals entering it.¹⁸⁵ However, the by-laws of a company would have bound only its members. In contrast, the grant of a monopoly would have directly affected those nonmembers seeking to engage in the same activity for which the company had incorporated. A traditional incorporated company would not have had the authority to bar persons not engaging in the protected activity from the territory. Nor would it have had authority to control other activities. On the other hand, the enabling documents provided patentees and their associates in the "first colony" with broad authority to control all persons and activities in Virginia. They could control access to the colony, and if they effectively exercised their right to choose the first council,¹⁸⁶ they could presumably control subsequent councils. Not incorporating a monopoly company would seem to have denied proponents a major lure in attracting investors. A monopoly on trade with the colony was, of course, the major attraction. Nevertheless, the charter indirectly obtained the economic protection that a monopoly would have directly secured. A monopoly could have prohibited all people

183. Williston, *supra* note 144, at 108.

184. See 1 JAMESTOWN VOYAGES, *supra* note 1, at 38-39, 43.

185. *Id.* at 43.

186. *Id.* at 29-30.

not of the colony from trading with the colony. But the charter did not expressly prohibit anyone from trading there. Instead it permitted the colony to tax indefinitely the value of goods that others "trafficked, bought or sold" within its "limits and precincts."¹⁸⁷ As a barrier to entry into trade with the colony, the tax could effectively create a monopoly. Essentially, the tax would protect the investors who would bear the initial risk by reassuring them that other investors could not subsequently capture the trade previously developed.

As described above, the documents defused the charged issue of monopolies. At the same time, by empowering the colony as though it were a municipal borough, the documents provided the backers of colonization with greater powers and privileges than those available through incorporation. This achievement reveals the influence and skill of the legal minds present among the colony's proponents and the documents' drafters. Sir John Popham, Edward Coke, and other legal figures certainly understood the legal status of municipal boroughs which had been around, at least in inchoate form, since Anglo-Saxon times.¹⁸⁸ Popham and Coke were also experts in the monopoly controversy. Popham knew the principle established in *Darcy v. Allen*¹⁸⁹ that a royal grant of a monopoly was generally invalid.¹⁹⁰ As Lord Chief Justice, Popham had been a member of the Court of the King's Bench that had decided *Darcy*.¹⁹¹ Edward Coke opposed monopolies because he believed they were contrary to the public good. In *Davenant v. Hurdis*,¹⁹² Coke argued that monopolies raised prices, caused unemployment, and burdened the relief system.¹⁹³ Coke's arguments offer an explanation as to why the "Instructions" permitted several companies to compete in trading. As a champion of parliament's

187. *Id.* at 30.

188. See REYNOLDS, *supra* note 163, at 92-98.

189. *Darcy v. Allen*, 74 Eng. Rep. 1131 (K.B. 1602).

190. *Id.* at 1137.

191. *Id.* at 1131. The court unanimously held that a royal patent granting a monopoly was invalid. *Id.* at 1137. Monopolies, the court reasoned, restrain trade and lead to increased prices and reduced quality. *Id.* at 1138.

192. *Davenant v. Hurdis*, 72 Eng. Rep. 769 (K.B. 1599).

193. *Id.* at 770-71. See also Coke's transaction, SIR EDWARD COKE, *The Case of Monopolies*, in VI THE REPORTS OF SIR EDWARD COKE, 85, 86-87 (George Wilson trans. 1777).

cause, Coke also favored a participatory council rather than a governorship.

III. THE STRUCTURE OF PROPERTY RELATIONS

Any scheme for governing Virginia could never be implemented without substantial capital from investors. Without a large initial contribution, proponents would not have been able to recruit settlers and transport them to Virginia. Moreover, they would have had to rely upon investors for a considerable period until the colony was secure. But in Virginia's uncertain circumstances, investors had little prospect of immediate return. Consequently, protecting investors' interests drove the planning process. The needs of settlers were subordinate.¹⁹⁴ So after ad-

194. In a recent article, Robert Ellickson asserted that "the settlers declined to establish private property" in order to distribute risks. Ellickson, *supra* note 2, at 1315, 1341. I agree that dispersing risk explains the "impetus for the initial collectivization of land at [Jamestown]." *Id.* But I do not agree that it was the settlers who decided to adopt a communal property system. As this article shows, the planners imposed that scheme upon settlers for the benefit of investors. Advocates of colonization adopted the joint stock scheme, primarily to alleviate the concerns of a merchant class that did not want to invest in colonization.

To argue that the settlers proposed the scheme implemented at Jamestown makes no sense. That scheme would have deterred most potential settlers. It provided little incentive to go to Virginia. It offered settlers for their first five years in the colony the guarantee of food and shelter. Anything they produced beyond that amount accrued to the investors. If the settlers survived the deadly conditions that Ellickson described, *id.* at 1336, 1342, and if the council nominated them, they might be granted land at the end of those five years. 1 JAMESTOWN VOYAGES, *supra* note 1, at 33. In addition, settlers could also have nothing material to show for their labor. A potential settler evaluating the risks in going to Virginia would quickly calculate that were he to go, he should contribute only enough labor to survive. He would gain nothing by contributing more. In fact, settlers who did go in the first voyage contributed only what they needed to survive. See generally 1-2 JAMESTOWN VOYAGES, *supra* note 1 (recounting some of the first settlers' stories).

Furthermore, the social composition of the first settlers indicates that the temporary communal property scheme discouraged potential settlers. The first colonists included a disproportionate number of gentlemen. For lists of the first planters, with a contemporaneous description of their social standing or occupation, see SAMS, *supra* note 52 at 809-13; SMITH, *supra* note 119, at 140-42; STUDLEY, *supra* note 119, at 207-09 (29 of the 67 people were labeled "gentlemen"). Some of these gentlemen brought servants in an attempt to insulate them from risk. Consequently, the scheme probably did not discourage these "gentlemen" to the extent that it would appear to have discouraged more suitable potential settlers. See discussion *infra* part III.B.d. (discussing other factors discouraging settlers).

dress how to govern the colony in the best interests of the investors, the proponents next sought to structure property relations so that investors would receive as expeditious a return on their contributions as possible.¹⁹⁵ To attain that goal, proponents examined forms of organizing foreign trade ventures because many of the circumstances surrounding trade and colonization were similar. They considered individual ventures, partnerships, regulated companies, and joint-stock companies.¹⁹⁶ Colonizing was more complex than trading because it required more capital, involved more risks, and demanded greater commitment and more intellectual resources. Colonization required founding a society. The planners' ultimate choice determined not only property relations, but also labor and external relations with both investors and Indians. That choice also defined crime in each colony. In short, in selecting among various forms of organization, the planners were selecting among different conceptions of the appropriate society for Virginia.

Had settlers determined the property scheme, they would have protected their own interests. At a lower cost, settlers could have achieved all the benefits that Ellickson said motivated them to choose the communal scheme. Ellickson, *supra* note 2, at 1342. For instance, a system granting land to individual settlers could have efficiently addressed the settlers' concerns. In return for land, settlers would remit a portion of their profits to the cape merchant. He, in turn, would distribute a portion to investors. But the cape merchant would also retain a portion to guarantee settlers the means of survival should their health fail, their plot of land be infertile, or their farming methods be inadequate. Furthermore, the settlers could have postponed allocating land until they had fortified themselves, thereby exploiting the returns to scale created by public works.

Finally, I am not convinced that Ellickson can rely upon the communal property system adopted in Jamestown for historical evidence to ground his more theoretical conclusions about property in land. At Jamestown, communal property was imposed upon settlers who were forced to implement it. The system provided little incentive to work. It was intended to be only temporary, which ultimately undermined the settlers' commitment to it. The evidence indicates that the settlers were never committed to such a scheme.

195. In what would strike one today as extraordinary commingling, the initiating documents address matters of both public and private law. These documents, like others of the earliest colonial period, set "a precedent for merging private and public law which would continue in the colonies long after the charters themselves had been superseded by other legal arrangements." PETER C. HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 13 (1992).

196. This discussion relies on ANDREWS, *supra* note 4, at 39-45; HOLDERNESS, *supra* note 14, at 132-39; SCOTT, *supra* note 11, at 15-63, 105-65.

A. *Private Funding of Colonization*

For two reasons those advocating colonization probably considered relying on individuals who would act singly or in small partnerships. First, the English had the most experience with that model. Since 1500, merchants had conducted most English foreign trade.¹⁹⁷ Moreover, in situations similar to Virginia, English mercantile interests relied upon individual enterprise. To gain a foothold in Africa during the mid-sixteenth century, those interests had turned to individual merchants.¹⁹⁸ Because individual expeditions were least likely to antagonize the Portuguese already ensconced in Africa, merchants did not seek a charter.¹⁹⁹ Once they had gained access, the merchants formally organized trade.²⁰⁰ Second, proposals to undertake the private colonization of Virginia circulated in 1605.²⁰¹ Sir John Zouche drafted the "Articles of Agreement" with Captain George Weymouth to send two hundred men to settle Virginia.²⁰² Zouche's view of property relations was essentially feudal. He intended to hold land as "Lord Paramount," or chief feudal proprietor, a title traditionally bestowed in England on the Crown.²⁰³ He also intended to be sole proprietor.²⁰⁴ Unlike earlier patentees, Zouche apparently did not intend to grant

197. Merchants "acting on their own account, singly or in small partnerships, unprotected by any form of limited liability" conducted most English foreign trade between 1500 and 1750. HOLDERNESS, *supra* note 14, at 132. Merchants "resorted together in regular trade in *ad hoc* associations for a particular voyage, but they remained accountable as individuals to their creditors." *Id.* at 132. Incorporating was very expensive. ANDREWS, *supra* note 4, at 42.

198. SCOTT, *supra* note 11, at 21.

199. *Id.*

200. *Id.*

201. See KINGSBURY, *supra* note 55, at 17. The proposals were those of Zouche and of the Earl of Southampton.

202. See 1 GENESIS, *supra* note 1, at 33-35.

203. *Id.* at 34.

204. Until 1606, proprietary grants had been the practice for North America. Such had been the grants to Sir Humphrey Gilbert in 1578 and Sir Walter Raleigh in 1584. The *Letters Patent* to Walter Raleigh stated: "Walter Raleigh, his heirs and assigns and every of them shall have, hold, occupy and enjoy . . . forever all the soil of all such lands, countries and territories so to be discovered or possessed . . . with full power to dispose thereof and of every parte in fee simple or otherwise according to the laws of England as near as the same conveniently may be. . . ." 1 THE ROANOKE VOYAGES, *supra* note 11, at 83-84.

parcels of land to major backers of his scheme to hold independently.²⁰⁵ In Zouche's hierarchical and centralized scheme, everyone would have a clearly defined subordinate status. Probably because Popham in particular opposed his scheme,²⁰⁶ Zouche progressed no further than drawing up the "Agreement."²⁰⁷ In any event, given that the feudal system had ceased in England,²⁰⁸ Zouche would have struggled to entice all but the most desperate or the most ignorant to settle Virginia.

Private ventures such as Zouche's were also encountering more general opposition. Investors did not want to tie their capital to the fortunes of one individual. Problems could arise if that individual died and his heirs had no interest in the project. Also, lucrative opportunities might distract the individual in question, especially if his own money or credit was running out. For instance, when privateering seemed more profitable than colonizing, Walter Raleigh abandoned, in 1590, his almost decade-long attempt to establish a colony at Roanoke Island.²⁰⁹

For reasons such as these, advocates "of a public stock" for colonizing organized to oppose "private" funding.²¹⁰ They promoted public funding because it would attract "better men of [be]havior and quality,"²¹¹ and generate work for the youngest sons of gentlemen,²¹² thereby enabling the colony to "continue

205. To finance their expeditions, patentees such as Sir Humphrey Gilbert granted extensive parcels of land to prospective wealthy investors. After Gilbert started the practice in the 1580's, it became increasingly common "as a means to underwrite the highly speculative business of American development." CRAVEN, *supra* note 17, at 36.

206. See *supra* text accompanying note 45.

207. 1 GENESIS, *supra* note 1, at 32-35. We do not know whether Zouche ever submitted his proposal to the Crown. A fire in 1619 destroyed the Privy Council register for the period from 1603 to 1613, eliminating any evidence that the register may have contained. ANDREWS, *supra* note 4, at 82.

208. By 1500, the feudal system was "virtually a dead letter in England." BAKER, *supra* note 15, at 214. See generally, ALAN MACFARLANE, THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY AND SOCIAL TRANSITION (1978).

209. 2 THE ROANOKE VOYAGES, *supra* note 11, at 598.

210. KINGSBURY, *supra* note 55, at 17-18. A brief drafted by opponents entitled *Reasons or Motives for the Raising of a Public Stock* appears in 1 GENESIS, *supra* note 1, at 37-42.

211. 1 GENESIS, *supra* note 1, at 38.

212. *Id.* at 40. These men were among the most geographically mobile members of

in better obedience, and become more industrious.”²¹³ “Better men” would enhance the “[r]eputation and opinion of the enterprise.”²¹⁴ Their financial contribution and their presence in the colony would attract new investors, while reassuring them that the colony was promoting values that investors approved.

B. *Joint Stocks*

Many of the reasons advanced by advocates of public funding influenced the plans for Virginia. To govern property relations, the planners ultimately settled on the joint-stock format. This format was a mid-sixteenth century innovation in English commercial enterprise.²¹⁵ In a joint stock organization, participants pooled resources, and anyone willing to subscribe could participate. Each participant acquired a share or shares in the venture.²¹⁶ Shareholders then enjoyed the profits or bore losses proportionately.²¹⁷ The joint-stock format was superior to all other models in generating the initial capital necessary for an overseas enterprise. The joint stock format therefore had an important advantage over the regulated company, an older form of company.²¹⁸ Participants in a joint stock did not need to

society. MACFARLANE, *supra* note 208, at 62-79. Consequently, they were likely emigrants to Virginia because they believed it was easier to attain greater status and wealth in Virginia than in England.

213. 1 GENESIS, *supra* note 1, at 38.

214. *Id.* at 40.

215. Though the joint-stock format first appeared in the mid-sixteenth century, other forms of organization dated back to the medieval period. SCOTT, *supra* note 11, at 1.

According to Charles M. Andrews, the joint stock system “became the starting point in the development of the colonial system of government.” ANDREWS, *supra* note 4, at 41.

Many of the extant descriptions of life in early Jamestown explain and defend behavior in terms of the relations that the joint stock organization established. That organization has crucially formed our present understanding of life in Jamestown.

216. See *infra* text accompanying notes 221-23 (discussing what “a share” meant at the time).

217. Joint stocks were of two types—temporary, or terminable, and permanent. The accounts of temporary stocks were settled at the end of an expedition. A further expedition required issuance of a new joint stock. SCOTT, *supra* note 11, at 45; see *id.* at 153 (discussing the “divisions” that occurred when stocks terminated).

218. The regulated company “was a kind of partnership, composed of a group of persons, incorporated by a royal letters patent, enjoying as individuals the monopoly of a certain trade.” ANDREWS, *supra* note 4, at 40. To join, members paid an admis-

pass a test demonstrating that they were "bred to the trade." Consequently, joint stocks were open to investors eager to capitalize on profitable foreign trade opportunities but barred from regulated companies because they were not properly "bred to the trade." A joint stock venture ensured a surer source of capital because it did not depend upon the financial stability of one individual or of a group of partners.

For those planning the Virginia enterprise, the joint-stock format had other important economic advantages. Pooling the resources of many contributors enabled larger ventures than those otherwise possible. Because both individual merchants and merchants in regulated companies managed their capital separately, they necessarily limited the size of any venture they could undertake. Pooling resources also permitted joint-stock companies to attain lower administrative and transaction costs than could individuals, partnerships or regulated companies. Unlike individuals, members of regulated companies, and partners, participants in a joint stock controlled but did not personally manage the enterprise.²¹⁹ Instead, they relied upon professionals, thereby cutting both administrative and transaction costs.²²⁰

Joint stocks also dispersed risk efficiently because they could attract a broad range of investors. The financial failure of any one shareholder was not likely to doom the entire venture. However, because of the risk to individual investors, the format

sion fee and passed a test demonstrating that they were "bred to the trade." *Id.* They then agreed to rules binding their commercial dealings, but were allowed to manage their own capital. Two of the most famous regulated companies were the Merchant Adventurers and the Merchant Staplers. *Id.*

The regulated company shed some light on governing relations among the English abroad. Some companies were entitled to select a governor to settle disputes among English merchants in the countries where they traded. For instance, a 1391 grant to merchants trading with Prussia granted members that privilege. SCOTT, *supra* note 11, at 8.

219. SCOTT, *supra* note 11, at 45. Partnerships demanded that partners closely involve themselves in the business. They also required that all partners assent to any action in relation to the trade. A partner, for instance, could not dispose of a share without the other partners' consent. *Id.* at 442.

220. For example, Virginia planners sought to reduce transaction costs by permitting only "some few" to represent the colony in trading with the Indians. See 1 JAMESTOWN VOYAGES, *supra* note 1, at 51.

had very serious drawbacks which the planners for Virginia had to confront. In the colonial period a share meant something very different from what it means today. A share was "an appreciable part of the whole undertaking," and not "a multiple of units of capital."²²¹ The number of shares in a company was fixed, but the amount of each share could vary. Today, the denomination of a share is fixed, but the number of shares may change depending on the success of the company.²²² In other words, joint-stock companies "did not offer a species of limited liability and participants could be called upon in law for more than their share capital in the event of foreclosure."²²³

Attracting investors to joint stock for Virginia was a daunting challenge. The venture was both risky and expensive. A long time would elapse before returns were received. In the meantime, shareholders could have had to contribute unexpectedly large amounts. To secure capital, planners had to convince cautious investors that the risk was as low as possible.

Unfortunately, details of the joint stock format adopted in Virginia are sparse. Historians do not know which of the two types of joint stocks, temporary or terminable and permanent, the proponents chose.²²⁴ The former would limit the time that an investor could be exposed to risk because investors would settle accounts when a specified event occurred.²²⁵ In Virginia, such an event might have been the return of ships from the first voyage. Further voyages would then have required a new joint stock. Historians also do not know how widely the proponents sought investors. The initiating documents did not call for an appeal to the public. Likewise, no promotional material

221. SCOTT, *supra* note 11, at 45.

222. *Id.* at 44.

223. HOLDERNESS, *supra* note 14, at 135.

224. Temporary stocks were the most common type in the sixteenth century. SCOTT, *supra* note 11, at 62. The East India Company during its first fifty years was a joint-stock company of the temporary type. ANDREWS, *supra* note 4, at 40.

Letters from London to Virginia in 1608 indicate that each voyage was expected to pay for its own expenses, and if any suffered serious loss, no further capital would be available.

2 SCOTT, *supra* note 171, at 249. These letters implied that the format was temporary. See ANDREWS, *supra* note 4, at 88.

225. See ANDREWS, *supra* note 4, at 45.

inviting the public to subscribe to the joint stock exists. Consequently, we must assume that only the group surrounding Popham and the patentees participated in the joint stock. Nothing, however, prohibited that group from inviting others to participate.

1. Protecting the Investors

Despite the dearth of detail on the joint stock system, the initiating documents reveal how planners shifted much of the risk inherent in the format from the investors to the settlers. To ensure a quick return for investors, the joint stock principle was extended to each settler for a limited period. For five years after arriving in Virginia, every settler had to:

[T]rade together all in one stock, or divideably, but in two, or three stocks at the most, and bring not only all the fruits of their labors there, but also all such other goods and commodities, which shall be brought out of England or any other place into the same colonies, into several magazines or storehouses.²²⁶

Likewise, land in Virginia was subject to the joint stock principle. Nobody could privately use land for the first five years that a person spent in Virginia.

These provisions aimed to assure investors that everything the settlers produced, beyond that which satisfied the settlers' immediate needs, would accrue to the investors' benefit. These provisions also seemed to guarantee settlers the means of survival. However, settlers had to invest five years of labor in a hostile environment before they could work solely for their own benefit. In these circumstances, extending the joint stock principle to land minimized the risks for investors by ensuring an early return for their contribution to the venture. The particular source of that return did not interest them.

226. 1 JAMESTOWN VOYAGES, *supra* note 1, at 40. The adventurers could "elect and choose out of themselves one or more Companies . . . [to] take charge of the trade, and . . . other things, which shall be sent from thence, to the company . . . in Virginia, and likewise of all such wares, goods, and merchandises, as shall be brought . . . within our realm of England." *Id.* at 42.

Had investors individually been allotted land in the colony, the venture might have appealed primarily to experienced landholders.²²⁷ But, as the planners knew, landed class investors had a dismal record of supporting efforts to colonize during the late sixteenth century.²²⁸ The landed class initiated, financed, and led both Gilbert's and Raleigh's initial attempts to establish colonies in North America.²²⁹ However, in both ventures, the original sponsors failed to continue their support.²³⁰ The merchant class also did not want to invest in colonizing.²³¹ Consequently, the planners had to appeal to a broad range of investors.

In a system of private allotments, each investor would have to bear the risk that the land allotted to him would not be fertile. Moreover, English agricultural methods might not be suited to land in Virginia. Additionally, each investor would have to bear all the costs and risks of providing laborers who might not remain healthy and who might desert the project.²³² Holding land communally forced each investor to bear a share of those risks. And, it also guaranteed each a minimum return from the most productive land.

The joint stock scheme adopted for Virginia did have risks for investors. Settlers collectively might not work as diligently on communal land as they might upon their own land. In addition, some individuals would probably be freeriders. All in all, applying the joint stock principle to land seemed to guarantee investors at least some return even though that return would take longer than in a private property system.

227. Patentees such as Sir Humphrey Gilbert had allotted land to wealthy investors in order to help them finance expeditions. CRAVEN, *supra* note 17, at 36.

228. See BRENNER *supra* note 9, at 108-09.

229. *Id.* at 108.

230. *Id.*

231. See *supra* notes 94-104 and accompanying text. A "mere £37,000" was contributed to the joint stock of the Virginia Company from its incorporation in 1609 to its dissolution in 1624. BRENNER, *supra* note 9, at 107. This was "a trivial sum for commercial ventures in this period." *Id.* By contrast, from 1609 until 1621, "the East India Company raised over £2,000,000 for its joint stock." *Id.* at 97.

232. Some settlers in Virginia apparently brought laborers, indentured servants, with them. The London Council's "Instructions Given by Way of Advice" mentions that "workm[e]n may belong to any private persons." 1 JAMESTOWN VOYAGES, *supra* note 1, at 49, 53.

The planners could have opted for an alternative private property scheme in which individual farmers, not investors, would receive land. In return, landholders would have had to remit to the investors either a portion of their profits or a fixed amount for a set period. The machinery for organizing and enforcing the former scheme was not in place in 1606.²³³ The company loosely gathered around the patentees had not incorporated and apparently, for political reasons, did not plan on incorporating in the future.²³⁴ Organizing, implementing, monitoring, and enforcing such a scheme would have imposed considerable administrative costs.²³⁵ A far more elaborate organization was necessary to monitor this type of system.

Requiring landholders to remit a portion of their profits would also have granted individual farmers considerable discretion to determine the correct portion. Farmers would pay themselves first and would then worry about paying investors. To avoid being defrauded, investors or their agents would have to be constantly vigilant. Presumably, investors would recover the land if individuals defaulted. However, recovering land was not the best solution, because it left investors holding an asset that they could not accurately evaluate. Furthermore, it would postpone a return, impose new search and transportation costs, and leave the risk unaddressed. Consequently, investors could decide to cut their losses and abandon the enterprise. The defaults of both farmers and investors would then discourage prospective investors during the colony's crucial start-up period.

A fixed payment scheme would also not have appealed to either settlers or investors. This approach would have been too risky given the uncertain knowledge of farming conditions in Virginia. No one would want to commit to a fixed amount in advance. On the one hand, the amount could be so high that it

233. Such a scheme was, in fact, adopted in 1619 when the Virginia Company allowed farmers to work common land for three years, paying one-fourth of their profits to the Company. When the three-year period expired, the farmer had two years' within which to procure a grant of the land farmed. Lynda L. Butler, *The Commons Concept: A Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835, 872 (1982).

234. None of the available documents indicated an intention to incorporate.

235. For instance, to enforce the scheme, agents might have been required to audit individual farmers.

would discourage farmers from going to Virginia. For those who did go, a high amount could provide an incentive to abandon the land. On the other hand, if the land proved as fruitful as some earlier reports had claimed, a fixed amount might offer investors a ridiculously low return.

The joint stock scheme structured property relations in favor of the investors. Individual settlers could not determine how much of what they produced to retain for themselves and how much to remit to investors. Settlers had to surrender all crops to the cape merchant who would ration necessities to all.²³⁶ Consequently, individuals would have to overcome the presumption that anything they possessed that was not accounted for on the cape merchant's books was communal property wrongfully retained.

The joint stock format also transferred primary responsibility for dealing with shirking and freeriding from the investors to the settlers. This problem could cause settlers not to produce enough crops to satisfy both their own immediate needs and the demands of investors. To solve this problem, the cape merchant or the council had the authority to reduce rations for the settlers and pay investors a constant return.²³⁷ Consequently, all settlers would bear the cost of freeriders. This result would give the community an incentive to pressure freeriders into working. The initiating documents granted the council the means to deal formally with the freerider problem.²³⁸ But if settlers were, as the planners intended, a relatively homogeneous group, they could also enforce appropriate behavior through less formal, but equally effective, means such as ostracizing the offending settler. The initial group was small enough that such methods might work.

236. 1 JAMESTOWN VOYAGES, *supra* note 1, at 41-42.

237. *Id.* at 42.

238. *Id.* at 40.

2. English Property Relations and the Settlers' Attitude Toward Joint Stocks

The allocation of risk in Virginia discouraged potential settlers. Similarly, so did the restrictions on their geographic and social mobility. The planners underestimated the degree of economic independence that property relations in England had generated. Compared to the possibilities that property relations in England permitted, those available in Virginia seemed extremely limited.

In England, freeholders and copyholders held most of the land.²³⁹ They could effectively give, grant, or will their land.²⁴⁰ They believed themselves free to acquire and dispose of property as they wished.²⁴¹ The freedom to alienate implied a concomitant freedom of movement.²⁴² Because property own-

239. In the medieval era a freeholder was a man defined as a free man, not as a villein, holding a freehold estate. CORNELIUS J. MOYNIHAN, *Introduction to the Law of Real Property* 9, 13 (2d ed. 1988). The character of the services required to be rendered one's lord distinguished a freeman from a villein. *Id.* at 9. The freehold estates were a fee simple, a fee tail, and a life estate. *Id.* at 25. These estates were "the only estates recognized by the law and given protection by the King's courts." *Id.* at 25.

Villeins held copyhold tenure. *Id.* at 14. Through the thirteenth century, villeins held land the will of the lord. *Id.* at 13. During the fourteenth century, however, "the obligations of the villein tenants became fixed by manorial customs so that ... [they] no longer depended on the lord's will." Eventually customary tenure evolved into copyholder tenure under which "the rights of such tenants were evidenced by the records of the manorial courts." *Id.* The term "copyhold" comes from the copy given to the tenant of the record of land transfer entered on the rolls of the manorial courts. *Id.*

"About one third of all English land was held by copyhold tenures in the early seventeenth century." MACFARLANE, *supra* note 208, at 83. In most respects, copyhold tenure equated to freehold tenure. Both offered similar security of tenure, and the small fixed fines imposed on copyholders were not unduly burdensome.

240. The Statute of Wills enacted in 1540 granted the legal right to dispose by will of freeholds. BAKER, *supra* note 15, at 218. "[B]y the late sixteenth century a copyholder could sell or grant away his land, or he could surrender it to the lord 'to the use of his will.' In this he could specify his heirs." MACFARLANE, *supra* note 208, at 84.

241. In fact, they often did not exercise the freedom to alienate, especially to dispose of property outside the family, and particularly at death. But not exercising that freedom does not undermine its legal existence nor does it undermine its importance in shaping the development of English, and ultimately North American, societies.

242. See generally ANDREWS, *supra* note 4, at 56; PHILIP J. GREVEN, JR., FOUR

ers could dispose of their property, many children left home early to make their own way in the world. The possibility of owning land and owning more and better land encouraged individuals to relocate. Land owners were often willing to sell their property and assume the risk of moving to a place where conditions could vary. The willingness to pursue economic opportunity engendered an adaptability in individuals that should have encouraged some to move to Virginia.

The structure of property relations in land had also generated in the English an unusual receptivity to change and an entrepreneurial spirit that should have promoted movement to Virginia. Unlike on the continent, land ownership alone often improved an individual's social standing. Social mobility was based on wealth in addition to blood.²⁴³ In France and Germany, wealth did not permit the same degree of mobility. In the former, "special rights . . . relating to private law, criminal law and fiscal law" differentiated the nobility from the rest of society.²⁴⁴ In the latter, jurists elaborately classified the upper echelons of the social hierarchy.²⁴⁵ In England, however, the common law essentially treated all Englishmen equally. After the thirteenth century, common law did not distinguish among free men.²⁴⁶ Villeinage was "almost the only real class."²⁴⁷ Consequently, even though the English legal system may not have actively facilitated upward mobility among classes, it certainly erected few, if any, direct impediments.

Surprisingly, opportunities for mobility were to be severely restricted in Virginia, at least initially. No one was to assume immediate private possession of land. In fact, even Edward

GENERATIONS: POPULATION, AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS 267-68 (1970) (discussing high geographical mobility of seventeenth century England); MACFARLANE, *supra* note 208, at 62-79 (discussing mobility in sixteenth- and seventeenth-century England).

243. MACFARLANE, *supra* note 208, at 165.

244. MARC BLOCH, LAND AND WORK IN MEDIAEVAL EUROPE 65 (J.E. Anderson trans., 1967).

245. *Id.* at 65-66. "They pictured a kind of ladder, each class having its own fixed place on one of the rungs. No one belonging to any one of these groups could, without loss of caste, accept a fief from a man lower down the scale." *Id.* at 66.

246. *Id.* at 65.

247. *Id.*

Wingfield, the only patentee in Virginia, was not deeded land individually.²⁴⁸ The charter was silent on when land could be held in private tenure. The "Instructions" implied that no grants would occur for at least five years.²⁴⁹ Only after five years could settlers acquire land, and then only if the council in Virginia nominated them.²⁵⁰

Moreover, despite the charter's reassurance that property relations in Virginia would eventually be as they were in England,²⁵¹ settlers could not act independently. Settlers had to satisfy the demands of the joint stock. The council in Virginia, like the feudal lords of old, could also demand all kinds of work and expel and punish all who did not conform. The charter promised socage tenure,²⁵² but, the settlers noted the echoes of early villeinage that resonated in the property scheme it described.

IV. CONCLUSION

Motivated by the possibility of governing themselves, by their conception of property relations, and by the large quantity of "unpossessed" land in Virginia, many Englishmen, especially the landless, saw an opportunity to improve their lot in America. However, as the difficulty in recruiting the first settlers suggests, many Englishmen doubted that opportunity initially. Many factors explain the initial reticence: the failure of all previous English attempts to settle North America, the risk of a Spanish attack on the proposed colony, and the obvious dangers mentioned at the beginning of this article. Certainly, the

248. The charter did not grant land to any specified individual. 1 JAMESTOWN VOYAGES, *supra* note 1, at 24-34.

249. "[F]or the space of five years next after their first landing," everybody had to "trade together all in one stock . . . and bring . . . all the fruits of their labors" to a common storehouse. *Id.* at 40.

250. Lands were to be distributed and divided amongst the undertakers and the settlers "in such manner and form and for such estates as shall be ordered and set down by the council of the same colony." *Id.* at 33.

251. Settlers would hold land of the Crown in free and common socage. It was to be "had and inherited and enjoyed," as "in the like estates" land was to "be had and enjoyed by the [l]aws, within this realm of England." *Id.* at 37. Some dispute has existed over the precise kind of tenure permitted by the charter. See ANDREWS, *supra* note 4, at 86-87 n.1; W. Hamilton Bryson, *English Common Law in Virginia*, 6 J. LEGAL HIST. 249, 252 (1985).

252. 1 JAMESTOWN VOYAGES, *supra* note 1, at 37.

charter's suspension of the known structure of property relations adversely affected the flow of settlers. The suspension also partly explains why investors were particularly cautious—many recognized that property relations provided little incentive to settlers to provide investors a speedy return.²⁵³

Despite the charter's reassurances that property relations in Virginia would eventually be as they were in England, the initiating documents clearly declared that property relations would be different. Suspending the possibility of acquiring land for five years and surrendering all profits they could gain from their labor ran counter to the expectations of most English people. Virginia posed a daunting challenge in that it was unknown. Against this backdrop, the unusual system of proposed property relations must certainly have intensified the obvious differences between living in England and living in Virginia. The proposed system alone must have caused many not to gamble their lives and fortunes.

253. See *supra* note 194 and text accompanying notes 226-36.