

The Origins of American Corporatism in the Stuart Age

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Abstract

This is the study of the corporation as it was transplanted to colonial Virginia, Massachusetts, and New York in the Stuart age. The ability of this evolving legal form to provide a combination of increasing legal certainty and practical flexibility, proved an appealing combination to protect and promote a range of evolving local private interests in unique colonial circumstances. In the same way, the corporate form was able to facilitate and fulfill certain political and economic interests of the metropolitan government, including for example, the personal interests of the Crown. The empirical basis of this thesis comprises a close examination, comparison, and contextualization of these terms of incorporation used in each of Virginia, Massachusetts, and New York from the time of James I to Anne. These terms become both increasingly formulaic in their grant of core elements, and reflective of their particular environment through the ancillary rights and privileges conveyed. The distinctive interplay between these evolving interests is evidenced through the evolving uses and terms of incorporation. This ability of the corporation to adapt to, and reflect its novel environment presents a fresh perspective on the legal history of the colonies as well as the genesis of the Anglo-American corporation.

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- Acts and Resolves: Acts and Resolves of the General Court passed by the General Court of Massachusetts: to which are prefixed the Charters of the Province with Historical and Explanatory Notes, and an Appendix, vol 1 (Boston: Wright & Potter, Printers to the State 1869)
- APCC: W.L. Grant, James Munro (eds) Acts of the Privy Council (Colonial Series) vol 1:1613-1680; vol 2: 1680-1720 (Hereford: Printed for His Majesty's Stationary Office, by Anthony Brothers Limited 1908)
- CSPC: Calendar of State Papers (Colonial Series, America and West Indies) vol 1: 1574- 1660; 5: 1661-1668; 10: 1677-1680; 12: 1685-1688 and Addenda 1653-1687:1710-1711 available at <http://www.british-history.ac.uk/search/series/cal-state-papers--colonial--america-west-indies>
- CPSD: Calendar of State Papers Domestic—Charles I; Calendar of State Papers Domestic—Charles II; Calendar of State Papers Domestic—James I; Calendar of State Papers Domestic—James II; Calendar of State Papers Domestic—William and Mary available at <http://www.british-history.ac.uk/catalogue>
- BL: The British Library
- Hening: William Waller Hening (ed) The Statutes at Large; being a Collection of the Laws of Virginia from the First Session of the Legislature in the year 1619 (New York: R&W&G Bartow 1823)
- HJC: Journal of the House of Commons, vol 1, 1547-1629 available at <http://www.british-history.ac.uk/search/series/commons-jrnl>
- JHB: HR McIlwaine (ed) Journal of the House of Burgesses of Virginia vol 1, vol 2 (Richmond, Virginia: Library Board, Virginia State Library 1915-1914, published out of sequence)
- LLFB*: James Spedding (ed) The Letters and Life of Francis Bacon, vols 3, 4 (London: Longmans, Green, and Co. 1890)
- LMA: The London Metropolitan Archives

NYSA: The New York State Archives

PRO: The Public Record Office, National Archives (London)

RCMB: Nathaniel Shurtleff (ed) Records of the Governor and Company of
Massachusetts Bay, vol I-V (Boston: W. White, printer to the Commonwealth)

RVC: Susan Myra Kingsbury (ed) The Records of the Virginia Company of London:
the Court Book from the Manuscript in the Library of Congress, vol 1-4
(Washington: Government Printing Office 1906)

Stuart Proclamations: James L. Larkin & Paul L Hughes (ed), Royal Proclamations of
King James I 1603-1625, vol 1(Oxford: Clarendon Press 1973)

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<i>The Case of Sutton's Hospital</i> (1612) 10 Co Rep 23a, 77 ER 960	2, 5, 16, 24, 29, 30, 38, 41, 49, 66, 67-96, 98, 101, 102, 121, 128, 132, 138, 151, 158, 169, 198, 201, 208, 227
<i>The Case of the Tailors, &c. of Ipswich</i> (1614) 11 Co Rep 53a, 77 ER 1218	56, 58, 90
<i>James Bagg's Case</i> (1615) 11 Co Rep 93b, 77 ER 1271	48
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Preface

This project is the result of the simple question: What was the legal origin of the early American corporation? Months of archival research in both the United States and the United Kingdom quickly revealed a wealth of information that would require a more narrow focus given the present space constraints. Accordingly, the thematic focus of this dissertation is the technical legal development of the corporation under the Stuarts through an examination of the precise terms of the corporate charters within their broader legal context. The geographic bounds have been limited to the colonies of Virginia, Massachusetts,¹ and New York. Virginia and Massachusetts were selected because of their status as the two most prominent seventeenth century British settlements in the colonies that would become the United States of America after 1776. New York has been included because it provides a valuable point of comparison as a proprietary colony occupied by an established Dutch settlement at the time of English conquest in 1664. Lastly, the time frame of this dissertation has been focused on the Stuart period as the few, but important, corporations of this time are able to provide an evolving picture of the corporate form prior to the corporate scandals caused by the South Sea Company and the Charitable Corporation of the early Hanoverian period.² It is hoped that this project will serve as the foundation for a larger monograph describing the genesis and development of the American corporation through to the incorporation of the First Bank of the United States. An expanded time period will allow the inclusion of two later American colonies with dynamic corporate landscapes: Pennsylvania and South Carolina.

¹ Hereinafter, the term 'Massachusetts', unless otherwise denoted, will refer to both the area settled by the Massachusetts Bay Company.

² Particular finds in the American archives have indicated responses to these corporate scandals in colonial British North America that have not yet been discussed in the secondary literature.

This dissertation and the sources consulted required embarking on a study of what John Baker has termed the ‘dark age of English legal history’:³ a period of political unrest; rapid imperial and economic expansion; and the worst obstacle for any legal historian, archival fires. The archival manuscripts directly referenced and quoted in this dissertation have been transcribed from the hand-written originals. Accordingly, as careful and dutiful as all efforts were, any transcription errors are purely the author's own. Original spellings and punctuation were preserved unless clarity required the modern usage, such as 'u' instead of the original 'v'. The same attempt at preservation applied to the dating discrepancy of this period. Since England used the Julian calendar until 1752, original documents were dated with a calendar year beginning March 25 rather than the Gregorian calendar's January 1.⁴ Slashes such as '1611/2' have been made as necessary to draw attention to this discrepancy as all dates are provided in the Old Style. The eleven-day difference that developed by the time England adopted the Gregorian calendar has been omitted for the sake of simplicity and clarity. The author does not believe that omission jeopardizes the value of any source or any argument made herein.

³ J.H. Baker, ‘The Dark Age of English Legal History, 1500-1700’ in *The Legal Profession and the Common Law* (London: Hambledon 1986).

⁴ Calendar (New Style) Act 1750 (24 Geo 2 c 23).

INTRODUCTION

The seventeenth-century English corporation emerged over a long period from a variety of juridical sources. The term ‘corporation’ was used to describe an entity wielding a spectrum of legal capacities, rights, and privileges considered necessary at law for a particular group, or in some cases an individual, to perform certain activities be they commercial, charitable, municipal, ecclesiastical, or the like.¹ By the mid-sixteenth century an underlying theory had emerged whereby corporations irrespective of their activity could have separate legal personality and might exist in perpetuity through a successive membership.² The seventeenth-century corporation was far from a singular legal concept. Legal instruments documenting the organization of these early corporations display unstable and evolving concepts of the nature of the legal entity as the corporation was called upon to acquit radically different tasks in the various political, social, and economic environments driving incorporation. This dissertation is a study of the early corporation as it was transplanted to colonial Virginia, Massachusetts, and New York under the Stuarts. The ability of this evolving legal form to provide a combination of legal certainty and practical flexibility, proved an appealing combination to protect and promote a range of evolving local private interests with

¹ Susan Reynolds has observed that with respect to the use of ‘corporations’ during the twelfth and thirteenth centuries:

The concept of a legal corporation or legal personality can exist only within a legal system in which there are things which an individual or a corporate group can do and suffer at law which an unincorporated group cannot. It also needs circumstances in which people feel a fairly serious need to distinguish the responsibilities of individuals from those of the groups to which they belong.

Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (Oxford: Oxford University Press 1997) 60. See also John H Baker, *The Oxford History of the Laws of England*, vol VI (Oxford: Oxford University Press 2003) (find that the early case law of corporations predominantly involved ecclesiastical entities, specifically monasteries).

² JH Baker (n 2) 622-25 (providing details of the legal conclusions and debates of the late fifteenth through mid-sixteenth centuries that affected the concept of corporation in that period).

particular needs and circumstances. It was also able to facilitate and fulfill certain policy and financial interests of a metropolitan government including, for example, the personal interests of the Crown. The empirical basis of this thesis comprises a close examination, comparison, and contextualization of the legal terms of incorporation used in each of Virginia, Massachusetts, and New York from the time of James I to Anne. This study reveals the distinctive interplay between the private interests emerging in each colony on the one hand and a metropolitan government on the other, and evidenced through the evolving uses and terms of incorporation. This ability of the legal form to adapt to and reflect its novel environment presents a fresh perspective on the legal history of the colonies as well as the genesis of the Anglo-American corporation.

As an initial matter, the primary materials at the heart of this study are the legal instruments of incorporation. The presented instruments are routinely referred to in secondary literature using the colloquial moniker of ‘corporate charter’. They are, however, in most cases technically letters patent.³ Historically royal charters were the grandest of legal instruments issued by the Crown to grant or to confirm previous grants of tangible benefits, usually land, and intangible benefits such as charters for incorporation often allied to trading, monopoly, and jurisdictional or franchise rights. These instruments always required several witnesses to ensure validity, were issued under the Great Seal, and were enrolled in the Charter Rolls until 1517.⁴ After 1517

³ Two notable exceptions herein being a colonial statute of incorporation, An Act for Establishing Ports and Towns 1705 (3 Henings 404) (‘Act for Establishing Ports and Towns’); and, an act of parliament issued to Thomas Sutton, An Acte to Confirme and Enable the Ereccion and Establishment of an Hospitall a Free Grammar Schoole and Sundrye Other Godlye and Charitable Actes and Uses Donne and Intended to be Done and P[er]formed by Thomas Sutton Esquire (7 Jac I c 27). (the ‘Hallingbury Act’).

⁴ Legal historian Mary Sarah Bilder has succinctly described the charters in comparison to letters patent as granting, ‘privileges in perpetuity...[and were] more formal, with more witnesses, written in Latin and, until the early sixteenth century, filed in the Charter Rolls.’ Mary Sarah Bilder, ‘English Settlement and Local Governance’ in Christopher Tomlins Michael Grossberg (ed), *The Cambridge History of Law in*

there was no longer a separate Charter Roll and royal grants were issued as letters patents enrolled on the Patent Rolls. A letters patent was a legal instrument publically announcing the will of the Crown on a wide variety of matters including licenses in mortmain, pardons, and incorporations.⁵ In the context of incorporations the two terms are, and have been, used interchangeably and at times conflated.⁶ Although acknowledging the technical accuracy of the term ‘letters patent’ for many of the primary sources presented, for the avoidance of confusion this dissertation keeps with the tradition of describing the incorporating instruments as ‘charters’ unless otherwise noted.

Though the term ‘corporation’ did not evoke a precise legal meaning at the turn of the seventeenth century, constructing a working definition of the term was possible. The desire for incorporation expanded through the later Tudor period with the rise of ambitious merchants seeking royal political support as well as a legal mechanism by which to pool their assets to fund overseas explorations. One such commercial association was granted a proprietary charter in 1606 licensing them to settle and establish a trade in the vast swath of North American land referred to as Virginia (the ‘1606 Virginia Charter’) as two groups, the ‘Virginia Company of London’ and the

America, vol I (Cambridge: Cambridge University Press 2008) 68 (continuing to describe the use of the term ‘charter’ in the particular context of the British North American colonies).

⁵ *Ibid* (noting further that the common use of the word ‘charter’ to describe these founding colonial documents only appears after 1660). See FW Maitland, ‘History from the Charter Roll’ (1893) 8 *The English Historical Review* 726 (observing that: ‘whereas the letters patent usually bears a simple *Teste Meipso*, the charter professes to have been delivered by the king or by his chancellor in the presence of many witnesses whose names are given.’) 726; Norman Evans Shelagh Bond, ‘The Process of Granting Charters to English Boroughs, 1547-1649’ (1976) 91 *The English Historical Review* 102 (describing the distinction for purposes of borough charters and observing that the technical difference between a letters patent and a charter was largely ignored after the early sixteenth century) 102.

⁶ *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960, 24b (acknowledging the incorporation was issued by letters patent but continuing to reference the document as a charter); William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Oxford: Clarendon Press 1765-1769) book 4, p 462, 474, Supplement p iv. See also for example, the Avalon Project at Yale University entitling the letters patent issued to the Virginia Company as ‘charters’: ‘The First Charter of Virginia: April 10, 1606’ (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va01.asp> accessed 17 July 2015 (the ‘1606 Virginia Charter’).

'Virginia Company of Plymouth'.⁷ The former group, commonly called the Virginia Company, was then incorporated in 1609 under a second charter as *The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia* (the '1609 Virginia Charter'), which was refined and revised by a third charter issued in 1612 (the '1612 Virginia Charter').⁸ These charters when compared with the charter terms of their trading and settlement company contemporaries demonstrate a broader corporate framework supported by a common commercial interest that was granted an increasingly regular set of capacities, rights, and privileges to explore foreign lands with the additional economic and political favor of the Crown. The increasingly formulaic nature of these rights, privileges, and obligations, and their formal memorialization by charter added an important degree of legal certainty and organization for all parties in a risky endeavor.⁹ Following the life cycle of the Virginia Company reveals the specific legal means by which the group was ordered and the interests of their membership, primarily financial, were protected and promoted. The emergence of colonial economic interests divergent from that of the Virginia Company's internal metropolitan government, the Virginia Council that was rife with factioning, and the resulting loss of royal support would ultimately render the corporate form untenable. The struggle to create a permanent corporate presence in Virginia is a crucial part of this legal history

⁷ See 1606 Virginia Charter ss 4,5. As shall be discussed at great length in Chapter 1, unless otherwise noted, references herein to the 'Virginia Company' are to the former more successful group, the 'Virginia Company of London'.

⁸ 'The Second Charter of Virginia; May 23, 1609' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va02.asp> accessed 29 June 2015 (the '1609 Virginia Charter'); 'The Third Charter of Virginia: March 12, 1611/12' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va03.asp> accessed 29 June 2015.

⁹ While certainly not a guarantee of rights it at least gave the group a sense that they could not be withdrawn or dissolved arbitrarily. Susan Reynolds, 'The History of Incorporation or Legal Personality: a case of fallacious teleology' in *Ideas and Solidarities of the Medieval Laity* (Aldershot: Variorum 1995) 6 (observing the importance of the charter from the Crown's perspective as it recorded obligations given in exchange for corporate rights).

and is the starting point for appreciating the evolution of the Anglo-American corporate form that followed.

As the Virginia Company charters provide an example of the practical application of an evolving corporate theory, it is conceptually complemented by the near simultaneous 1613 report by Sir Edward Coke in *The Case of Sutton's Hospital* (hereinafter '*Sutton's Hospital*').¹⁰ This case has been cited through modern times for its distillation of broadly applicable principles underlying secular incorporation at the turn of the seventeenth century. Here we revisit the facts giving rise to this case through archival exploration and also by re-analysis of the conclusions that may be extracted from one of Coke's more confusing reports; this fresh analysis reveals a decision that was highly innovative on certain points of law and yet a conservative restatement of generally accepted principals on others. There are striking parallels between Coke's declaration of essential elements of incorporation and those appearing in the corporate charters at the time. Moreover, the connection between the elite political and legal minds simultaneously involved in deciding this this case and drafting the Virginia Company charters suggests that this was a defining or constitutive moment in the emergence of the corporation. Through re-characterization of the dynamics of the decision in its time and its seventeenth century reception and application, *Sutton's Hospital* allows us to see new perspectives in the conceptual emergence of the English corporation at the time of its transplantation to British North America.

The third chapter returns to Virginia addressing its use of the corporate form to the conclusion of the Stuart period. The conflicting interests among the colonists and the London merchants represented by the Virginia Council ultimately led to the

¹⁰ See Chapter 2 for a discussion on the dating discrepancy for this case and the argument that it was decided in 1613 and not 1612 as reported by Coke. The pleadings of the case as presented to the King's Bench are reported at *The Case of Sutton's Hospital* (1612) 10 Co Rep 1a, 77 ER 937 (*Sutton's Hospital Pleadings*). *The Case of Sutton's Hospital* is also reported in the Jenkins abridgement with the unsurprisingly incorrect date at *Sutton's Hospital* (1597) Jenk 270.

dissolution of the corporate framework for the colony by a writ of *quo warranto* in 1624. Although expressly granted the authority to create fresh corporate bodies, succeeding royal governors declined to form concentrated settlements through municipal incorporation within Virginia. Instead they permitted, and indeed promoted, the existing pattern of dispersed settlement necessary for the extension of large tobacco plantations financially benefitting both local and metropolitan interests. The corporation was not reintroduced to the legal landscape until 1693 when William III and Mary II granted the colonial petition for a royal charter incorporating and funding the 'College of William and Mary' (the 'College of William and Mary Charter').¹¹ With Virginia's original settlement by a class of class of highly educated gentlemen merchants, an educational institution had been contemplated at the time of founding as an essential element of the colony's social and religious life. Long sidelined by desperate financial conditions and matters of survival, it was only in the post-Glorious Revolution era when the northern colonies were embroiled in a war against the French and their Native American allies, that the personal interests of William III and Mary II actively favored the establishment of a college guaranteeing the place of Protestantism in North America and so forming an intellectual bulwark against the Catholics of New France and aligning with the local interests in Virginia. The two-tier incorporation described by the College of William and Mary Charter, and reminiscent in form to that discussed in *Sutton's Hospital*, provides a guide to understanding the legal means by which this corporation was intended to establish and encourage this fledgling educational and ideological endeavor representing both local interests and the metropolitan interests of the Protestant Crown.

¹¹ *The Charter of the College of William and Mary (8 February 1693)* (Thomas Nicolson 1800) (the 'College of William and Mary Charter').

Such alignment nearly occurred again in 1705, this time in the midst of Queen Anne's War, when after a near century of debating the merits of acquiescing to the Lords Commissioners of Trade and Foreign Plantation's desire for municipal incorporation to more effectively control and tax the colony, the House of Burgesses passed legislation for the simultaneous incorporation of fifteen municipal entities under the Act for Establishing Ports and Towns. A change in colonial strategy from the metropole led to the repeal of the statute before implementation, but its terms are still important for appreciating the legal role of the corporation in promoting and defining the organization of divergent interests. This legislation is also critical for its conceptual deviation from the normal route of petitioning for incorporation; instead there was a legislative imposition of corporate status on a group without requiring positive action on the part of the intended members. This top-down genesis marked a break in the evolution of the local municipal corporation. By the time of Anne's death in 1714, the corporations of colonial Virginia had developed in response to, and reflective of evolving local political, social, and economic interests as they interacted with the desires of the colony's metropolitan government. The distinctiveness of these developments is underscored by a comparison with the corporations of its northern neighbors, Massachusetts Bay and New York.

The fourth chapter moves to the colony settled in the New England region by the 'Governor and Company of the Mattachusetts Bay in Newe-England', or the 'Massachusetts Bay Company', incorporated by charter in 1629.¹² Considering the religious nature of these particular colonists and in the nearby settlement established as the Plymouth Colony, municipal and ecclesiastical lives were merged and neither formally incorporated but remaining voluntary associations throughout this period.

¹² 'The Charter of Massachusetts Bay: 1629' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/mass03.asp> accessed 30 September 2014 (the 'Massachusetts Bay Charter').

The prize corporation of the colony was, similar to Virginia, an educational incorporation. At its foundation the Massachusetts Bay Company had been instructed to organize a college for the purpose of educating and spreading Christianity. In 1636, the colonial assembly, the Great and General Court, organized such an entity to be later known as Harvard College after its early benefactor John Harvard. Then in 1650, the first year of the Commonwealth, the colonial assembly without the knowledge of, and therefore in defiance of its metropolitan government, boldly used the language of the royal charters and declared its Harvard College incorporated.¹³ There is also evidence, although minimal, of an additional attempt to incorporate a public water utility in 1652.¹⁴ In post-Restoration 1684 the Massachusetts Bay Company's charter was revoked for routinely infringing upon the prerogative and the incorporation of Harvard College was among the infringements listed. Even when efforts to renew the Massachusetts Bay Company's charter subsided, the colonial petitions continued requesting recognition of the corporate status of their prized Harvard College.¹⁵ The importance placed upon the corporate status of the college illustrates the perceived value of the form for protecting and preserving group property, rights, and purposes, and their inherent recognition by the metropolitan government in a corporate charter.

The final point of comparison illustrating the corporation's reflection of the evolving interplay between local and metropolitan interests is New York. The youngest of these three colonies, New York had been the Dutch colony of New Netherland until it was conquered and gifted by Charles II to his brother James, Duke of York, in 1664

¹³ 'The Charter of the President and Fellows of Harvard College, Under the Seal of the Colony of Massachusetts Bay, and Bearing the Date of May 31st, A.D. 1650' (*Online Resources, Harvard University Archives*) <<http://library.harvard.edu/university-archives/using-the-collections/online-resources/charter-of-1650>> accessed 30 September 2014 (the 'Harvard College Charter').

¹⁴ Att a Gennerall Court called to sitt in Boston 7th November, 1683, by order from the Gounor & Magests, met in Boston, & then satt. (7 November 1683) RCMB 5.

¹⁵ Its corporate status was even declared and included in the Massachusetts State Constitution of 1780, ch 5.

at the onset of the Second Anglo-Dutch War.¹⁶ At the time of conquest it was a sparsely and diversely populated colony with strategic importance for developing the British North American fur trade and curbing the expansion of French claims to the region. These unique circumstances fostered local commercial interest groups unlike those of its colonial neighbors excepting that they also sought incorporation. By the end of the Stuart period, New York had three municipal corporations and three ecclesiastical corporations. Following protracted battles with New France over the region's exceptionally valuable fur trade, temporary peace came in 1686 and that same year a newly crowned James II incorporated the City of Albany, the City of New York, and the Town of Westchester in 1687, granting each group their desired monopolistic rights to a piece of the fur trade. These municipal incorporations represent the aligned local and metropolitan interest in protecting the trading network into the interior of North America.¹⁷

Two of the three ecclesiastical incorporations of New York occur in 1696 as King William's War raged and William III ruled in his lone capacity after Mary II's death in 1694. The sizeable Dutch Calvinist population of New York petitioned the Stadtholder-King, himself a raised Dutch Calvinist, for incorporation of their church in order to protect the property and rights of the religious community predating the English conquest from Anglican encroachment. The resulting Dutch Reformed Church of the City of New York in 1696 (the 'Dutch Reformed Church') quickly prompted the incorporation of the New York Rector and Inhabitants in Communion

¹⁶ Grant to the Duke of York (of New York) (16 March 1664), NYSA, Land Patents 12943-78, vol 1, roll 1 (microfiche) (the 'Duke of York Grant').

¹⁷ City of New York, Mayor, Aldermen, and Commonalty, A Charter constituting them a body politic (27 April 1686) NYSA, Land Patents 12943-78, vol 5, roll 2 (microfiche) (the 'New York Municipal Charter Manuscript'); City of Albany, Mayor Alderman and Commonalty (22 July 1686) NYSA, Land Patents 12943 -78, vol 5, roll 2 (microfiche) (the 'Albany Municipal Charter Manuscript'); Town of Westchester (6 January 1687/8), NYSA, Land Patents 12943-78, vol 7, roll 3 (microfiche) (the 'Westchester Municipal Charter Manuscript').

of the Protestant Church of England ('Trinity Church') lest the King be accused of favoring his Dutch ancestry over his new English crown and her Church of England.

Continued concern over the weak presence of the Church of England in colonial North America, particularly New York, encouraged the newly arriving members of an English missionary group, the Society for the Propagation of the Gospel in Foreign Parts, to petition in 1714 the staunch Church of England supporter, Queen Anne, for the incorporation of a new parish on Staten Island to be known as 'St Andrew, Minister, Church, Wardens and Vestry' ('St. Andrew's Church').¹⁸ Their intention, as with that of the incorporators of the Trinity Church, was that the legal capacities of corporate property ownership coupled with the formal structure approved by the Crown in their respective charters, would facilitate donative collections and enable the groups to establish and maintain a church community. The result was that at the end of the Stuart period, colonial New York had an active and diverse corporate landscape featuring six instances in which the emerging local economic, political, or social interests sought and achieved alignment with that of the metropolitan government. It is perhaps then ironic that this occurred in one of the least populated and most politically fractured of the Stuarts' North American colonies.

This dissertation concludes with the assertion that the corporation appearing in Virginia, Massachusetts, and New York reflected and adapted to evolving local economic, social, and political interests as they intersected those of their respective metropolitan government. In examining the precise terms used in their incorporating instruments, it is evident that there was a continual similarity of descriptive core

¹⁸ Reformed Protestant Dutch Church of the City of New York, Minister, Elders and Deacons of, Deed of Confirmation of Realty and Conferring Corporate Powers (11 May 1696) NYSA, Land Patents 12943-78, vol 7, roll 3 (microfiche) (the 'Dutch Church Charter Manuscript'); New York Rector and Inhabitants in Communion of the Protestant Church of England (Trinity Church), Deed of confirmation of Realty and Confirmation of Corporate Powers (6 May 1697) NYSA, Land Patents 12943-78, vol 7, roll 3 (microfiche) (the 'Trinity Church Charter Manuscript'); St Andrew, Minister, Church, Wardens and Vestry, Act of Incorporation and Grant (29 June 1713) NYSA, Land Patents 12943-78, vol 8, roll 3 (microfiche) (the 'St Andrew Church Charter Manuscript').

elements of incorporation, such as its separate legal personhood and the necessity of a corporate name, as well as of certain corporate rights and privileges, most notably self-governance. These similarities suggest that the corporate form arriving in seventeenth century British North America created an increasingly regular and certain framework. But these provisional similarities are also accompanied by variations among other corporate rights and privileges specific to the circumstances in which they were created, such as the detailed voting rights of the 1609 Virginia Charter or the property value caps placed on the ecclesiastical and education corporations. The colonial corporation proved a tool to protect and preserve existing interests as well as to establish, organize, and promote newly emerging interests in these fledgling societies. The ultimate success of these corporations depended upon the ability of the corporate form to evolve and adequately protect interests as they varied across the ocean by political, social, and economic context. The legal history of Anglo-American corporation as it was transplanted from England and evolved unique functions and powers within each colony's government, society, and economy is part of the broader legal history of colonial New York, Massachusetts, and Virginia.

CHAPTER ONE:

The Corporate Framework for Settling Colonial Virginia

The Virginia Company's arrival and establishment of a permanent colony in North America came in the midst of dozens of other English ventures to explore foreign lands; most of which met with failure rather than success.¹ This particular group of gentlemen explorers was initially organized by proprietary charter in 1606 as an unincorporated association directed to settle a colony and cultivate a trade in North America.² It was similar in form to those charters granted to Sir Humphrey Gilbert and Sir Walter Raleigh in 1584.³ The Virginia Company's subsequent incorporation by charter in 1609 was not a foregone conclusion as there were legal alternatives for organization, including maintaining its existing form as an association. But the corporation had become an increasingly preferred legal framework for explorer groups to both protect established aggregate interests in a particular trade route or settlement, as well as to promote and encourage future expansion of these interests to their benefit and that of the Crown.⁴ The terms of the 1609 Virginia Charter bear remarkable

¹ Karen Ordhal Kupperman, *Roanoke: the abandoned colony* (Lanham; Plymouth: Rowan & Littlefield Publishers 2007) especially page 184. See Charles McLean Andrews, *The Colonial Period of American History* (New Haven: Yale University Press 1934-1938) c 1, 2. A particular example of another adventurer would be Sir John Zouche and Captain George Weymouth setting out in 1605: Articles of Agreement between Sir John Zouche, of Codnor, in the county of Derby, knight, and Captain George Waynmouth (elsewhere Weymouth), of Corkington, in the county of Devon (30 Oct 1605) reprinted in *Eighth Report of the Royal Commission on Historical Manuscripts*, vol 1 (1881); also reprinted in Alexander Brown, *The Genesis of the United States*, vol 1 (London: William Heinemann 1890) (n 55) 34-35.

² Bernard Bailyn, *The Barbarous Years*: (New York: Alfred A Knopf 2012) c 2.

³ A distinction between settlement charters and discovery charters is presented immediately below. For a discussion of the Raleigh spelling rather than the Raleigh spelling, see in Agnes Latham Joyce Youngs (ed), *The Letters of Sir Walter Raleigh* (1999) xxi-xxiv.

⁴ John H Baker, *The Oxford History of the Laws of England*, vol VI (Oxford: Oxford University Press 2003) 622-23. See also William Robert Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, vol 1 (Cambridge: Cambridge University Press 1910) (discussing the contractual joint stock arrangement that typically accompanied these incorporations); see also *ibid*, vol 2, p 135. See the specific example of the East India Company and the distinction between a joint-stock and a 'regulated'

likeness to that issued in 1610 to a fellow commercial venture in search of settlement, the London and Bristol Company (the 'Newfoundland Company'), as well as those issued to the trading companies at this time, such as the Eastland Company of York (the 'Eastland Company') incorporated in 1579 or the Governor and Company of Merchants of London, Trading into the East-Indies (the 'East India Company') incorporated in 1600. Ultimately the commercial interests of its metropolitan government, represented by the politically factioned Virginia Council, conflicted with the emerging interests of those individuals settling the colony.⁵ Although the Virginia Company's corporate charter was revised again in 1612 as an attempt to resolve major issues of leadership and management, the corporation succumbed to the fractioning of economic and political interests and was dissolved in 1624. Despite this failure, the

company, Philip J. Stern, *The Company State: Corporate Sovereignty and the Early Modern Foundations of the British in India* (Oxford: Oxford University Press 2011) 44-45.

⁵ The two groups did not necessarily overlap, for a discussion of the method of transporting Englishmen to the Chesapeake, see William Nelson, *Common Law in Colonial America: The Chesapeake and New England, 1607-1660*, vol 1 (New York: Oxford University Press 2008) 25-47; Christopher Tomlins, 'Law, Population, Labor' in Christopher Tomlins Michael Grossberg (ed), *The Cambridge History of Law in America*, vol I (Cambridge: Cambridge University Press 2008) 215-16. As to the commercial nature of the venture, Wesley Craven noted in his 1932 seminal work, *Dissolution of the Virginia Company*:

The most common error in writing the history of the Virginia Company has been a failure to understand the fundamental character of that corporation. Whatever else may have entered into the activities of the company, it was primarily a business organization with large sums of capital invested by adventurers whose chief interest lay in the returns expected from their investment. Their motives were not entirely selfish; their desire to render a public service is unquestionable. They intended to aid England in the solution of her economic and social problems by increasing her trade, by relieving her of a dependence upon other countries for certain necessary commodities, and by relieving her congested state of population. Yet even these considerations of public welfare were not wholly divorced from the idea that in fulfilling its higher purposes there was to be found the best guarantee of financial reward for the company, and hence the best assurance of profit for each individual adventurer.

Wesley Frank Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (New York: Oxford University Press 1932) 24. The importance of the commercial side has been more recently reiterated in William M Billings, John E. Selby and Thad W. Tate, *Colonial Virginia: a history* (White Plains, NY: KTO Press 1986) 13; Jack P. Greene, *Pursuits of Happiness: the Social Development of Early Modern British Colonies and the Formation of American Culture* (Chapel Hill: University of North Carolina Press 1988) 8-9; Andrew Fitzmaurice, 'The Civic Solution to the Crisis of English Colonization, 1609-1625' (1999) 42 *The Historical Journal* 25; Ken MacMillan, *Sovereignty and Possession in the English New World: the Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press 2006) 93-98; W Nelson (n 5) 11-18.

incorporated Virginia Company succeeded in establishing an initial framework for a permanent society and economy in colonial Virginia. Examining the evolving legal terms and the context in which these three successive charters were issued to the Virginia Company offers a fresh perspective on both the colonial legal history of Virginia as well as on the roots of a nascent Anglo-American corporate form used to establish and govern an overseas colony.

I. A Workable Definition for an English ‘Corporation’ at the Turn of the Seventeenth Century

Group activity in England was described throughout the medieval period, if not earlier, using political, social, and economic terminology, such as the borough, the college, or the guild.⁶ The term ‘corporation’ was used occasionally in conjunction with or as an alternative to these terms but as medievalist Susan Reynolds has observed: the term ‘corporation’ lacked any semblance of a distinct legal meaning until the thirteenth century at the earliest. She posits that the introduction of mortmain restrictions on property transfers to ecclesiastical entities at this time prompted legal discussions of a discrete category for corporations in England.⁷ Group ownership of property by the

⁶ Susan Reynolds, ‘The History of Incorporation or Legal Personality: a case of fallacious teleology’ in *Ideas and Solidarities of the Medieval Laity* (Aldershot: Variorum 1995); JH Baker n (4), 622 (finding that group ownership of real property was common since at least the turn of the fifteenth century).

⁷ S Reynolds (n 6) 11. Sandra Raban discusses the uncertain theory as to the mortmain statutes initial passage through the fourteenth and fifteenth centuries observing: ‘[d]e viris religiosus is generally seen as a move to limit the wealth of the church, its target was not the church as such but the tenure by which its lands were held.’ Sandra Raban, *Mortmain Legislation and the English Church, 1279-1500* (Cambridge: Cambridge University Press 1982) 2, see also 1-28. For further reading on the history of mortmain law as it affected corporate property ownership leading up to the period considered, Stewart Kyd, *A Treatise on the Law of Corporations* (London, Printed for J. Butterworth, Fleet-Street 1793) 103-104; Theodore FT Plucknett, *A Concise History of the Common Law* (Rochester, New York: The Lawyers Co-operative Publishing Company 1929) 28; Gareth Jones, *History of the law of Charity 1532-1827* (Cambridge: Cambridge University Press 1969) especially p 112; AH Oosterhoff, ‘The Law of Mortmain: An Historical and Comparative Review’ (1977) Vol. 27, No. 3 *The University of Toronto Law Journal* 257; Chantal Stebbings, ‘Charity land: A Mortmain Confusion’ (1991) 12 *The Journal of Legal History* 7. See also Brian Arthur Molloy, ‘Analysis of the report and evidence of the Select Committee of the House of Commons on the Operation of the Laws of Mortmain, and the restrictions of the power of making deeds and wills’ [1845] *Hume Tracts* (noting that the statutes of mortmain never applied to colonial land).

fifteenth century generally required a legal form such as a trust or a corporation that could stand for itself at law.⁸ Legal historian John Baker has identified royal charters appearing during the mid-fifteenth century that explicitly granted perpetual corporate status to the incorporated group.⁹ Both he and fellow legal historian David Seipp have remarked upon judicial discussions appearing late in the fifteenth century wherein corporate personality was noted as a distinct legal concept from natural personhood.¹⁰ Evident by the end of that century was a theoretical movement assigning a greater degree of legal distinction between a corporation and an unincorporated group.¹¹ Then by the close of the Tudor period the term ‘corporation’ was increasingly described by references to underlying concepts of perpetual existence and separate personhood, but with variations among form, and the assignment of rights and privileges dependent upon a number of factors including the nature of the corporation’s activity.¹²

⁸ JH Baker (n 4) 625-26.

⁹ Ibid 622.

¹⁰ Ibid. See David J Seipp, ‘Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural’ in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge: Cambridge University Press 2002).

¹¹ DJ Seipp (n 10) 46-49 (observing that he did not discover a group of lawyers or judges that consistently advocated for the finding of a corporate status in the fifteenth century, but rather that judges and lawyers regularly switched conceptual sides depending upon the facts). See generally Ernest Hartwig Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press 1957) c 5,6 (discussing the larger medieval political debates and conflicts causing or influencing the theoretical conceptualization of the king as possessing a corporate capacity).

¹² JH Baker (n 4) 622. Brian Tierney, ‘Corporatism, Individualism, and Consent: Locke and Premodern Thought’ in Kenneth Pennington Melodie Harris Eichbauer (ed), *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A Brundage* (Burlington, VT: Ashgate Publishing Ltd 2013) (arguing against the idea that Locke’s emphasis on individual consent was at odds or a break with the medieval concept of corporation where an individual consents to be bound by the corporate form and operate by general consensus, Tierney finds continuity). For further introduction to the English corporation's varied history up through the medieval period one might begin with the following: John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of their Relation to the Authority of the State*, vol 1 (New York: G.P. Putnam's Sons 1905); Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (2d edn, Cambridge: Cambridge University Press 1905) c II s 12 – c III s 8; William Searle Holdsworth, *A History of English Law* vol 3 (London: Methuen 1923-31) s 2; G Jones 37-39, 66, 79-80; Frederic William Maitland, *State, Trust and Corporation* (David Runciman and Magnus Ryan ed, Cambridge: Cambridge University Press 2003) 216-33, 371-383; John H Baker, ‘The Inns of Court and Chancery as Voluntary Associations’ in *Collected Papers on English Legal History*, vol I (Cambridge: Cambridge University Press 2013).

As starting point for discussing the corporate form arriving in British North America with the Virginia Company after 1609, the definition provided by John Cowell's legal dictionary published in 1607 is illustrative:

That which the civile law calleth universitatem, or collegium, a bodie politique authorised by the kings charter, to have a common seale, a head officer, one or more, and members able by their common consent, to graunt or to receive in law any thing within the compas of their charter: even as one man may doe by law all things, that by lawe he is not forbidden: and bindeth the successours, as a single man bindeth his executour or heyre.¹³

This definition of presumably common elements of secular corporations in the early seventeenth century, includes: incorporation by the authority of the king and evidenced by a charter; the grant of a common seal; the appointment of a leading officer or head; a defined corporate membership operating by common consent; the capacity to own and sell property to the extent permitted by its charter and by common law; and the power to have and to bind successors. In addition to these logistical elements of incorporation, the theoretical concepts underpinning this definition are that the corporation possesses separate personhood acting 'even as one man may doe' and may bind successors thereby allowing for perpetual succession of the entity. These logistical and practical elements of incorporation are each explicitly articulated in the provisions of the 1609 Virginia Charter and reiterated in the 1612 Virginia Charter as well as their corporate contemporaries. While Chapter 2 will address the near simultaneous common law discussions defining the corporation, particularly by Sir Edward Coke in his well-known 1613 decision of *Sutton's Hospital*, first consider the corporation in its practical application as framing a permanent settlement and development of commercial activity in colonial Virginia in 1609.

¹³ John Cowell, *The Interpreter: or Booke Containing the Signification of Words...* (Cambridge: John Legate 1607) entry for 'corporation'.

II. Alternative Legal Forms of Ventures to North America

At the close of the fifteenth century an impoverished England watched as Spain and Portugal divided up the claims to commercial trade routes stretching the globe.¹⁴ For much of the sixteenth century Spain would dominate European efforts at overseas trade exploration and amass a singular wealth from silver mining in colonial Peru.¹⁵ Although the emergence of a profitable continental market for cloth exports had drastically improved the English economy in the latter half of the century, repeated attempts to curtail Spanish (Catholic) power continued to drain England's coffers and morale, perhaps excepting the privateers that found a lucrative business attacking Spain's transatlantic trade.¹⁶ In 1585 England had found herself once again at war with Spain and fending off Spanish aspirations for a reestablished Catholic Church in England.¹⁷ Spain was well aware of England's designs on her overseas trade network and aimed to protect it from encroachment.¹⁸ Peace would not be reached between England and Spain until 1604 but certain ambitious English explorers would not wait for peace before they embarked on their search for new trade and settlements to

¹⁴ A Brown (n 1) 43-46; CM Andrews (n 1) 12; K MacMillan (n 5) 64-74. As to an impoverished beginning, economic historian, Robert Brenner, gives an excellent description of the changing economy of England her cloth trade with continental Europe. Robert Brenner, *Merchants and revolution : commercial change, political conflict, and London's overseas traders, 1550-1653* (Cambridge: Cambridge University Press 1993) especially pp 4-15.

¹⁵ CM Andrews (n 1) c 1, especially 9-17. See Richard Middleton and Anne Lombard, *Colonial America: A History to 1763* (West Sussex, UK: Wiley-Blackwell 2011) 28-41.

¹⁶ WM Billings, JE Selby and TW Tate (n 54) 5.

¹⁷ Tim Harris, *Rebellion: Britain's First Stuart Kings, 1567-1642* (Oxford: Oxford University Press 2014) 79. See generally, R Middleton and A Lombard 28-50. See also Jonathan Israel, *Conflicts of Empires: Spain, the Low Countries and the Struggle for World Supremacy* (London; Rio Grande, Ohio: Hambledon Press 1997).

¹⁸ See John Jay TePaske, 'Integral to Empire: The Vital Peripheries of Colonial Spanish America' in Christine Daniels and Michael V Kennedy (eds), *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820* (New York: Routledge 2002). See also Elizabeth Mancke, 'Negotiating an Empire: Britain and Its Overseas Peripheries, c. 1550-1780' in Christine Daniels and Michael V Kennedy (eds), *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820* (2002).

surpass Spain's.¹⁹ There was variety among the legal form taken by these adventurers but they were all self-financed and relied heavily upon royal political support.²⁰ Considering these charters as the forbearers to those of the Virginia Company, there were marked points of commonality among them as well as divergences. The corporate charters used similar language establishing a separate legal personhood and perpetual succession and many of the logistical elements of incorporation were repeated: the corporate name, domicile, right to sue and be sued, among others. The evolving theoretical and logistical patterns among these commercial corporations appear at the time the form was introduced to British North America to facilitate the shared commercial interests of London merchants and the Crown.

A. Exploring and Settling Brothers: the Charters of the Gilberts and Raleigh

In the first English wave of explorers to North America appears Sir Humphrey Gilbert receiving a charter from Elizabeth I on 11 June 1578.²¹ This charter bestowed a six-year royal license to explore and settle a new colony to:

[Gilbert and his] heires and assignee for ever, free libertie and licence from time to time, and at all times for ever hereafter, to discover, finde, search out, and view such remote, heathen and barbarous lands, countreys and territories not actually possessed of any Christian prince or people, as to him, his heirs & assignee, and to every or any of them, shall seeme good: and the fame to have, hold, occupie and enjoy to him, his heires and assignee for ever, with all commodities, jurisdictions, and royalties both by sea and land; and the said sir Humfrev and all such as from time to time by licence of us, our heire and successours, shall goe and travell thither, to inhabits or romaine there, to build and fortifie

¹⁹ CM Andrews (n 1) ch 1 (detailing the exploration of other English adventurers, John Cabot, Sir Francis Drake, and Sir Martin Frobisher).

²⁰ R Brenner (n 14) 83. In the specific case of the Virginia adventurers, see: Thomas J. Wertenbaker, *Virginia Under the Stuarts* (Princeton: Princeton University Press 1914) 34.

²¹ 'Letters Patent to Sir Humfrey Gylberte June 11, 1578' (*The Avalon Project, Yale Law School*) accessed 22 July 2015 ('H. Gilbert's 1578 Charter'). CM Andrews (n 1) c 1 (describing Gilbert's path that followed the courses explored by Frobisher and Cabot).

at the discretion of the sayde Sir Humfrey, and of his heires and assignee...²²

Gilbert was permitted by royal authority to explore and claim foreign lands and the property interest created by this grant was transmissible to his heirs.²³ Pursuant to the charter, Gilbert laid claim to Newfoundland but was unable to effect an occupation of the land because of his death at sea on the return trip.²⁴ The family interest in exploration and colonial settlement, however, continued with Gilbert's brother, Sir Adrian Gilbert, and his half-brother, Sir Walter Raleigh, not to mention nephew, Raleigh Gilbert, who would be an initial member of the Virginia Company.²⁵ In 1584, just as Gilbert's charter was to expire, Adrian Gilbert and Raleigh each received charters from Elizabeth I on 6 February and 25 March, respectively.²⁶ Adrian Gilbert was in search of the elusive Northwest Passage that would allow England a faster trade route to China; Raleigh was interested in establishing a colony in North America that would serve as a trading hub.²⁷

²² H. Gilbert's 1578 Charter, s 1.

²³ Ibid.

²⁴ David Beers Quinn, *Explorers and Colonies: America, 1500-1625* (London: Hambledon Press 1990) c 13. See the more complete narrative at, David Beers Quinn, *The Voyages and Colonising Enterprises of Sir Humphrey Gilbert*, vol I (Surrey: Ashgate 2010). England would still lay claim to the region based on Gilbert's claim. Richard Hakluyt, *Principall Navigations, Voiages and Discoveries of the English Nation*, vol VIII (F.R.H.S. Edmund Goldsmid ed, Project Gutenberg Ebook #25645 2008 (originally published (1589-1600)) [34] 51-55. For his Irish attempts and his attempts at incorporation in Munster, see Mary Sarah Bilder, 'English Settlement and Local Governance' in Christopher Tomlins Michael Grossberg (ed), *The Cambridge History of Law in America*, vol I (Cambridge: Cambridge University Press 2008) 68.

²⁵ 'The First Charter of Virginia: April 10, 1606' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va01.asp> accessed 17 July 2015 (the '1606 Virginia Charter') s 1.

²⁶ H. Gilbert's charter was due to expire that June of 1584.

²⁷ Charter to the Colleagues of the Fellowship for the Discovery of the Northwest Passage (1684), PRO C 66/1244 (the 'Northwest Passage 1684 Charter'). Note that Raleigh had a variety of exploration and settlement interests. He was in fact a member of Adrian Gilbert's venture to the Northwest Passage too.

Adrian Gilbert's petition had a significant difference from that of either brother: it was on behalf of a group of explorers rather than as an individual. His charter authorizing a search for the Northwest Passage read:

[U]nto the said Adrian Gilbert and his said associates, their heirs and assigns, we impose, give, assign, create and confirm this name peculiar to be named by, to serve and to be served by, that is to wit, by the name of the Colleagues of the Fellowship for the Discovery of the Northwest Passage, and them for us, our heirs and successors, by that name do incorporate and do erect and create as one body corporate to have continuance forever...²⁸

This charter intended to create a corporation that would be known by a singular name, 'Colleagues of the Fellowship for the Discovery of the Northwest Passage', and would operate as a singular entity in succession for five years (the 'Northwest Passage Charter').²⁹ Its corporate members are listed on a separate annex and include Walter Raleigh and Sir Francis Drake among others.³⁰ The one lone named member in the body of the charter is 'Adrian Gilbert of Sandridge in the county of Devon', suggesting that he was to be the head of the corporation.³¹ Adrian Gilbert and his associates, the corporate members, are permitted to regulate themselves through laws and ordinances, as well as to punish those infringing upon their monopolistic rights to search for a Northwest Passage although there was no specified right to sue and be sued.³² They are licensed the use of ships in order to transport the men and supplies necessary and to erect residences as necessary but ancillary to the goal of discovery.³³ In exchange for these rights, the charter obligated the group to save one-tenth of any precious stones

²⁸ Ibid, s 6.

²⁹ Ibid s 9.

³⁰ Ibid annex.

³¹ Ibid s 2.

³² Ibid s 5, 7 (granting the right to expel interlopers and confiscate goods), s 11 (granting the right to punish mutineers).

³³ Ibid s 3.

and metals discovered for the Crown as well as other financial concessions.³⁴ Failure to fulfill such obligation would result in a complete forfeiture of all rights and privileges under the charter.³⁵ The Northwest Passage Charter was similar in many respects to brother Humphrey Gilbert's grant issued six years previously, particularly with respect to these latter provisions. But this charter also declared an intention to create a separate legal entity according to terms that bore significant resemblance to that later defined by Cowell. It was certainly not a perfect match but when compared with the charter of Humphrey Gilbert, the Northwest Passage Charter created something different conceptually if not in practice.

The difference of the Northwest Passage Charter is underscored by a comparison with Walter Raleigh's charter issued the next month. The opening passage of this charter reads:

[W]e give and graunt to our trustie and welbeloved servant Walter Raleigh, Esquire, and to his heires assignes for ever, free libertie and licence from time to time, and at all times for ever hereafter, to discover, search, finde out, and view such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People, as to him, his heires and assignee, and to every or any of them shall seeme good, and the same to have, horde, occupie and enjoy to him, his heires and assignee for ever, with all prerogatives, commodities, jurisdictions, royalties, privileges, franchises, and preheminences, thereto or thereabouts both by sea and land, whatsoever we by our letters patents may graunt, and as we or any of our noble progenitors have heretofore graunted to any person or persons, bodies politique or corporate³⁶

³⁴ See Michael J Braddick, *Nerves of State: Taxation and the Financing of the English State, 1558-1714* (Manchester: Manchester University Press 1996) (explaining simply the value of these commercial monopolies to both the recipient and to the Crown as part of a system of indirect taxation) *especially* 78.

³⁵ Northwest Passage Charter ss 4, 5 (obligating the corporation to return half of what is confiscated to the Crown), s 10.

³⁶ Charter to Sir Walter Raleigh: 1584 reprinted in Francis Newton Thorpe (ed), *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the State, Territories, and Colonies now or heretofore forming the United States of America* (Washington, DC: Government Printing Office 1909) ('Raleigh's 1584 Charter') s 1.

Raleigh received all that might be granted to 'bodies politique or corporation' such as under the Northwest Passage Charter but strictly according to the language, it was to be received in Raleigh's personal capacity just as Humphrey Gilbert's charter provided. The incorporating language was reserved to Adrian Gilbert's royal charter issued to a group. Raleigh's contemporary and fellow adventurer, Thomas Harriot, raises the question of whether Raleigh's charter was intended to create a corporation sole and what value was placed on a designation of corporation. In a fragmented journal entry Harriot writes under the umbrella term of 'corporation':

There is great difference betwixte a corporation privileged for only trade; & a corporation privileged for planting & trade; & a corporation priveledged only for planting. Of the first we haue examples of many corporations of Societies. The Muscouy Company, Turkey, Barbary, Guinny, Spagnishe, & others: which are knowne well in there gouvernement. Of the other two we haue yet noe especiall example that haue proved well. *Sir Humfry Gilbert* for planting & trading in Norumbega & *Sir Walter Raleigh* for Virginia.³⁷

The chartered ventures of both Humphrey Gilbert and Raleigh are listed as corporations within the latter settlement category. There is a possibility of a transcription error and that 'incorporations of Societies' could be 'incorporations or Societies'.³⁸ In which case Harriot may have considered Gilbert and Raleigh's respective charters as issued to unincorporated societies. However, the first line's singular use of the term 'corporation' suggests that 'oP' is likely the correct transcription and he meant it to apply generally to all listed. It is possible that he meant each of these ventures were legal incorporations and that Gilbert and Raleigh were presumed corporations sole despite a lack of incorporating language in the relevant charters. Conversely, it could reflect that the incorporating language of the Northwest Passage

³⁷ Thomas Harriot, "Thomas Harriot's Notes on Corporations for Trade and Plantations" in David Beers Quinn (ed), *The Roanoke Voyages, 1584-1590: documents to illustrate the English voyages to North America under the patent granted to Walter Raleigh in 1584*, vol 1 (London: Hakluyt Society) 389.

³⁸ See David Quinn's editorial note: *ibid* p 389 n7.

Charter had no practical effect and it was overseas activity that drew these ventures within the description of corporation. It seems most probable, however, that Harriot intended the term ‘corporation’ in this casual note-taking context as a term-of-art rather than a legal description of these ventures. The additional importance of this passage and Harriot’s categorization of the ventures could be that it indicates a contemporary view that the activity of the venture dictated a particular charter formula. Those ventures organized for trade, or trade and planting, were groups such as the East India Company or the Eastland Company and were issued corporate charters (*i.e.* discovery charters). The only ventures organized for settlement were by individuals, Humphrey Gilbert and Walter Raleigh, and they were issued proprietary charters (*i.e.* settlement charters). Accordingly, when the group petitioning for a charter to settle Virginia was issued as a charter in 1606 it was likely based upon the settlement charters issued to Gilbert and Raleigh, rather than the discovery charters, such as the Northwest Passage Charter. It was only after the Virginia Company proved desperate for additional funding that its charter was reissued in 1609 using the corporate form appearing in the discovery charters and that had been able to attract outside financial investors like the East India Company.³⁹

Further support that Raleigh’s charter did not create a corporation is present in Raleigh’s own attempts to incorporate. In 1587 Raleigh drafted a charter for a corporate ‘Cittie of Raleigh’ in his newly claimed region of Virginia (present-day North Carolina). Although this document no longer exists and Raleigh’s colonial endeavors ultimately failed, contemporary secondary sources refer to Raleigh’s charter as detailing plans using the terms ‘corporation’ and ‘body politick’ and with a proposed membership consisting

³⁹ For further discussion of the distinction between charters issued for settlement and those issued for discovery: CM Andrews I (n 1) 42-3, 432-42; George Lee Haskins, *Law and Authority in Early Massachusetts* (University Press of America 1985) 26-7, 69, 111.

of financial investors in its settlement.⁴⁰ Raleigh's specific use of terms of incorporation indicates that they had a particular meaning and created something that was not memorialized in the terms of his proprietary charter. As to his authority to incorporate, in 1613, Coke would proclaim valid incorporation could only be by Crown, Parliament, common law or prescription in *Sutton's Hospital*.⁴¹ But as Chapter 3 will discuss, the royal governor of Virginia, Sir George Yeardley, would be given explicit royal instructions in 1618 to incorporate cities and boroughs in colonial Virginia. Then Matthew Hale writing in the 1650s would describe the palatinate bishops as having long possessed a devolved power to incorporate.⁴² It was an issue of continued discussion but notably appears in British North America as early as 1587 with Raleigh's plans.

The differing terms among the three charters and the assumed powers of incorporation show the uncertainty surrounding the legal status of 'incorporated' in the decades leading up to the Stuart period. The terms of the Northwest Passage Charter demonstrate an intention to create a legal capacity that was not present in the charters of Humphrey Gilbert or Walter Raleigh. The language of incorporation was not as precise as John Cowell's 1607 definition of a corporation might want, but it is an initial phase of the corporation venturing to British North America.

B. The Evolving Conceptual Context: The Great Trading Companies

By the conclusion of the Anglo-Spanish War with the Treaty of London in 1604, English commercial trading companies were approaching their prime.⁴³ At the

⁴⁰ KO Kupperman (n 1) 105-118; Daniel K Richter, *Before the Revolution: America's Ancient Past* (Cambridge: Belknap Press 2011) 104.

⁴¹ *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960, (*'Sutton's Hospital'*) 29b.

⁴² Matthew Hale, *The Prerogatives of the King* (Selden Society 1976) 210-14.

⁴³ CM Andrews (n 1) c 3, 5.

time James I issued the first charter for the Virginia Company in 1606 there were numerous examples of overseas ventures actively engaging in the discovery of a lucrative overseas trade, including for example: the Eastland Company incorporated in 1579, the East India Company incorporated in 1600, and the Company of Merchants of England trading to the Seas of the Levant (the ‘Levant Company’) incorporated in 1605. The commercial operations so intrinsic to their existence, historian Bernard Bailyn has described them as ‘overseas trading guilds in effect.’⁴⁴ While the specific rights granted under each of these charters varied, they all contained language organizing their group into a single entity and existing in succession for a term of years similar to the Northwest Passage Charter. To give an example, the 1579 charter issued for the Eastland Company, reads: ‘shalbe one fellowship and comynaltye and one bodye incorporated and pollytyque of it selfe in deede and in name and shall have ppetuall succession forever by the name of Governours assistant and Fellowship of the Marchaunt of Easteland...’⁴⁵ The East India Company incorporated by charter dated 31 December 1600⁴⁶ reads in pertinent part: ‘[t]hat they and every of them from henceforth be, and shall be one Body Corporate and Politick, in Deed and Name, by the name of the Governor and Company of Merchants of London, trading into the East Indies...and by that name ... they shall have Succession. . . .’⁴⁷ These charters

⁴⁴ See B Bailyn (n 2) 37.

⁴⁵ Maud Sellers (ed) *The Acts and Ordinances of the Eastland Company* (London: Spottiswoode and Co. Ltd. 1906) 144.

⁴⁶ John Shaw (ed) *Charters relating to the East India Company from 1600 to 1761: reprinted from a former collection with some additions and a preface for the Government of Madras* (Madras: R. Hill at the Government Press 1887) iii (presenting an account of the dating discrepancy with a well reasoned argument for using December 31, 1600 as the correct date of the charter).

⁴⁷ Charter Granted by Queen Elizabeth, to the Governor and Company of Merchants of London, Trading into the East Indies (31 December 1600) reprinted in John Shaw (ed), *Charters relating to the East India Company from 1600 to 1761: reprinted from a former collection with some additions and a preface for the Government of Madras* (R. Hill at the Government Press 1887) (n 53). Present space considerations do not allow a full comparison with the East India Company, which has been the recent subject of excellent scholarship. See for example PJ Stern (n 4); Ron Harris, ‘The English East India Company and the History of Company Law’ in Gerard van Solinge Ella Gepken-Jager, Levinus Timmerman (ed), *VOC*

were each creating a separate legal entity through language that did not appear for either Raleigh or Humphrey Gilbert, but did in the Northwest Passage Charter. However, the form was still adaptable to the particular needs of the group. Unlike the charter issued to the Eastland Company or even the Northwest Passage Charter, the use of the term ‘perpetual’ or the equivalent did not appear in this charter of the East India Company. The East India Company was to ‘have Succession’ but there was no mention of perpetuity or a perpetuity capped by a particular term of years as with the Northwest Passage Charter. Practically, investors proved uninterested in long-term investment strategies. The East India Company struggled during its initial years to find investors unless they distributed each voyage’s profits upon return.⁴⁸ To accommodate the realities, the East India Company was issued a new charter at the completion of each planned voyage. The result conceptually was that each voyage was considered a successful fulfillment of a charter’s stated corporate purpose; new voyages lead to a new corporate charter with a refreshed statement of purpose.⁴⁹ So though having a theoretical variation from the Eastland Company, the constant is that there was legal

1602-2002 - 400 Years of Company Law, Series Law of Business and Finance, vol 6 (Kluwer Legal Publishers 2005).

⁴⁸ KN Chaudhuri, *The English East India Company; the study of an early joint-stock company, 1600-1640* (London: F Cass 1965) 209; R Brenner (n 14) 96.

⁴⁹ East India Company Charter (n 53) 2. William Mitchell argues that from a modern financial perspective, the East India Company was a partnership rather than a joint-stock company:

In England the East India Company received a royal charter in the opening year of the 17th century. At first the company could hardly be considered as a joint-stock company; for in the early years of its history the voyages were separate and not necessarily permanent ventures of the subscribers, who contributed varying amounts to the capital required for the expedition and received a proportionate share of the proceeds when the expedition returned. A shareholder in one of the early expeditions might or might not be a shareholder in the next. In 1613 the first so-called joint-stock was subscribed; but the term is misleading; it was not a subscription of permanent capital.

However, Mitchell does not address the concept of ‘purpose’ as a limitation on corporate life. Each voyage fulfilled the purpose described in the charter. William Mitchell, ‘Early Forms of Partnership’ in Committee of the Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History*, vol 3 (Boston: Little, Brown, and Company 1909) 194. See also PJ Stern (n 4); fn 47 and accompanying text.

language organizing the group as an ongoing separate entity described as a corporation.⁵⁰ This ability of the corporate form to adapt to its circumstances is made even clearer in a comparison of the legal terms in the three successive charters issued to the Virginia Company in an attempt to accommodate the rapidly changing circumstances of settlement.

C. The Virginia Company's Attempt at Settlement

Raleigh's attempts at settling a colony in the vast region described as Virginia had failed, but a revived English interest in North America occurred around the turn of the seventeenth century. After the 1604 Treaty of London, there was relative peace from England's perspective, while Spain would remain preoccupied with the Low Countries until 1609. France was continuing to establish a stronger foothold for its North American fur trade with Samuel de Champlain founding Port Royal, Acadia in 1605, and then Quebec City in 1608.⁵¹ In the midst of this, two groups of experienced merchant adventurers sought a joint charter from James I to explore and establish British colonies in North America.⁵² The resulting Virginia Company was ultimately transmuted into successive legal forms under three distinct charters, evolving from an unincorporated association of gentlemen explorers under the 1606 Virginia Charter, to a private corporation under the 1609 Virginia Charter, with its private powers expanded and entrenched by the 1612 Virginia Charter. A constant was its hybrid nature: the Virginia Company exercised powers of public governance and responsibility within the

⁵⁰ MS Bilder (n 24) 67 (observing that the governance structure of 'governor, deputy governor, and twenty-four assistants with "politke gouvernement, laws, and orders"' emerged in 1601 with John Wheeler's *A Treatise of Commerce*).

⁵¹ Brenda Dunn, *A History of Port Royal/Annapolis Royal 1605-1800* (Toronto: Nimbus Publishing Ltd & The Historical Association of Annapolis Royal 2009) ch 1; T Harris (n 17) 80.

⁵² To have the two groups seeking a single charter actually made financial sense considering the considerable cost of obtaining such a document. R Brenner (n 14) 93-96. .

colony but it remained exclusively motivated by commercial success. The terms of its corporate charters gave formal structure in attempt to protect and encourage the commercial interests of the London investors, but increasing competition among them and among emerging local commercial interests ultimately lead to the corporation's dissolution in 1624.

i. Settlement Purpose Established by the 1606 Virginia Charter

The 1606 Virginia Charter was among the first authorizing a settlement overseas, as compared to the discovery charter issued to the East India Company in 1600.⁵³ The secondary literature has traditionally considered the Virginia Company among the great trading companies focusing on the collective commercial nature of the venture rather than specific activity of the corporation (*i.e.* discovery or settlement).⁵⁴ It is not obvious, however, that those drafting the 1606 Virginia Charter would have initially agreed with that categorization.⁵⁵ Although all members were commercially motivated, the technical legal conceptualization of this venture under the 1606 Virginia Charter was more akin to the settlement charters of Humphrey Gilbert and Raleigh than the East India Company or the Levant Company. The following evidence points to it being a type of proprietorship with broad settlement rights to be shared and distributed

⁵³ Note that the Levant Company's charter was revoked in 1606. For a discussion of the political reasons for this, *ibid* 82. See also The Charter to the [Levant] Company of James I (10 December 1605) reprinted in M. Epstein (ed), *The Early History of the Levant Company* (George Routledge & Sons Limited 1908) 152-210; East India Company Charter (editor's notes) 1-15.

⁵⁴ See generally David Hannay, *The Great Chartered Companies* (Williams and Norgate, Ltd. 1926); WR Scott (n 4) chs 6, 7; cf Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge: Cambridge University Press 2000) 41 (arguing that the Virginia Company should not be considered among the great trading English trading companies because it had minimal impact on the development of the business corporation and should be categorized as a 'colonial corporation').

⁵⁵ There is also a discrepancy with respect to the month the charter was issued: whether it was issued 10 April 1606, or actually, 20 November 1606 due to the parliamentary delays that occurred as a result of the Gunpowder Plot of 1605. A Brown (n 1) 42.

among a group of eight individuals, rather than an endeavor embarked upon by a group operating as a single entity.

ii A Network of Skilled Legal Draftsmen and Colonial Adventurers

To begin, those drafting and adventuring under the 1606 Virginia Charter were part of an exclusive and interconnected political and legal world commanding England's overseas trade. Economic historian, Robert Brenner has found that, for example, membership in the East India Company overlapped extensively with that of the Levant Company; and as to the latter, he estimates nearly half of the members of the Levant Company had a brother, father, or brother-in-law also in the corporate membership at the time they joined.⁵⁶ The Virginia Company was no different. Among the original adventurers were the experienced Raleigh Gilbert, Humphrey Gilbert's son and Raleigh's nephew; Thomas Smythe, a governor of the East India Company;⁵⁷ and a long well-known proponent of North American colonization, Richard Hakluyt. It is believed that that Sir John Popham,⁵⁸ the Lord Chief Justice since 1592, was primarily responsible for the drafting of the 1606 Virginia Charter with assistance from then Attorney General, Sir Edward Coke, future author of the important 1613 case assessing the status of corporations at common law, *Sutton's Hospital*, a topic for Chapter 2.⁵⁹ The Virginia venture verged on a Popham family affair

⁵⁶ Brenner (n 14) 21, 71-73.

⁵⁷ Andrews (n 1) 37; Wesley Frank Craven, *The Virginia Company of London, 1606-1624* (Charlottesville: The University Press of Virginia 1957) 3 (finding it unclear why Smythe wasn't listed in the charter as the original eight, but he was an original member).

⁵⁸ He was Lord Chief Justice of the King's Bench at this time, and had been since 1592 until his death in 1607. David Ibbetson, 'Popham, Sir John (c. 1531-1607)' in *Oxford Dictionary of National Biography* (online edn, Oxford: Oxford University Press 2004) <<http://ezproxy-prd.bodleian.ox.ac.uk:2167/view/article/22543?docPos=8>> .

⁵⁹ WM Billings, JE Selby and TW Tate (n 54) 12; A Brown (n 55) 5; WF Craven, *The Virginia Company of London, 1606-1624* 2.

as his cousin, George Popham, and son-in-law, Thomas Hanham, were among the original named investors; and Sir John Popham's son, Sir Francis Popham, was an original member of London council appointed to govern and was incidentally also married to the stepdaughter of Thomas Sutton founding of the charitable corporation at issue in famed *Sutton's Hospital*.⁶⁰ Moreover, in addition to drafting the 1606 Virginia Charter, Sir John Popham was a founding governor of Sutton's charitable corporation.⁶¹ There was no lacking of legal or political experience in the drafting of the 1606 Virginia Charter. It should be assumed that those legal provisions included or omitted from the charter, such as an intention to incorporate, were done for considered reasons.

iii Legal Organization of the Virginia Company under the 1606 Virginia Charter

The 1606 Virginia Charter names eight individuals organized for the purpose of establishing two new settlements in a swath of land described as 'Virginia'.⁶² The charter begins:

JAMES, by the Grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c. WHEREAS our loving and well-disposed Subjects, Sir Thomas Gales, and Sir George Somers, Knights, Richard Hackluit, Clerk, Prebendary of Westminster, and Edward-Maria Wingfield, Thomas Hanharm and Raleigh Gilbert, Esqrs. William Parker, and George Popham, Gentlemen, and divers others of our loving Subjects, have been humble Suitors unto us, that We would vouchsafe unto them our Licence, to make Habitation, Plantation, and to deduce a colony of sundry of our People into that part of America commonly called VIRGINIA, and other parts and Territories in America, either

⁶⁰ 1606 Virginia Charter s 1; David R. Ransome, 'Founders of the Virginia Company (act. 1606-1624)' in *Oxford Dictionary of National Biography* (May 2012, online edn, Oxford: Oxford University Press 2004).

⁶¹ Indenture, Articles and Orders for the Intended Hospital at Hallingbury: Admission of Sir John Popham as a Party to the Venture (1602), ACC/1876/F/07/008; WF Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (n 5) 3. There is also a question of whether Sir John Popham had been an investor, but for unknown reasons, missing from the list of eight. Ibid.

⁶² For perspective, this includes all territory stretching from the present day state of Maine to the state of South Carolina: over two million square miles.

appertaining unto us, or which are not now actually possessed by any Christian Prince or People, situate, lying, and being 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 Latitude⁶³

Neither this first section nor any subsequent section of this charter states an intention to give the venture successive legal personhood as had been granted in the Northwest Passage Charter, and other trading company charters.⁶⁴ Rather, the 1606 Virginia Charter focuses on partitioning the group and charging both with the broad rights and privileges for establishing a respective first and second colony within prescribed geographical limits. For example:

Sir Thomas Gates, Sir George Somers, Richard Hackluit, and Edward-Maria Wingfield, Adventurers of and for our City of London, and all such others, as are, or shall be, joined unto them of that Colony, shall be called the first Colony; And they shall and may begin their said first Plantation 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; And that they shall have all the Lands, Woods, . . . And shall and may inhabit and remain there; and shall and may also build and fortify within any the same, for their better Safeguard and Defense, according to their best Discretion, and the Discretion of the Council of that Colony; And that no other of our Subjects shall be permitted, or suffered, to plant or inhabit behind, or on the Backside of them, towards the main Land, without the Express License or Consent of the Council of that Colony, thereunto in Writing; first had and obtained.⁶⁵

The common law in the late sixteenth century had acknowledged that a corporation might exist despite a lack of written evidence like those incorporated by prescription. Those situations assumed a positive royal intent to incorporate had originally existed and looked to long-tolerated practice of corporate activity as evidence.⁶⁶ Frustratingly,

⁶³ 1606 Virginia Charter s1.

⁶⁴ Excepting the previously discussed use of succession rather than perpetual in the East India Company charter of 1600.

⁶⁵ 1606 Virginia Charter s 4.

⁶⁶ See for example an underlying assumption of the holding in *Fulwood's Case*, which was that an incorporation by prescription was a legal possibility: 'it was objected that in case of a sole corporation or body politic, be it created by *charter or prescription*, as bishop, parson, vicar, master of an hospital . . . [emphasis added]'. *Fulwood's Case* (1590) 4 Co Rep 64b, 76 ER 1031, 64b-65a. But, even incorporation

contextual materials are minimal. The 1606-1615 records of the Virginia Company were lost some time after 1623.⁶⁷ Their loss was compounded by the destruction of the Privy Council Records for dates between 1 January 1602 and 1 May 1613 by a fire in 1619.⁶⁸ It is impossible to speculate what those records might have added to the understanding of the 1606 Virginia Charter, however, based upon the comparison of contemporary charter terms and the sophistication of those involved in this initial venture, a reasonable interpretation would be that the 1606 Virginia Charter was modeled to follow the organizational form established by the other settlement charters issued to proprietors, Humphrey Gilbert and Raleigh. The two groups organized under the 1606 Virginia Charter were not intended to have a separate legal personhood. This is reinforced by the reissuance of the charter in 1609, which contains the explicit intention to incorporate. The intervening three years saw a marked change in circumstances for the Virginia Company. It was poorly managed by a confusing system of governance and it was desperate for new sources of funding.⁶⁹ A corporate form mirroring those of the profitable trading companies was an appealing resolution since it

by prescription assumed that a written intent had existed at one point: 'That which hath been and continued time out of Mind a good Corporation, and hath all the Incidents and Badges of a good Corporation, shall continue so, although they cannot shew any Charter for it. For doubtless this was by Charter first, that which hath been since lost.' See also Anonymous, *The Law of corporations : containing the laws and customs of all the corporations and inferior courts of record in England* (1 edn, London: R. and E. Atkins for I. Cleeve 1702) 8 ('1702 Anonymous Corporate Treatise).

⁶⁷ Susan M. Kingsbury, *An Introduction to the Records of the Virginia Company of London* (Washington: Government Printing Office 1905) (n 73) 21. Alexander Brown has suggested political aims and intrigue as the reason for their destruction. A Brown (n 55). Also note that the instructions don't shed any further light. Royal Instructions for the Virginia Colony (20 November 1606) reprinted in Alexander Brown (ed), *The Genesis of the United States*, vol 1 (London: W Heineman 1890) 65-75 (Brown noting that there may have been additional sets of instructions accompanying the 1606 Virginia Charter but this is the only one that survives).

⁶⁸ Godfrey Goodman and John Sherren Brewer, *The Court of King James the first; to which are added, letters, publ by JS Brewer, vol II* (London 1839) 187-8 (discussing the far reaches of the fire).

⁶⁹ See WF Craven, *The Virginia Company of London, 1606-1624* (n 59).

could provide a formal hierarchy for self-governance and a mechanism for passive investment.⁷⁰

iv. **Fatal Flaws of the 1606 Virginia Charter: Sagadahoc's Failure and Jamestown's Surprising Survival**

Before turning to the 1609 Virginia Charter, one should consider the fatal flaws of the 1606 Virginia Charter that the corporate charter was crafted to resolve. The 1606 Virginia Charter established two proprietary colonies governed by overlapping tiers.⁷¹ There were to be two local councils in each colony instructed to make necessary laws and ordinances as then approved by the Privy Council:

[G]overn and order all matters-and Causes, which shall arise, grow, or happen, to or within the same several Colonies, 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 of England.*⁷²

These councils would govern in conjunction with, and subject to, a council in London whose members would be royally appointed (the 'Royal Council of Virginia in London'):⁷³

And that also there shall be a Council, established here in England, which shall, in like manner, consist of thirteen Persons, to be for that Purpose, appointed by Us, our Heirs and Successors, which shall be called our Council of Virginia; And shall, from time to time, have the superior Managing and Direction, only of and for all Matters that shall or may concern the Government, as well of the said several Colonies, as of and for any other Part or Place, within the aforesaid Precincts of four and thirty and five and forty Degrees abovementioned...⁷⁴

⁷⁰ Note that to the extent its provisions of the 1606 Virginia Charter were not superseded, they were ratified and confirmed by 1609 Virginia Charter. "The Second Charter of Virginia; May 23, 1609" (*The Avalon Project, Yale Law School*) < http://avalon.law.yale.edu/17th_century/va02.asp > accessed 29 June 2015 (the '1606 Virginia Charter') ss 1, 2, 26.

⁷¹ Peter Charles Hoffer, *Law and People in Colonial America* (Baltimore: Johns Hopkins University Press 1992) 12; John Philipps Kenyon (ed) *The Stuart Constitution, 1603-1688: documents and commentary* (Cambridge: Cambridge University Press 1966) 12-14.

⁷² 1606 Virginia Charter s 7 (emphasis added).

⁷³ Ibid 8. See SM Kingsbury (n 67) 11.

⁷⁴ 1606 Virginia Charter s 8.

This complicated network to govern two independent groups in North America from London was inefficient at best and quickly allowed for mismanagement.⁷⁵ Problems were exacerbated by financial woes and the 1606 Virginia Charter's failure to provide an internal mechanism for admitting new members (*i.e.* new investment) to either colony without going through the long process of royal approval.⁷⁶

The members of the described 'second colony', or the Virginia Company of Plymouth, were the first to land in North America, reaching the mouth of the Sagadahoc River, now the Kennebec River of present-day Maine, in late 1607. This region stretching up through Newfoundland and Labrador had long been populated by European fisherman, including those from the West Country of England, and so some information was available to them.⁷⁷ But despite this knowledge of the coastline and peoples to be encountered, scant as it was, the small colony at Sagadahoc barely lasted a few months. Primary blame is likely attributable to the factions that quickly developed in the absence of strong leadership coupled with a particularly harsh winter in 1607-1608.⁷⁸ By all accounts the described 'first colony' adventurers arriving in the unknown Chesapeake region should have met the same fate. The ships sent to settle the described 'first colony' contained 145 people of which 100 were to remain as settlers. The vast majority of the one hundred were gentlemen explorers with none of the practical skills necessary for the clearing, building, or feeding a colony.⁷⁹ Moreover, as

⁷⁵ WF Craven, *The Virginia Company of London, 1606-1624* (n 59) 4.

⁷⁶ Nor does it appear in the supplemental Royal Instructions for the Virginia Colony (20 November 1606) (n 67) 65-75 (editor noting that there may have been additional sets of instructions accompanying the 1606 Virginia Charter but this is the only one that survives).

⁷⁷ See Andrews (n 1) and discussion below. Karen Ordhal Kupperman, *The Jamestown Project* (Cambridge, MA: Belknap Press of Harvard University Press 2007) 42.

⁷⁸ The Virginia Company of Plymouth would eventually come back to life as the Council for New England discussed in Chapter Four.

⁷⁹ WF Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (n 5).

in Sagadahoc, there were heated conflicts over leadership from the outset with political factions emerging on the initial voyage. A near complete lack of leadership and investment, and near constant clashes with local Native American tribes left the English colony on the brink of collapse.⁸⁰ When supply ships arrived in early 1608 only 38 of the original 100 colonists had survived.⁸¹ A revised charter was issued on 23 May 1609 reorganizing this first colony at Jamestown as a corporation, abolishing the Royal Council of Virginia in London in favor of expanded powers of corporate self-governance and introducing new mechanisms by which it hoped to attract new investment.

III. The Virginia Company's Incorporation under the 1609 Virginia Charter

By 1609, the second colony's settlement at Sagadahoc had failed and there were no plans for a next attempt; the group settling the first colony was barely surviving in Jamestown.⁸² A petition for reorganization was heeded and the 1609 Virginia Charter was issued for the first colony group, the Virginia Company of London. The geographic expansion of the first colony under the 1609 Virginia Charter was in the hope that a passage through to the South Seas could be discovered and that

⁸⁰ WF Craven, *The Virginia Company of London, 1606-1624* (n 59); Charles E Hatch, *The First Seventeen Years: Virginia 1607-1624* (Charlottesville: The University Press of Virginia 1957) 6-10.

⁸¹ Andrews (n 1) 100-01. Kupperman 214 credits the political connections of the London Council with the speedy arrival of a supply ship and to a degree the survival of the colony:

The London seat of the VA Company was a major factor in the colony's ability to survive. Many of the original company sponsors were in parliament or had the ear of leading government officials and were thus able to focus attention on the project. Where many attempted settlements had foundered when their resupply "miscarried" or failed altogether, the Virginia Company's fleet under Captain Christopher Newport made record times both in sailing to and from the colony and in lessening turnaround requirements in London.

⁸² WF Craven, *The Virginia Company of London, 1606-1624* (n 59) 4.

Carolina might prove to have the natural resources (*i.e.* gold and silver) hoped for in Virginia.⁸³ Sir Edwin Sandys was a principal drafter of the 1609 Virginia Charter with assistance from Sir Francis Bacon, then Solicitor General and admitted new member of the Virginia Company.⁸⁴ The 1609 Virginia Charter begins with an acknowledgement that it is a reorganization of the group authorized to settle the first colony under the 1606 Virginia Charter stating:

We should be pleased to grant them a further Enlargement and Explanation of the said Grant, Privileges, and Liberties, and that such Counsellors, and other Officers, may be appointed amongst them, to manage and direct their Affairs, as are willing and ready to adventure with them, as also whose Dwellings are not so far remote from the City of London, but they may, at convenient Times, be ready at Hand, to give their Advice and Assistance, upon all Occasions requisite.⁸⁵

The subsequent 27 provisions of the 1609 Virginia Charter establish the legal bounds by which this corporation would operate a commercial, profit-maximizing enterprise while governing, in effect, its employees, (*i.e.* those Englishmen venturing to Virginia to settle a new colony). The charter's terms were reminiscent of its trading company predecessors, and foreshadows its northern neighbor, the Newfoundland Company incorporated almost exactly one year later on 2 May 1610 (the '1610 Newfoundland Company Charter').⁸⁶

A. The Intent to Incorporate: Section 3 of the 1609 Virginia Charter

The 1609 Virginia Charter reflects a contemporary understanding of both the logistical elements necessary for successful incorporation as well as underlying

⁸³ Ibid (n 59) 14.

⁸⁴ WF Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (n 5) 18.

⁸⁵ 1609 Virginia Charter s 2. See *ibid* s 1.

⁸⁶ Charter of the London and Bristol Company, Earl of Northampton and Associates (2 May 1610) reprinted in Dominion of Canada and the Colony of Newfoundland (ed), *Labrador Boundary Dispute Documentation* available at <http://www.heritage.nf.ca/articles/politics/pdf/labrador-boundary-dispute-documents.pdf> accessed 1 August 2015 (the 'Newfoundland Company 1610 Charter') 1701-1710.

theoretical concepts, as imprecise as those may have been. In particular it is Section 3 of the 1609 Virginia Charter that serves as baseline for comparing the 'Incorporating Provisions' appearing in the later corporate charters of this empirical study. It is this core provision that contains the distinct point of divergence of this charter from the 1606 Virginia Charter. The 1609 Virginia Charter reorganizes the members of the group settling the first colony under the 1606 Virginia Charter into corporation. It reads in pertinent part:

We greatly affecting the effectual Prosecution and happy success of the said Plantation, and commending their good desires therein, for their further Encouragement in accomplishing so excellent a Work, much pleasing to God, and profitable to our Kingdom, do of our especial Grace . . . GIVE, GRANT, and CONFIRM, to our trusty and well beloved Subjects, Robert Earl of Salisbury... and to such and so many as they do, or shall hereafter admit to be joined with them, in the form hereafter expressed, whether they go in their Persons to be Planters there in the said Plantation, or whether they do not, but adventure their monies, goods or Chattles, that they [shall be] One Body or Commonalty perpetual, and shall have perpetual Succession and one common Seal to serve for the said Body or Commonalty perpetual, and shall have perpetual Succession and one common Seal to serve for the said Body or Commonalty, and that they and their Successors 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.

These first lines of this dense provision reiterate the 1606 Virginia Charter's stated purposes of finding new wealth while spreading Christianity: 'much pleasing to God, and profitable to our Kingdom.' Although modern opinion might categorize these as public and private purposes, the necessity of an English corporation to produce a benefit for the public at large, such as spreading Christianity and increasing the wealth of the kingdom on the whole, persists through the nineteenth century.⁸⁷ That private individuals would also benefit tremendously was not problematic.

⁸⁷ Bernard Rudden, *The New River: a legal history* (Oxford: Clarendon Press 1985) 101; JP Davis (n 12) 241 (observing that the Anglo-American distinction between public and private purposes has changed significantly over the years).

The purpose for incorporation established, the section then recites a long list of named corporate members. Section 1 of the 1606 Virginia Charter had named eight individual persons to be members of the two ventures; this Section 3 of the 1609 Virginia Charter lists 659 individual persons and 56 municipal corporations and guilds as members.⁸⁸ The rights attendant to such membership will be discussed in turn, but it is worth highlighting a few notable names on the list as a continuing reminder of the fantastic political web linking the Virginia Company and overseas corporate adventurers with the foundation of Sutton's charitable hospital. Sir Henry Hobart, the Attorney General in 1609, was a member and was likely to have provided drafting assistance for the 1609 Virginia Charter to fellow members, Sandys and Bacon. Hobart will also represent the defendants in *Sutton's Hospital* and Bacon, the plaintiff. Moreover, Bacon will be a founding member in 1610 of the Newfoundland Company.⁸⁹ Corporate membership lists throughout this period continued to be packed with a select and exclusive group of cronies. In addition to the substantial financial investment generally required, corporate voting by member rather than by share encouraged members to pack the membership with their allies.⁹⁰ For example, William Cavendish was a member of the incorporated Virginia Company, and in 1622 he granted an interest to his tutor, Thomas Hobbes, presumably based upon a desire to create a loose shareholders' agreement rather than any aspiring business aspiration of Hobbes.⁹¹ Although there have been suggestions that Coke and his sons were

⁸⁸ See also A Brown (n 55) 228 fn 1 (giving a further breakdown of the professions, peerages, etc., of the individuals). For the investment made in the Virginia Company by the London Livery Companies, see Terence H. O'Brien, 'The London Livery Companies and the Virginia Company' (1960) 68 *The Virginia Magazine of History and Biography* 137.

⁸⁹ 1610 Newfoundland Company Charter p 1702.

⁹⁰ WF Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (n 5) 31.

⁹¹ Noel Malcolm, 'Hobbes, Sandys, and the Virginia Company' (1981) Vol. 24, No. 2 *The Historical Journal* 297, 299; see also Hobbes' intense distrust of the corporation as being formed of the 'bowels of

members of the Virginia Company, the ‘Cokes’ listed as initial members, such as Sir John Coke, do not appear to be immediate relations.⁹²

Returning to the text of Section 3, the provision provided that in consideration for a membership interest, each named party, successor or additional member, were required to make a capital contribution in kind (*i.e.* laboring in the plantation) or monetarily in exchange for such interest. The corporate membership, then defined, was granted separate legal personality as, ‘one Body or Commonalty perpetual, and shall have perpetual Succession’. Unlike many of the corporate charters examined, there was not a term-of-years capping the length of the succession.⁹³ The implication for this incorporation was that since the settlement would be permanent, its governing corporation would continue in a permanent perpetual succession. Section 3 concludes with another logistical element. It provides a mechanism whereby the corporation could bind itself and be bound: by a corporate seal bearing the corporate name, *The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia*. Just this first portion of a single section of the charter incorporated certain members into a legal entity possessing a separate and distinct identity from that membership, created for dual purpose and existing in perpetuity. It required a capital contribution in exchange for corporate membership, and it further granted a corporate seal, and a corporate name by which the entity may be identified and bound. It provided logistical details of what was necessary to form a corporation and language on

humanity.’ Thomas Hobbes, *Leviathan* (London: Penguin Books Ltd. 1985 (originally published in 1651)) (n 157).

⁹² Allen D. Boyer, ‘Coke, Sir Edward (1552-1634)’ in *Oxford Dictionary of National Biography* (online edn, Oxford: Oxford University Press 2004) <<http://www.oxforddnb.com/view/article/5826>> ; cf 1609 Virginia Charter s 3; Barbara Malament, ‘The "Economic Liberalism" of Sir Edward Coke’ (1967) 76 *The Yale Law Journal* 1321, 1324-25. See generally SM Kingsbury (n 73).

⁹³ The charter to Walter Raleigh containing such an example.

how that corporation was intended to be perceived at law: as a separate entity existing in perpetuity.

These statements of an intention to incorporate coupled with essential logistical elements appear in nearly identical form in the 1610 Newfoundland Company Charter. This group was incorporated by royal charter and licensed to settle the region originally claimed by Humphrey Gilbert just prior to his death, but long known and populated by European fishermen because the fishing off the coast of what is now Newfoundland and Labrador was exceptionally valuable.⁹⁴ The 1610 Newfoundland Company Charter begins with a similar recitation of a royal desire to settle a colony:

[M]ake plantacon to inhabite and to establishe a Colony or Colonyes in the Southerne and Easterne partes of the Countrie and Isle or Ilandes comonlye called Newfoundlande vnto the Coast and harbour whereof the Subiectes of this our Realme of England have for the space of ffiftye yeares and vpwards yearley vsed to resort in noe smale numbers to fishe, intending by such plantacon and inhabiting both to secure and make safe the trade of ffishing to our Subiectes for ever...⁹⁵

The provision continues its declaration of a desire to enhance the profitability of the fishing industry and to spread ‘our Christian faith’ by the efforts of this Newfoundland Company. But unlike either 1606 Virginia Charter or the 1609 Virginia Charter, the description of land subject to settlement contains a subtle acknowledgment of the existing settlement of Englishmen who had established a regular fishing industry there.⁹⁶ The professed purpose of this corporation was to protect what those Englishmen already possessed by establishing a settlement under the explicit protection of royal authority, which would be better in fending off foreign encroachment.⁹⁷

⁹⁴ Daniel Woodley Prowse, *A History of Newfoundland from the English, colonial, and foreign records* (London: MacMillan and Co. 1895) ch 1, 2.

⁹⁵ 1610 Newfoundland Company Charter p 1702.

⁹⁶ Ibid.

⁹⁷ Ibid 1703.

Although subsumed by the Newfoundland Company's interest in the region, the 1610 Newfoundland Company Charter acknowledges competing prior claims but declares them within the new corporate framework of the settlement.⁹⁸

Then, in the same pattern of Section 3 of the 1609 Virginia Charter, the 1610 Newfoundland Company Charter lists the recipients of the grant, the corporate members, which included Bacon as well as Sir John Doddridge who would be appointed in 1612 to the King's Bench in time to take part in the upholding of Thomas Sutton's corporation.⁹⁹ The 1610 Newfoundland Company Charter next recites the royal intention that the group be organized as a single entity existing in perpetual succession. The named individuals, and whomever they later admit to their group, are then pronounced legally incorporated as one separate legal 'bodie':

[T]o such and soe manye as they doe or shall hereafter admytt to be ioyned with them in forme hereafter in their p'sentes exp'ssed, whether they goe in their p'sons to be planted in the saide plantacon or whether they goe not, but doe adventure their moneys goodes and chattelles that they shal be one bodie or comynalty p'petuall, and shall have p'petuall succession and one Comon Seale to serve for the saide bodye and Comynalty, and that they and their Successors shalbe knowen called and incorporated by the name of the Tresurer and the Companye of Adventurers and planter of the Cittye of london and Bristoll for the Collonye or plantacon in Newfoundland ...¹⁰⁰

This is nearly identical to the beginning of Section 3 in the 1609 Virginia Charter. They each describe a discrete group of members; the creation of an entity possessing separate legal personhood to be evidenced by a corporate seal and existing in perpetuity; and a descriptive name for that entity including a reference to the physical location of the group. The similarities in language of these Incorporating Provisions and their

⁹⁸ See Chapter Five for interesting parallels with the corporate landscape in New York and its pre-existing Dutch population.

⁹⁹ See *Sutton's Hospital*, 23a, 24b. See David Ibbetson, 'Dodderidge, Sir John (1555-1628)' in *Oxford Dictionary of National Biography* (online edn, Oxford: Oxford University Press 2005) <<http://www.oxforddnb.com/view/article/7745?docPos=1>> accessed 1 August 2015.

¹⁰⁰ 1610 Newfoundland Company Charter p 1702.

prominence in the charter highlight the importance of these particular elements to the act of incorporation and what such status was considered to entail.

B. Corporate Real Property Ownership

The next section of the 1609 Virginia Charter, Section 4, briefly states that this corporation has the capacity to hold and sell real and personal property provided the appropriate licenses from mortmain have been obtained:

And that they and their Successors shall be from henceforth forever enabled to take, acquire, and purchase by the Name aforesaid (Licence for the same from Us, our Heirs, and Successors, first had and obtained) any Manner of Lands, Tenements, and Hereditaments, Goods and Chattles, within our Realm of England, and Dominion of Wales.¹⁰¹

This would be in addition to the explicit grant of real property ‘being in that Part of America, called Virginia...’.¹⁰² The 1606 Virginia Charter did not have a comparable provision nor should it have because mortmain restrictions only affected corporate ownership of real property. The provisions relating to real property ownership in the 1606 Virginia Charter authorized the group to occupy, settle, and distribute the lands described, and prohibited any potential interlopers from occupying the land without obtaining a license from the charter holders.¹⁰³ There was no mention of the groups’ capacities to acquire or own additional real property provided a royal license was obtained. The 1610 Newfoundland Company Charter did, however, have comparable language: ‘that they and their successors shalbe from thenceforth foever enabled to take acquire and purchase by the name aforesaid (licence for the same from vs our heires or successors first had and obtayned) any manner of landes tenementes and

¹⁰¹ 1609 Virginia Charter s 4.

¹⁰² Ibid s 6.

¹⁰³ 1606 Virginia Charter ss 4, 5, 20.

hereditamentes goodes and chattelles...'¹⁰⁴ This lends further credence to the argument that the 1606 Virginia Charter did not create a corporation unlike the 1609 Virginia Charter and the 1610 Newfoundland Company Charter. As a final note for future reference, there is also no stated cap on the value of future property that the Virginia Company or the Newfoundland Company would be permitted to acquire.¹⁰⁵ Such a cap does appear in the educational and ecclesiastical incorporations later examined, but is also noticeably absent from Virginia's statutory incorporation of municipalities under the 1705 Act for Establishing Ports and Townes.

As a point of similarity among the settlement charters and apart from corporate status, the 1609 Virginia Charter, the 1606 Virginia Charter, and the 1610 Newfoundland Company Charter each convey the settlement's land to be held of the royal demesne: 'To BE HOLDEN of Us, our Heirs and Successors, as of our Manor of East-Greenwich, in free and common Soccage, and not in Capite'¹⁰⁶ Each of the charters issued for settlement to British North American colonies would contain the same or similar conveyancing formula allowing the land to be freely alienable and devisable.¹⁰⁷ The distribution of land is provided in both the 1606 Virginia Charter but in greater detail in the 1609 Virginia Charter. The former charter includes a concluding recognition that the land be, 'so distributed and divided amongst the Undertakers for the Plantation of the said several Colonies....'¹⁰⁸ The later charter charges the

¹⁰⁴ 1610 Newfoundland Company Charter p 1702.

¹⁰⁵ 1609 Virginia Charter s 29. See S Kyd (n 7) 103-04 (observing that, 'none of the statutes of mortmain limit the extent to which a corporation may purchase lands; but that the object of all of them is to prevent a corporation from making any purchase without previous license . . .').

¹⁰⁶ 1606 Virginia Charter s 19; 1609 Virginia Charter s 6; 1610 Newfoundland Company Charter p 1703.

¹⁰⁷ The most comprehensive discussion of this provision in the colonial charters is: B.H. McPherson, 'Revisiting the Manor of East Greenwich' (1998) 42 *The American Journal of Legal History* 35. For an earlier history on the formula, see for example: Joel Hurstfield, 'The Greenwich Tenures of the Reign of Edward VI' (1949) *LXV Law Quarterly Review* 72.

¹⁰⁸ 1606 Virginia Charter s 20.

corporation to, ‘distribute, convey, assign, and set over such particular Portions of Lands, Tenements, and Hereditaments, by these Presents formerly granted unto such our loving Subjects, naturally born, or Denizens, or others, as well Adventurers as Planters....’¹⁰⁹ Permitting this distribution to be at the discretion of the corporation, Section 7 of the 1609 Virginia Charter reads:

[A]s by the said Company (upon a Commission of Survey and Distribution, executed and returned for that Purpose) shall be nominated, appointed, and allowed; Wherein our Will and Pleasure is, that Respect be had as well of the Proportion of the Adventurer, as to the special Service, Hazard, Exploit, or Merit of any Person so to be recompensed, advanced, or rewarded.¹¹⁰

Perhaps unsurprisingly, despite this language promising land distributions, they did not readily occur under the Virginia Company. In fact, there was no widespread land distribution in Virginia until 1616 and then to a greater extent in 1619.¹¹¹ As will be discussed in Chapter 3, distribution of land, its only true asset, outside of the hands of its corporate members would be a major contributor to the corporation’s steady financial decline.

C. Corporate Membership

The corporation of the medieval period was generally appreciated to operate by common consent of its membership.¹¹² Not all of the charters of this period mention the concept of common consent with respect to operations. The 1609 Virginia Company Charter is actually the only of the corporate charters in Stuart Virginia, New

¹⁰⁹ 1609 Virginia Charter s 7.

¹¹⁰ Ibid.

¹¹¹ R Brenner (n 14) 93-95 (providing an overview of the ownership structure of colonial land from 1614 when the first contract of indentured servitude expired and land distributed to 1619 with the widespread distribution of land to private, non-corporate member individuals willing to settle in Virginia). See CE Hatch (n 80) 15.

¹¹² See generally B Tierney (n 12).

York, or Massachusetts to specifically mention the need for majority consent for certain corporate actions. Section 7 of the 1609 Virginia Charter, the distribution of corporate real property, provides that transfers could only be by a majority vote with each member possessing one vote:

[T]hat the said Treasurer, and Company, or their Successors, or the major Part of them which shall be present and assembled for that Purpose, shall from Time to Time, under their common Seal, DISTRIBUTE, convey, assign, and set over such particular Portions of Lands....¹¹³

Similarly, the governing council of the corporation, including the Treasurer, was to be elected by a majority of corporate members at:

AND the said Council and Treasurer, or any of them shall be from henceforth nominated, chosen, continued, displaced, changed, altered and supplied, as Death, or other several Occasions shall require, out of the Company of the said Adventurers, by the Voice of the greater part of the said Company and Adventurers, in their Assembly for that Purpose...¹¹⁴

There was a single class of membership interest in the corporation with the exact same voting rights; there was no differentiation between those members contributing in kind or in currency, nor in the amount contributed.¹¹⁵ This is consistent with the Virginia Company's trading company heritage. A similar voting provision appears in the 1610 Newfoundland Company Charter and the East India Company charter of 1600 also specifies that each member had one vote.¹¹⁶ Economic historian Robert Brenner has observed that the practical effect of these requirements for corporate-wide consensus

¹¹³ 1609 Virginia Charter s 7.

¹¹⁴ Ibid s 11.

¹¹⁵ There is no mention of how the membership interest itself should be classified (*i.e.* personalty or real property). Compare B Rudden (n 87) 3-4 (describing how the New River Company, incorporated in 1619, had immediately transferable shares that were considered real property despite the fact it did not own the riverbed).

¹¹⁶ 1610 Newfoundland Company Charter 1704 (requiring a majority vote at annual meetings). The East India Company also had a voting structure based on membership rather than number of shares owned. East India Company Charter (n 53) 1-9; CA Cooke, *Corporation Trust and Company* (Manchester: Manchester University 1950) 73.

votes was perhaps minimal. The corporate membership of the East India Company was to meet four times a year to vote on company policies, but such infrequent meetings by such a large group meant that in truth the early iteration of the East India Company was run by its twenty-four directors.¹¹⁷

There was also nothing in the 1609 Virginia Charter distinguishing the rights afforded those individual persons holding membership interests and those held by other corporations. For example, the stock certificate verifying the Dover Municipal Corporation's ownership in the Virginia Company, dated 23 May 1610, reads:

Wheras the Maior Juratts¹¹⁸ and Commonaltye of the Towne and Porte of Dover have payde in readye money for S^r Thomas Smythe knight Treasurer of Virginia, the some of twenty five ... for there adventurers [towards] the sayd voyage. It is agreed that for the same, they the sayd Maior, Juratts and Commonaltye, and there [successors] shall have ... according to there adventures, there full [part] of all ... landed ... tenementes, and hereditamentes, as shall from tyme to tyme be there ..., planted and inhabited, and of ... myned, and minerals of gold, silver, and other mettalls or treasure, pearles, precious stoanes, or anye kinde of wares or [merchandizes], commodities, or profits whatsoever, ... obteyned, or gotton in the sayd voyage according to the portion of money by them employed to that ... *in as ample manner as anye other adventurer therein shall* ... for the like time.¹¹⁹

The Dover Municipal Corporation held a full membership interest in the Virginia Company. The critical point lay with the legal acceptance that one corporation could possess an ownership interest in another corporation. This is a testament to the degree of entity separation that might be afforded at this time. One entity is stated as being held of another entity rather one entity held by the aggregate membership of another, or held by the officers of another entity. Moreover, it speaks further to the respect

¹¹⁷ Brenner (n 14) 77.

¹¹⁸ Presumably this term is 'jurat' or a municipal officer similar to an alderman.

¹¹⁹ There was some difficulty with the quality of the document: brackets are contextualized assumptions but ellipses have been used when no reasonable guess could be made. Virginia Company Share Certificate held by Dover Municipal Corporation, BL, BG MS 2087 v 1 (emphasis added).

given to the entity status of the owner corporation as 'it' was given a single vote as a member.¹²⁰

The next provision directly addressing corporate membership appears in Section 15 of the 1609 Virginia Charter, which concerns the admittance of new members. This section states:

That the said Treasurer and Council here resident, and their successors or any four of them being assembled (the Treasurer being one) shall from time to time have full Power and Authority to admit and receive any other Person into their Company, Corporation, and Freedom; And further in a General Assembly of Adventurers, with the consent of the greater part upon good Cause, to disfranchise and put out any Person or Persons out of the said Freedom or Company.¹²¹

In other words, the Treasurer, as the governor of the corporation, and the local council of the Virginia Company could admit a new member, but it would require a majority vote of the entire membership to disenfranchise any member.¹²² The 1610 Newfoundland Company Charter contained nearly identical language:

[S]hall from tyme to tyne have full power and authoritie to admitt and receive anye other p'son into their Company Corporacon or ffredome And further in a genall assembleie of the Adventurers with the consent of the greater parte vppon good cause to disfranchize and put out any p'son or p'sons out of the saide freedome and company ...¹²³

Furthermore, the explicit power to disenfranchise was repeated in the 1612 Virginia Charter in similar language to the 1609 Virginia Charter.¹²⁴ The importance of including such a mechanism would be later confirmed at common law in 1615's *James Bagg's Case*, which found the disenfranchisement of a corporate member could only be

¹²⁰ See further discussion on this point in Chapter 2.

¹²¹ 1609 Virginia Charter s 15.

¹²² Note that the Newfoundland Company 1610 Charter also uses the title 'Treasurer' rather than 'Governor.'

¹²³ 1610 Newfoundland Company Charter 1705.

¹²⁴ 1609 Virginia Charter s 8.

done in accordance with the express provisions of the charter or bylaws. If no such mechanism existed then ousting a member required judicial approval.¹²⁵

A final clause of the 1609 Virginia Charter pertaining to the membership is most certainly the product of the corporation's desperation for new funding. Section 27 of the 1609 Virginia Charter required any future corporate members to make a capital contribution of, 'any Sum or Sums of Money', and in exchange, their rights would be precisely the same as that of the originally named members:

[S]hall and may be accounted, accepted, taken, held and reputed Adventurers of the said Colony, and shall, and may enjoy all and singular Grants, Privileges, Liberties, Benefits, Profits, Commodities and Immunities, Advantages and Emoluments whatsoever, as fully, largely, amply, and absolutely, as if they and every of them had been precisely, plainly, singularly, and distinctly named and inserted in these our Letters-patents.¹²⁶

Such a provision did not appear in the 1606 Virginia Charter nor was there a discussion about membership voting. Their appearance demonstrates the strong shift of the goals of the private interests controlling this corporation: under the 1606 Virginia Charter it had been to establish a settlement to facilitate new trade, but by the 1609 Virginia Charter, the provisions focused on finding and appealing to new financial investors.

D. A System of Corporate Self-Governance

These corporate membership provisions of the 1609 Virginia Charter raise the question: how were the members of the Virginia Company to govern their commercial affairs and the settlement? The two groups organized under the 1606 Virginia Charter were governed by two local councils submitting their proposed laws for Privy Council approval and under the direction of the Royal Council for Virginia in London. The

¹²⁵ *James Bagg's Case* (1615) 11 Co Rep 93b, 77 ER 1271.

¹²⁶ 1609 Virginia Charter s 27.

1609 Virginia Charter saw a significant relaxation of those royal controls and deferment to a system of self-governance believed necessary for the transforming the venture into a profitable one.¹²⁷ Nearly half of the 1609 Virginia Charter was devoted to self-governance.¹²⁸ These provisions preserve the London presence for corporate management but also provide for a local council to be physically present in the colony with greater responsibility for the day-to-day management and under the direction of the corporate metropolitan government, the Virginia Council.¹²⁹ These councils were authorized to bind the Virginia Company by its corporate seal.¹³⁰ Section 10 appointed a ‘Treasurer’ as the chief officer of the corporation. New local council members, the Treasurer, and a temporary Deputy Treasurer could be elected and removed by a majority vote of members present.¹³¹ The election of a new member of the local council, although not the removal, was subject to confirmation by the Lord Chancellor acting as a royal agent.¹³² The Virginia Council was similarly empowered to elect a president, known as the Governor, and other councilors to represent their commercial

¹²⁷ TJ Wertenbaker (n 20) 35.

¹²⁸ This seems unsurprising considering a significant portion of both Sheppard's 1659 Corporate Treatise and the 1702 Corporate Treatise were devoted to fact-specific discussions on the legality of various corporate bylaws. William Sheppard, *OF CORPORATIONS, Fraternities, AND GUILDS, OR a Discourse, wherein THE LEARNING of the LAW touching Bodies-Politique is unfolded, shewing the USE and NECESSITY of that INVENTION, the ANTIQUITY, various Kinds, Order and Government of the same* (2nd edn, London: Printed for H. Twyford, T. Dring, and H. Place 1659) (8; 1702 Corporate Treatise (n 14) 160-272.

¹²⁹ 1606 Virginia Charter s 11. The difficulty in managing the venture from London was a significant impediment, which gave impetus to revisions in the 1609 Virginia Charter. WF Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (n 5) 26-31; SM Kingsbury (n 73) 21-23; TJ Wertenbaker (n 20) 34-35. But see KO Kupperman, *The Jamestown Project* 214 (arguing that it was the London presence that gave the Virginia Company an edge and lead to the relatively quick turn-around with supply ships).

¹³⁰ 1609 Virginia Charter s 8. Although Coke would find the details for a corporate seal to be a superfluous provision, it is included in every corporate charter issued during this period for the North American colonies. *Sutton's Hospital* 30b. Moreover, the Newfoundland Company 1610 Charter includes a description of the seal itself.

¹³¹ 1609 Virginia Charter s 11; 1610 Newfoundland Company Charter 1703-04.

¹³² 1609 Virginia Charter s 11.

interests in the settlement.¹³³ This arrangement and the allocation of management powers between councils, and Treasurer and Governor, were replicated by the 1610 Newfoundland Company Charter using the same terminology and very similar language.¹³⁴ A bare legal formula for corporate self-governance was becoming apparent in these settlement corporations.

Establishing who would be part of management leads to the matter of who would be managed. This highlights the public nature of the Virginia Company because the 'managed' included not only the corporate membership but all individuals within the geographic bounds of the colony. This is a departure from the period's general common law rule that corporate bylaws could only affect the membership.¹³⁵ The Crown devolved general governance authority to this corporation in Section 12 of the 1609 Virginia Charter:

[T]o make, ordain, and establish all Manner of Orders, Laws, Directions, Instructions, Forms and Ceremonies of Government and Magistracy, fit and necessary for and concerning the Government of the said Colony and Plantation; And the same, at all Times hereafter, to abrogate, revoke, or change, not only within the Precincts of the said Colony, but also upon the Seas, in going and coming to and from the said Colony, as they in their good Discretion, shall think to be fittest for the Good of the Adventurers and inhabitants there.¹³⁶

This is expanded upon by Section 22, which devolved jurisdictional powers of enforcement to the corporation, consistent with jurisdictional authority exercised by the English municipal corporation:¹³⁷

¹³³ Ibid s 12.

¹³⁴ 1610 Newfoundland Company Charter 1705.

¹³⁵ See for example *Waggoner v Fish* (1609) 2 Brownl 278, 123 ER 941.

¹³⁶ 1609 Virginia Charter s 13. Any previous ordinances, rules, or official appointments made in accordance with the 1606 Virginia Charter and the Royal Instructions, are also declared null and void. Ibid §14.

¹³⁷ Sheppard's 1659 Corporate Treatise ss 8, 9.

Give and Grant unto the said Treasurer and Company, and their Successors, and to such Governors, Officers, and Ministers, as shall be by our said Council constituted and appointed according to the Natures and Limits of their Offices and Places respectively, that they shall and may . . . have full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of Us, our Heires and Successors . . . according to such Orders, Ordinances, Constitutions, Directions, and Instructions, as by our said Council as aforesaid, shall be established; And in Defect thereof in case of Necessity, according to the good Discretions of the said Governor and Officers respectively, as well in Cases capital and criminal, as civil, both Marine and other; So always as the said Statutes, Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes, Government, and Policy of this our Realm of England.¹³⁸

This corporate power was not limitless though. Enforcement efforts had to be within the legal parameters set by the governing council in London as well as more broadly, the laws of England.¹³⁹ Furthermore, there was a necessity exception whereby the powers of governance would become wholly vested in the Governor, ‘to use and exercise Martial Law in Cases of Rebellion or Mutiny...’.¹⁴⁰ Notably, the Newfoundland Company had similar powers of expanded corporate governance but there is no mention of the power to exercise martial law.¹⁴¹ This provision is without a doubt the result of the harsh realities present in the colony: starvation, disorder, lack of leadership, lack of funding, and constant battling with neighboring Native Americans. It was a corporate right that was deemed necessary for the fulfillment of the corporate purpose of establishing a colonial settlement. It was an example of the flexibility of the corporate form to promote and preserve private interests.

¹³⁸ 1609 Virginia Charter s 22.

¹³⁹ Ibid.

¹⁴⁰ The permissibility of martial law under English common law is debatable for this point in time. Although Blackstone would come to declare it contrary to the laws of England, he looks to the later Petition of Right in 1629 for his conclusion’s support. William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Oxford: Clarendon Press 1765-1769) ch 13.

¹⁴¹ 1610 Newfoundland Company Charter 1704-06. For comparison with East India Company powers of governance, see generally PJ Stern (n 4) ch 1, 2.

E. The Corporate Monopoly and Economic Privilege

By the Stuart period, the monopoly had long been a valuable privilege of the prerogative. The rents and profits derived from such grants were a significant source of revenue for the Crown, closely guarded under Elizabeth I and even more so under the lavish James I.¹⁴² In the case of the trading companies, the enormous start-up costs associated with outfitting ships to sail around the globe depended upon the pooling of investor assets and the royal monopoly.¹⁴³ The monopoly typically came in the form of a grant of exclusive rights, such as for a trade route or a region for settlement, and indirectly through exclusive economic rights such as tax exemptions.¹⁴⁴

¹⁴² The Crown in this period increasingly relied upon the monopoly as the other sources of royal income, such as feudal rents and dues, customs, tonnage & poundage proved unable to cover the expenses of the Stuart court. See W Blackstone (n 140) ch 8. William Scott noted the historical heritage of the monopoly as originating with the medieval merchant guilds:

In view of the exceedingly narrow views on freedom of exchange of goods in the eleventh, twelfth and thirteenth centuries, it was natural that the idea of exclusiveness, which has already been shown to have been inherent in the gild, should result in the *gilda mercatoria* in the formation of bodies, which confined trade within the circle of their own members. Thus, in the gild merchant there was involved a monopoly, which came to be implied in the grant of the privilege of *gilda mercatoria*, and which was jealously guarded by the officials of these fellowships.

WR Scott (n 4) 5. For a financial analysis of the monopoly as a source of revenue for the Stuart Crown see for examples: Stephen Dowell, *A History of Taxation and Taxes in England: from the earliest times to the present day*, vol 1 (London: Longmans, Green 1884) 217-52, especially 249-52; David Harris Sacks, 'The Countervailing of Benefits: Monopoly, Liberty and Benevolence in Elizabethan England' in Dale Hoak (ed), *Tudor Political Culture* (Cambridge: Cambridge University Press 1995); John Cramsie, *Kingship and Crown Finance under James VI and I, 1603-1625* (London: Royal Historical Society 2002) esp 164-65. For a discussion of later economic monopolies in colonial North America, Alvin Rabushka, *Taxation in Colonial America* (Princeton: Princeton University Press 2008) 28, 83-84.

¹⁴³ Robert Brenner has observed that:

Above all, the Levant-EIC merchants shared with all the other company merchants of London a profound dependence on the Crown-sanctioned commercial corporations that provided the foundation for their protected trades. This dependence united the generality of company merchants in defense of privilege and, all else being equal, in support of the royal government, which was of course the guarantor of their protected status.

R Brenner (n 14) 83.

¹⁴⁴ C Cooke (n 113) 54.

i. Monopolies of the 1606 Virginia Charter and the 1609 Virginia Charter

The 1606 Virginia Charter had granted a monopoly to eight individuals for the establishment of a colony in the enormous region called Virginia.¹⁴⁵ The 1609 Virginia Charter granted an expanded geographic monopoly to the Virginia Company, granting:

[I]o the said Treasurer and Company, and their Successors, . . . That they, and every of them, shall and lawfully . . . for their several Defence and Safety, encounter, expulse, repel, and resist by Force and Arms, as well by Sea as by Land, and all Ways and Means whatsoever, all and every such Person and Persons whatsoever as (without the special Licence of the said Treasurer and Company and their Successors) shall attempt to inhabit within the said several Precincts and Limits of the said Colony and Plantation; And also all and every such Person and Persons whatsoever, as shall enterprise or attempt at any Time hereafter, Destruction, Invasion, Hurt, Detriment, or Annoyance, to the said Colony and Plantation, as is likewise specified in the said former Grant¹⁴⁶

Backed by royal authority, only the Virginia Company was permitted to settle within the allotted geographic bounds and they were permitted to forcefully repel any competing attempts at settlement. Section 20 of the 1609 Virginia Charter then provides for the economic monopoly, a version of which was originally granted under the 1606 Virginia Charter:

[T]he said Treasurer and Company and their Successors, . . . shall have full Power and Authority to take and surprise by all Ways and Means whatsoever, all and every Person and Persons whatsoever, with their Ships, Goods, and other Furniture, trafficking in any Harbour, Creek, or Place, within the Limits or Precincts of the said Colony and Plantation not being allowed by the said Company . . . until such Time as they being of any Realms and Dominions under our Obedience, shall pay, or agree to pay, to the Hands of the Treasurer, or of some other Officer deputed by the said Governor of Virginia (over and above such Subsidy or Custom as the said Company is or hereafter shall be to pay) five Pounds per Cent. upon all Goods and Merchandises so brought in thither, and also five per Cent. upon all Goods by them shipped out from thence¹⁴⁷

¹⁴⁵ 1606 Virginia Charter ss 4, 5.

¹⁴⁶ 1609 Virginia Charter s 19.

¹⁴⁷ The amount is increased to ten percent for all foreign merchants. Ibid s 21.

The Virginia Company could collect a tax on five percent of the value of goods traded within the colony; this was an increase from the 2.5 percent allowed under the 1606 Virginia Charter.¹⁴⁸ The 21-year window for collecting such tax was extended as well.¹⁴⁹ Section 17 extended the suspension of royal customs and duties for seven years on the certain imports from England and granted the corporation an exclusive license, a monopoly, on the transportation of people, subjects and aliens, between England and her 'Dominions' to Virginia in order for the colony to build up its numbers as quickly as possible.¹⁵⁰

[T]hat it shall be lawful and free for them and their Assigns, at all and every time and times hereafter, out of our Realm of England, and out of all other our Dominions,¹⁵¹ to take and lead into the said Voyages, and for and towards the said Plantation, and to travel thitherwards and to abide and inhabit there in the said Colony and Plantation, all such and so many of our loving Subjects, or any other Strangers, that will become our loving Subjects, and live under our Obedience, as shall willingly accompany them in the said Voyage and Plantation; With sufficient Shipping, Armour, Weapons, . . . and such Merchandises or Wares as are esteemed by the wild People in those Parts, . . . and all other things necessary for the said Plantation, and for their Use, and Defence, and Trade with the People there; and passing and returning to and fro; Without yielding or paying . . . any other Tax or Duty, to Us, our Heirs, or Successors, for the space of seven Years from the Date of these Presents...¹⁵²

Section 18 of the 1609 Virginia Charter went still further with a complementary provision suspending royal customs and duties on exports to England for the extended period of twenty-one years. Perhaps most importantly, the corporation could enforce

¹⁴⁸ 1606 Virginia Charter s 10.

¹⁴⁹ 1609 Virginia Charter s 21. The twenty-one year time frame was frequently used for monopolies granted for new inventions. B Rudden (n 87) 3.

¹⁵⁰ Subjects were generally prohibited from travelling outside of the realm without a royal licence. M Hale (n 42) 296; Christopher L Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580 - 1865* (New York: Cambridge University Press 2010) 73-74.

¹⁵¹ See 1609 Virginia Charter s 24 (further prohibiting the colonists and Virginia Company from trade overseas or elsewhere in the dominion without going to English ports first).

¹⁵² *Ibid* s 17.

and protect these monopolies at law because Section 5 had granted the Virginia Company the right to plead and be impleaded in any English court.¹⁵³

ii. Contemporary Common Law Debates on the Monopoly

To appreciate how the Virginia Company's monopolies fits within the larger English corporate landscape, similar trading monopolies were granted to the Newfoundland Company, which was a potentially much more profitable income stream due to the fishing trade.¹⁵⁴ An example within the territorial realm of England would be the tax exemption granted to the town of Lyme Regis in 1604:

From the end of this session of parliament, during seven years, and no longer, there shall be paid by the master or owner of every ship vessel or crayer (saving of *Lyme Regis* in the county of *Dorset*) whereof any of the King's subjects shall be owners or part-owners of the burden of twenty tons or upwards, for every voyage loading or discharging within this realm, or to or for any foreign county beyond the seas, and passing to or from *London*, or from, to or by *Dover*, . . . three pence for every ton of the burden of every such vessel. . . .¹⁵⁵

Every trading vessel passing through London or Dover was subject to a three pence tax, except those trading vessels from Lyme Regis. It was a valuable trade advantage for the municipal corporation and it was intended to be so for the Virginia Company.

The frequency with which monopolies were issued should not imply that the monopoly was not without its challengers in the early seventeenth century. However, its value to the Crown required a carefully crafted debate. In a 1601 speech to the House of Commons, Sir Francis Bacon touched upon the tension between royal prerogative rights and economic restraint as:

¹⁵³ See for example *Dr Bonham's Case* (1609) 8 Co Rep 113b, 77 ER 646; *The Case of the Tailors, &c. of Ipswich* (1614) 11 Co Rep 53a, 77 ER 1218.

¹⁵⁴ 1610 Newfoundland Company Charter 1706.

¹⁵⁵ 1 & 2 Jac I ch 32.

These [monopolies], and divers of this nature, have been in trial, both at the Common Pleas upon action of trespass; where, if the Judges do find the privilege good and beneficial for the Commonwealth they will then allow it, otherwise disallow it; and also I know that her Majesty herself hath given commandment to her Attorney-General to bring divers of them, since the last Parliament, to trial in her Exchequer. Since which time at least fifteen or sixteen, of my knowledge, have been repealed; some upon her Majesty's own express commandment, upon complaint made unto her Majesty by petition; and some by Quo Warranto in the Exchequer.... I say, and I say again, that we ought not to deal or judge or meddle with her Majesty's Prerogative. I wish every man therefore to be careful in this point...¹⁵⁶

Upon his accession to the English throne, James I had cancelled existing monopolistic privileges under the guise of their need for reform. His true ambition, however, was to re-issue such privileges under terms more beneficial to his coffers:

[T]he Queene our Sister deceased, finding some few yeeres before her death, that some things had passed her hand at the importunitie of her servants, whom she was willing to reward with little burden to her estate (otherwise by necessary occasions exhausted,) which though they had and might have foundation in Princely prerogative, yet either by too large extending thereof, or for the most part in respect that they were of such nature, as could hardly be put in use without hinderance to multitudes of people, or else committed to inferiour persons, who in execution thereof did so exceedingly abuse the same, as they became intolerable . . .¹⁵⁷

To put the monopolies of the 1606 Virginia Charter and 1609 Virginia in their common law context, one of the more famous cases in the string of continued questioning of monopolists' powers is reported by none other than Sir Edward Coke in

¹⁵⁶ Sir Francis Bacon, Speech in the House Against a Bill for the Explanations of the Common Law in Certain Cases of Letters Patents (21 November 1601) reprinted in *LLSFB* 3, 28. Note that the new edition of Bacon's personal papers has not yet been published for this time period.

¹⁵⁷ A Proclamation Inhibiting the Use and Execution of any Charter or Graunt made by the Late Queene Elizabeth, of Any Kind of Monopolies, &c (May 1603) reprinted in *Stuart Proclamations* 11. See also WR Scott (n 9) 4 (providing an overview of the trading monopolies granted to each of the trading corporations). Looking forward to the monograph version of this dissertation, the perceived ruinous and pervasive nature of this relationship between monopoly and corporations leading into the seventeenth century would be significant for Adam Smith and Thomas Hobbes for example. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol 4 (Edwin Cannan ed, 5th edn, London: Methuen & Co, Ltd 1904) ch 2-3; T Hobbes 281-88. And, for a broader description of the legislation affecting the early seventeenth century corporate monopoly, see Ronan Deazley, 'Commentary on the Statute of Monopolies 1624' in L. Bently & M. Kretschmer (ed), *Primary Sources on Copyright (1450-1900)* (Oxford: Alden Group 2008) <www.copyrighthistory.org> .

1602, *The Case of Monopolies*.¹⁵⁸ The facts involve a royal grant to an individual for a monopoly on the manufacturing and trading of playing cards within London. Among the holdings of *The Case of Monopolies*, the court found that this monopoly granted to an individual was an unreasonable restraint on the common law right to trade.¹⁵⁹ This then begs the question: what if the monopoly was granted to a corporation rather than to an individual? Bacon indicated an answer to this question just the year before in a 1601 speech to the House of Commons: '[i]f her Majesty make a patent or, as we term it, a monopoly unto any of her servants, that must go and we cry out of it: but if she grants it to a number of burgesses or a corporation, that must stand; and that forsooth is no monopoly.'¹⁶⁰ The distinction of the corporate monopoly as granted to the group rather than to the entity provides an insightful example of the limits of the entity theory applied to the corporate form.¹⁶¹ Although the corporation possessed legal personhood, it was not an absolute concept and its aggregate status was still routinely recognized.¹⁶² Although there would be continued challenges to restraints of trade, many of which were led by Coke, the corporate monopoly remained a significant and frequent privilege of the status.¹⁶³

¹⁵⁸ *The Case of Monopolies (Darcy v Allin)* (1602) 11 Co Rep 84, 77 ER 1260 (although included in Part 11 of *Coke's Reports*, which were published in 1615). See also Paul Raffield, 'Contract, Classicism, and the Common-weal: Coke's Reports and the Foundations of the Modern English Constitution' (2005) Vol. 17, No. 1 *Law and Literature* 69, 82 (discussing the structural significance, if any, to Coke's organization of the *Reports*).

¹⁵⁹ See Jacob I Corre, 'The Argument, Decision, and Reports of *Darcy v Allen*' (1996) 45 *Emory Law Journal* 1261 (discussing this case, its effects and the implications of the its summary in Coke's Reports).

¹⁶⁰ Speech in the House Against a Bill for the Explanations of the Common Law in Certain Cases of Letters Patents (21 November 1601) reprinted in *LLSFB* 3, 26.

¹⁶¹ Presumably a monopoly granted to a corporation sole would not stand under this theory.

¹⁶² A frequent issue continuing through to today. See for example, Brian R. Cheffins, *Corporate Ownership and Control: British Business Transformed* (2008) (tracing the aggregate versus entity debates at common law through the centuries).

¹⁶³ *Dr Bonham's Case; The Case of the Tailors, &c. of Ipswich; Norris v Staps* (1616) Hobart 210, 80 ER 357. See Sheppard's 1659 *Corporate Treatise* 91-94; 1702 *Corporate Treatise* 210-12; B Malamet (n 92). For Lord Ellesmere's critique of Coke's position on monopolies and further contextualization of the debate,

Unlike the 1606 Virginia Charter, the 1609 Virginia Charter incorporated the venture giving it separate legal personhood and perpetual existence. While this second charter cured some of the ills of the initial framework, increasing self-governance provisions in an attempt to improve responsiveness between governance and the conditions in the colony as well as attract more financial investors to the benefit of the London merchants and the Crown, the colony remained on the brink of failure in 1611. One last attempt to reorganize was made a new charter was granted early in 1611/1612.

IV The 1612 Virginia Charter: An Expansion and Reinforcement of Corporate Rights

That same year that the 1609 Virginia Charter was issued, several ships were sent with reinforcements to the colony. One ship was driven off course during the voyage and found itself, and the colony's new governor, Sir Thomas Gates, in present-day Bermuda.¹⁶⁴ The second ship arrived in the colony bringing a group hostile to the sitting governor, John Smith. The result was a continuation of the chaotic and divided leadership that had plagued the Chesapeake settlement since its inception with frequent turnovers in the governor's position.¹⁶⁵ The lack of management was exacerbated by the realities of attempting to establish a settlement on unknown land across an ocean: shipwrecks, meager and slow-to-arrive supplies, unpredictable weather, and hostile neighbors. The sums promised by the new members attracted with the 1609 Virginia Charter were rarely, if ever, paid.¹⁶⁶ The winter of 1609-1610, referred to as the

see Louis A Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press 2008) especially 148-151.

¹⁶⁴ See for example Peter Thompson, *Paradise Lost: The Founding of Bermuda* (2009).

¹⁶⁵ CE Hatch (n 80) 8-9.

¹⁶⁶ WF Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (n 5) 31.

‘starving time’ saw an estimated 440 of the 500 Virginia colonists die from cold and starvation. When Governor Gates did arrive in May of 1610, he promptly declared martial law.¹⁶⁷ Although tobacco would be introduced to the colony later that year, the first exportation of the crop would not happen until 1613.¹⁶⁸ By the close of 1611/1612 the Virginia Company was in desperate need of additional funds and had an eye toward the further expansion of its boundaries to include the newly discovered, and potentially more lucrative, Bermuda.¹⁶⁹

A. The Financial Reality of Perpetual Existence

Against that background, the third and final royal charter was issued for the Virginia Company on 12 March 1611/12 following the dissolution of Parliament on 9 February 1611/12 and just before the legal struggle over Sutton’s estate. The opening lines of the 1612 Virginia Charter reference the grant made under the 1609 Virginia Charter, the inclusion of the members added since the 1609 Virginia Charter, confirm the Virginia Company’s incorporation, and restates the corporate name:

GIVEN and GRANTED unto them that they and all such and so many of our loving Subjects as should from time to time, for ever after, be joined with them as Planters or Adventurers in the said Plantation, and their Successors, for ever, should be one Body politick, incorporated by the Name of the Treasurer and Company of Adventurers and; Planters of the city of London for the first Colony in Virginia.¹⁷⁰

¹⁶⁷ CE Hatch (n 80) 10-11 (arguing that it was under Gates leadership that the colony was brought from the brink of disaster to the point of being a going concern).

¹⁶⁸ Edmund Burke, *An Account of the European Settlements in America*, vol I (London: J Dodsley 1770) 213-14; CE Hatch 9n 80) 17-18.

¹⁶⁹ Referred to in this period as the Somers Islands for the captain of the lost ship, Sir George Summers. WF Craven, *The Virginia Company of London, 1606-1624* (n 59) 20-22; Paradise Lost: The Founding of Bermuda (n 164).

¹⁷⁰ ‘The Third Charter of Virginia: March 12, 1611/12’ (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va03.asp> accessed 29 June 2015 s 1.

In fact, much of the 1612 Virginia Charter was a reiteration of the 1609 Virginia Charter with slight refinements and extensions. This first point to consider on the charter is not a difference with the 1609 Virginia Charter, but rather the legal relationship between the corporation contemplated by both charters. Did the terms of the 1612 Virginia Charter envision a new corporation or a continuation of the existing? The concept of corporate perpetuity in the face of additional royal grants was complicated by the joint stock arrangement that the Virginia Company and many of the large trading companies had in place. These financial agreements between corporate members could be confusingly conflated with the perpetual existence of the corporation. The most notable example was the East India Company, which as previously mentioned, required an entirely new subscription from potentially different successors (*i.e.* members) for each venture. This was the result of financial realities. In 1600 London investors proved unwilling to gamble their money on a long-term investment. They demanded their portion of the profits at the return of each ship, a reality that is reflected in the 1600 East India Company Charter: ‘one Body Corporate and Politick, in Deed and in Name, really and fully ... and they shall have Succession...’¹⁷¹ Modern scholarship of the finances and operating of the East India Company has proved that its ‘Succession’ meant a line of successive ventures.¹⁷² This language differed from the Virginia Company’s granted status, ‘and their Successors, for ever’. The latter was interpreted to create a continuous corporation, there were no distributions of profits and the membership list was not cleared at the issuance of the new corporate charter, the 1612 Virginia Charter. In truth, this is most likely due to the simple reality that there were no profits to distribute. Unlike the Virginia Company’s

¹⁷¹ East India Company Charter (n 53) 2-3. See Brenner (n 14) 83.

¹⁷² R Harris, ‘The English East India Company and the History of Company Law’ (n 47); WR Scott (n 9) 122-124.

lacking returns from its settlement venture,¹⁷³ the East India Company's profitable trade¹⁷⁴ allowed investors to recoup their initial investment as well as any profits upon the completion of each voyage.¹⁷⁵ This reality altered investors' expectations and meant that each voyage was a new investment rather than the ongoing concern of the original investors and their lawful additions under the successive corporate charters of the Virginia Company. Although the practical realities may explain differences in charter language, the result is not insignificant for the continued evolution of the relationship between independent corporate existence and the members. If membership was determined at the start of each voyage rather than as an ongoing concern determined on an individual basis, could an entity be considered a single, continuous, ongoing concern? It was the Virginia Company's version of succession and perpetuity not that of the East India Company that was introduced to the North American colonies.

B. An Expanding Geographic Monopoly and Attracting New Corporate Members

The 1612 Virginia Charter next addresses what its drafters hope will be the remedy for the corporation's ills: new geographic boundaries and new investors. The reward of the former is declared to be as recompense for the Virginia Company's own diligence and financial investment with the settlement in Virginia and discovery of Bermuda, even if the latter was by accident of mother nature:

Now forasmuch as we are given to understand, that in those Seas adjoining to the said Coasts of Virginia, and without the Compass of those two hundred Miles by Us so granted unto the said Treasurer and

¹⁷³ The original investors were bitterly disappointed. They had speculated a return on their investment within two years of the 1607 settlement. WM Billings, JE Selby and TW Tate (n 54) 37.

¹⁷⁴ It was immensely profitable, even James I saw the potential and personally invested in the East India Company. PJ Stern (n 4) 59; E Mancke (n 18) 244.

¹⁷⁵ D Hannay (n 54) 32; WR Scott (n 9) 154-160. Compare with the Virginia Company that was only able to raise about 2/3 of the necessary funds according to the incomplete pre-1619 Company records. WF Craven, *The Virginia Company of London, 1606-1624* (n 59) 23.

Company as aforesaid, and yet not far distant from the said Colony in Virginia, there are or may be divers Islands lying desolate and uninhabited, some of which are already made known and discovered by the Industry, Travel, and Expences of the said Company, and others also are supposed to be and remain as yet unknown and undiscovered, all and every of which it may [be important to] the said Colony both in Safety and Policy of Trade to populate and plant; in Regard whereof, as well for the preventing of Peril, as for the better Commodity of the said Colony . . . We would be pleased to grant unto them an Enlargement of our said former Letters-patents, as well for a more ample Extent of their Limits and Territories into the Seas adjoining to and upon the Coast of Virginia, as also for some other Matters and Articles concerning the better government of the said Company and Colony . . .¹⁷⁶

The 1612 Virginia Charter expanded the geographic bounds in the hopes of finding the illusive colonial riches, or at the very least attracting further optimistic investors. To this second end, the 1612 Virginia Charter was also drafted to refine the governance structure in a way that new investors might consider favorable as in theory members would be compensated in proportion to their investment regardless of when they invested. Section 5 of the 1612 Virginia Charter identifies certain new and high profile adventurers, such as George Abbot, Lord Archbishop of Canterbury, who was also a governor of Sutton's charitable corporation:

[W]ho since our last Letters-Patents are become Adventurers, and have joined themselves with the former Adventurers and Planters of the Said Company and Society, shall from henceforth be reputed, deemed, and taken to be, and shall be Brethren and free Members of the Company; and shall and may respectively, and according to the Proportion and Value of their several Adventures, HAVE, HOLD, and ENJOY . . . as any other Adventures [sic] nominated and expresses in any our former Letters-Patent . . .¹⁷⁷

This provision admitted new members on equal footing as the original members under the 1606 Virginia Charter and the 1609 Virginia Charter, just as the 1609 Virginia Charter had done.¹⁷⁸ In the more profitable East India Company, an additional fee was

¹⁷⁶ 1612 Virginia Charters 3.

¹⁷⁷ Ibid s 5 (emphasis added).

¹⁷⁸ 1609 Virginia Charter s 11.

required to become a member. Thus, interests purchased by existing members were cheaper than those purchased by non-members.¹⁷⁹ The 1612 Virginia Charter did not distinguish in that way between new and original members, frankly, nor could it because of its desperate financial situation. But the suggestion of corporate distributions in proportion to investment was moot in reality. There were no profits to distribute and the corporation would not distribute land to private individuals for another six years. These seeming marketing ploys were extended by the 1612 Virginia Charter charter's explicit authorization to include foreign individuals among the corporate membership:

[The Virginia General Court] shall and may . . . elect choose and admit into their Company, and Society, any Person or Persons, as well Strangers and Aliens born in any Part beyond the Seas wheresoever, being in Amity with us, as our natural Liege Subjects born in any our Realms and Dominions: And that all such Persons so elected, chosen, and admitted to be of the said Company as aforesaid, shall thereupon be taken, reputed, and held, and shall be free Members of the said Company, and shall have, hold, and enjoy all and singular Freedoms, Liberties, Franchises, Privileges, Immunities, Benefits, Profits, and Commodities whatsoever, to the said Company in any Sort belonging or appertaining, as fully, freely and amply as any other Adventurers now being, or which hereafter at any Time shall be of the said Company, has, have, shall, may, might, or ought to have and enjoy the same to all Intents and Purposes whatsoever.

Given the financial realities of Europe in 1612 and the commercial prowess of the United Provinces, the hoped-for foreign members recited in this provision were almost certainly the new class of very wealthy Dutch merchants.¹⁸⁰ The establishment of a lottery by Section 15 further evidences the corporation's desperation for funds.

As to the corporation's existing membership under the 1609 Virginia Charter, the power to disenfranchise could be done by a majority vote of the entire

¹⁷⁹ WR Scott (n 9) 152.

¹⁸⁰ R Brenner (n 14) c 1.

membership,¹⁸¹ this power was confirmed in the 1612 Virginia Charter and that such votes would be taken at one of the four annual meetings of the general membership.¹⁸²

The 1612 Virginia Charter continued to explicitly provide that grounds for expulsion would include a member's failure to pay promised subscriptions:

And shall, in like Manner, have Power and Authority, to expulse, disfranchise, and put out of and from their said Company and Society for ever, all and every such Person and Persons, as having either promised or subscribed their Names to become Adventurers to the said Plantation, of the said first Colony in Virginia, or having been nominated for Adventurers in these or any other our Letters-Patents, or having been otherwise admitted and nominated to be of the said Company, have nevertheless either not put in any adventure at all for and towards the said Plantation, or else have refused or neglected, or shall refuse and neglect to bring in his or their Adventure, by Word or Writing, promised within six Months after the same shall be so payable and due.¹⁸³

The 1612 Virginia Charter further provided that such failure to pay, a frequent and real problem for the Virginia Company, was enforceable by the corporation in the London courts.¹⁸⁴

Relatedly, the 1612 Virginia Charter refers to another chronic problem of the Virginia Company: its colonists fleeing the settlement prior to the completion of their bound service.¹⁸⁵ Section 12 granted the corporation the right, 'to remand and send back the said Offenders, or any of them, unto the said Colony in Virginia, there to be proceeded against and punished . . .'¹⁸⁶ Legal historian Christopher Tomlins has observed that although the initial settlers of the Virginia Company's colony were of the gentry class, the corporation's promoters were soon looking to orphaned or vagrant

¹⁸¹ 1609 Virginia Charter s 15.

¹⁸² 1612 Virginia Charter s 8.

¹⁸³ *Ibid* s 8.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid* s 12.

children and convicts for their immigrant population.¹⁸⁷ It was part of the final attempt to salvage the Virginia Company as its corporate framework bent to accommodate the near impossible circumstances encountered in newly settled Virginia.

V. Conclusion

The corporation at the start of the Stuart age was a fluid concept with certain points of commonality listed by John Cowell in 1607 to include incorporation by the authority of the king and evidenced by a charter; the grant of a common seal; the appointment of a leading officer or head; a defined corporate membership operating by common consent; the capacity to own and sell property to the extent permitted by its charter and by common law; and the power to have and to bind successors. The solemnity of the corporate charters considered thus far, and the advent of common elements among corporations produced a degree of legal certainty that appealed to certain commercial interests risking an overseas trade and settlement. The variations among the specific rights afforded to each corporation by these charters, the specific monopolies granted or the mechanism of admitting new members, further allowed the entity to reflect and accommodate the particular interests of the merchants as well as of the authorizing Crown.

Although the 1606 Virginia Charter had its proprietary origins in the settlement charters issued to the likes of Humphrey Gilbert and Walter Raleigh, the realities of its undertaking soon led to a reorganization that reframed the venture in 1609 as a corporation similar to its profitable contemporaries, the trading companies. The corporate form under the 1609 Virginia Charter allowed for the Virginia Company's

¹⁸⁷ Christopher Tomlins, 'Early British America, 1585-1875: The Law and Its Uses' in Paul Craven Douglas Hay (ed), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: University of North Carolina Press 2004).

membership to act as a single separate entity by corporate seal, to attract new members into its folds on the same terms, and to operate by its own system of self-governance. When compared with its contemporary charters, such as the 1610 Newfoundland Company Charter, there are point of departure, such as the 1609 Virginia Charter's attention to operation by majority consent, but there are far more points of similarities. When the 1609 Virginia Charter proved unable to adequately encourage the commercial interests it had been formed to protect, its charter was revised and reissued as the 1612 Virginia Company Charter. This third charter demonstrated continued elements of consistency within the broader corporate framework. But, the revisions also reflected the corporation's reality as it struggled for money, the enforcement of broken financial promises, and a new immigrant population that were in many cases forced to migrate to the struggling colony. Considering these corporate charters together, a picture begins to appear of corporate terms evidencing an evolving set interests. The evolution of this form is next challenged and shaped by Coke's famous case of *Sutton's Hospital*.

CHAPTER TWO:

A Critical Moment at Common Law for Corporations? The Case of Sutton's Hospital

The terms of the 1609 Virginia Company Charter and the 1612 Virginia Company Charter were the practical applications of a nascent corporate theory. These charters and their contemporaries were each founded on an underlying concept of separate corporate personhood and perpetual succession and evolving elements of commonality, such as the clear statement of corporate name and purpose, distinguishing them from unincorporated associations. The points of divergence among these corporate charters demonstrate the accommodation of evolving interests, for the Virginia Company charters this was the ever more contentious relationship among the London investors and the increasingly independent local colonists. The resulting corporation in 1612 was a legal entity created within a broader corporate framework, but reflecting particular political, social, and economic stresses of a settlement venture to Virginia. The next year Sir Edward Coke delivered his opinion in *Sutton's Hospital*¹ reciting what has come to be regarded as a snapshot of the common law of corporations in the early seventeenth century. To compare it with the Virginia Company charters and the contemporary secondary literature reveals the finer nuances

¹ The date of this case is listed in Coke's Reports as 1612, which would have been the date the defendants initially entered an appearance. *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960. The best evidence for the final decision date is a manuscript report of the case held by Cambridge University Library, which records it as '11 Jac.', or 1613, although omitting the term. Reports, MS Hh2.2, Cambridge University Library, p 200 et seq. Entries in the Calendar of State Papers more specifically suggest that the decision was delivered in the first part of 1613. (23 June 1613) CSPD 74: James I, June 1613 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp186-189> (accessed 15 September 2015) (reporting that, '[t]he decision on Sutton's [will] case given in its favour by ten judges against one.');

(8 July 1613) CSPD 74: James I, July 1613 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp189-196> (accessed 15 September 2015) (noting that that, '[t]he trustees under Sutton's will have been to the Charter House to take possession', which would have been in keeping with a decision in favor of the defendants as described in Coke's Reports). This conclusion is further supported by William Hale's description of the first recorded meeting of the Board of Governors on June 30, 1613. William Hale, *Some Account of the Early History and Foundation of the Hospital of King James* (London: Gilbert & Rivington Printers 1854) 12.

of Coke's opinion and reevaluates why it should still be a revolutionary case for corporations.

I. Sir Edward Coke's Corporation by Modern Reputation

Seventeenth-century entities described as corporations included not just the previously discussed selection of trading and settlement companies, but ranged from municipalities such as the City of London, to professional corporations such as London's College of Physicians. Consequently, the corporate form reflected overlapping juridical sources, including constitutional, municipal, merchant, trust, and ecclesiastical law. To illustrate this point, consider Baker's observation that much of the earliest case law effecting corporations involved ecclesiastical entities.² This was and would remain a great point of distinction among the broader category of corporations well beyond the Stuart period.³ A survey of secondary legal literature published around this time, including those by Matthew Hale writing, *The History of the Common Law of England and An Analysis of the Civil Part of the Law* ('*Analysis of the Law*') in the 1650s, William Sheppard publishing, *OF CORPORATIONS, Fraternities, AND GUILDS...* in 1659 ('*Sheppard's 1659 Corporate Treatise*'), and an anonymously-authored corporate treatise published in 1702 (the '*1702 Corporate Treatise*'), reveals that each began their analysis of corporations by first distinguishing the entity as either temporal or ecclesiastical.⁴ Among the reasons for the distinction, there was a fundamental legal

² John H Baker, *The Oxford History of the Laws of England*, vol VI (Oxford: Oxford University Press 2003) 622-23.

³ See for example: Gareth Jones, *History of the law of Charity 1532-1827* (Cambridge: Cambridge University Press 1969).

⁴ William Sheppard, *OF CORPORATIONS, Fraternities, AND GUILDS, OR a Discourse, wherein THE LEARNING of the LAW touching Bodies-Politique is unfolded, shewing the USE and NECESSITY of that INVENTION, the ANTIQUITY, various Kinds, Order and Government of the same* (2nd edn, London: Printed

need for ecclesiastical corporations to have personality at law: individuals taking religious orders (*e.g.* monks) did not exist at common law. The members of a monastery were deemed ‘dead’. In order to hold property in their capacity as a group of monks, the monastery had to be given ‘life’ at law, which was possible through the creation of corporate personhood.⁵ The broader result was that ecclesiastical legal history, while creating a distinct category of ecclesiastical corporations, would necessarily effect the overarching refinement of a theory or law of corporations, such as through the development of mortmain restrictions or effects of the Dissolution of the Monasteries between 1536 and 1540.⁶ The evolving concept of a corporation as a separate perpetual entity and its practical application at the turn of the seventeenth century continued this process. The form was modified both by evolving charter terms, such as in the case of the Virginia Company, and legal debates at common law raised by the particular needs of those petitioning or questioning such status.⁷

Just as the corporate charters were issued for the settlement of Virginia, Thomas Sutton was enlisting the upper echelons of England’s legal and political world to assist with the fulfillment of his personal desire to found the largest charitable

for H. Twyford, T. Dring, and H. Place 1659) (‘Sheppard’s 1659 Corporate Treatise’); Anonymous, *The Law of corporations : containing the laws and customs of all the corporations and inferior courts of record in England* (1 edn, London: R. and E. Atkins for I. Cleeve 1702) (‘1702 Corporate Treatise’); Matthew Hale, *The History of the Common Law of England and An Analysis of the Civil Part of the Law* (Charles Runnington ed, 6 edn, London: Henry Butterworth 1829). The first line of Cowell’s definition for corporation excluded ecclesiastical entities by beginning his description for, ‘[t]hat which the civile law calleth universitatem, or collegium, a bodie politique.’ John Cowell, *The Interpreter: or Booke Containing the Signification of Words...* (Cambridge: John Legate 1607) entry for ‘corporation’.

⁵ For a more thorough explanation and the finer nuances (such as acting in other capacities, such as an executor) see JH Baker (n 1) 608. See also William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Oxford: Clarendon Press 1765-1769) ch 18.

⁶ See for example, G Jones (n 1); Sandra Raban, *Mortmain Legislation and the English Church, 1279-1500* (Cambridge: Cambridge University Press 1982).

⁷ Susan Reynolds, ‘The History of Incorporation or Legal Personality: a case of fallacious teleology’ in *Ideas and Solidarities of the Medieval Laity* (Aldershot: Variorum 1995) (arguing that, ‘modern law about corporations or legal personality has been shaped less by advances in legal concepts or theories than by rules that were devised over the centuries to suit the practical needs of governments, lawyers, and their clients’) 1.

corporation in England to date. Sutton's untimely death in December 1611 before his vision was fulfilled, gave rise to this, one of Coke's more famous decisions. In the four hundred years since, *Sutton's Hospital* has been regarded as a landmark case for Anglo-American corporate law. William Holdsworth began his early twentieth century observations on the history of the English corporation stating that Coke's distillation of the essential elements required for incorporation in *Sutton's Hospital* quickly became entrenched in the English common law.⁸ Multiple references to the case were made by Joseph Angell & Samuel Ames in their critical 1861 corporate treatise, *A Treatise of the Law of Private Corporations Aggregate*,⁹ and well over seventy American cases have relied on *Sutton's Hospital* for a point of corporate law, from Justice Story's concurrence in the 1819 U.S. Supreme Court decision, *Trustees of Dartmouth v Woodward* to the 2006 decision by the Court of Appeals of Oregon in *Liberty Northwest Insurance Corporation v Oregon Insurance Guarantee Association*.¹⁰ Yet at some point during these intervening years the finer details of *Sutton's Hospital* have been lost and its true place in contemporary thought muddled. Lord Templeman honestly observed in a 1992 case before the House of Lords, '[*Sutton's Hospital*], although largely incomprehensible in 1990, has been accepted as "express authority" ...'¹¹

⁸ William Searle Holdsworth, *A History of English Law* vol 3 (London: Methuen 1923-31) c 2. See also Paul Halliday, *Dismembering the Body Politic* (Cambridge: Cambridge University Press 1998) 31 (referring to *Sutton's Hospital* as the 'single most influential writing on corporations in the seventeenth and eighteenth centuries.').

⁹ Joseph Kinnicut Angell & Samuel Ames, *A Treatise on the Law of Private Corporations Aggregate* (Boston: Hilliard, Gray, Little & Wilkins 1832) ss 169, 175, 184, 187, 217, 325, 687.

¹⁰ *The Trustees of Dartmouth v Woodward* 17 US 518 (1819) 670-71 (citing *Sutton's Hospital* for several points of law, including support for a distinction between public and private corporations); *Liberty Northwest Insurance Corporation* 136 P 3d 49 (Or App 2006) 57-59 (citing to *Sutton's Hospital* for support in distinguishing between natural and artificial persons in order to determine whether a corporation was within the meaning of a 'person' under the state constitution of Oregon).

¹¹ *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL), 39.

Despite Coke's lengthy and highly confusing report, *Sutton's Hospital* deserves its place in this analysis as an encapsulation and advancement of common law debates distinguishing a corporation from other forms of group association. Previously obscured facts that triggered this case reveal a complicated web of politics, which both affected and prefigured other legal developments for corporations. Its contextualization, particularly with the Virginia Company charters and secondary literature, highlight which the conclusions were conservative restatements of common understanding and which would be considered revolutionary. It also importantly reveals those points of Coke's sweeping conclusions diverging from contemporary thought and thus typifying the uncertainty of an evolving body of law.

II. The Factual Background to *Sutton's Hospital*

The charitable hospital at the center of *Sutton's Hospital* was the creation of Thomas Sutton. A dearth of relevant primary records and conflicting secondary reports render the beginnings of Sutton's career a near mystery. There has been some recent support for the claim that Sutton's career began in the military in the mid-sixteenth century under the patronage of Ambrose Dudley, Master General of the Ordnance.¹² Regardless of his military service, there is a general concurrence among his biographers and Charterhouse historians that by 1578 Sutton used connections to the Dudley family to acquire a lucrative lease of coal rich property near Newcastle.¹³ The rapid expansion of the coal industry during the period of the lease allowed Sutton

¹² Philip Temple, *The Charterhouse* (Paul Mellon Centre for the Studies in British Art English Heritage ed, New Haven: Yale University Press 2010) 59 (citing military service); compare with Neal R. Shipley, 'Thomas Sutton: Tudor-Stuart Moneylender' (1976) Vol 50 *The Business History Review* 456 (not mentioning military service); Hugh Trevor-Roper, 'Sutton, Thomas (1532-1611)' in *Oxford Dictionary of National Biography* (online edn, Oxford: Oxford University Press 2004) <<http://ezproxy-prd.bodleian.ox.ac.uk:2167/view/article/26806?docPos=3>> accessed 30 September 2014 (specifically stating no military service).

¹³ NR Shipley (n 12) 458-59; P Temple (n 12) 59.

to amass a remarkable fortune in just five years.¹⁴ Selling the property in 1583, Sutton moved to London to start on yet another lucrative venture: moneylending. Over the next several decades Sutton loaned an estimated £220,000 to a long, distinguished list of clients, including individuals such as Coke.¹⁵

By the 1590s Sutton had taken the initial steps to found a hospital on his Essex estate at Little Hallingbury.¹⁶ An account of the earlier documentations of his charitable intention states:

‘Witnessth that the Said Thomas Sutton for and in consideration of a competent [amount] ... Hath aliened ~ ~ ~ bargained and [sold] ... All those his manors and Lordshippes of Southminster ... Little Hallingbury at Hallingbury Bouchers . . .’¹⁷

This estate, as well as other real property, were transferred through a series of deeds and indentures to the intended governors of the hospital between 1594 and 1601.¹⁸ The governors included the most powerful names of the day: from John Whitgift, Archbishop of Canterbury, to the Chief Justice of the King’s Bench, Sir John Popham, whose only son, Sir Francis Popham was married to Sutton’s step-daughter, and whose

¹⁴ NR Shipley (n 12) 458-59 (noting that exact figures are not available).

¹⁵ Ibid 464. See also P Temple (n 12) 59.

¹⁶ Sale of Thomas Sutton’s Lands to the Governors of the New Hospital (1594), LMA, ACC/1876/F/07/001; Sale of Sutton’s Land to the Hospital Governors (1595), LMA, ACC/1876/F/07/002; Deed, Articles and Orders for the Intended Hospital at Hallingbury (1596), LMA, ACC/1876/F/07/003 ; Deed, Articles and Orders for the Intended Hospital at Hallingbury (1598), LMA, ACC/1876/F/07/004 ; Deed, Articles and Orders for the Intended Hospital at Hallingbury (1599), LMA, ACC/1876/F/07/005; Deed, Articles and Orders for the Intended Hospital at Hallingbury (1601), LMA, ACC/1876/F/07/006; Deed, Articles and Orders for the Intended Hospital at Hallingbury (1601), LMA, ACC/1876/F/07/007. See also *The Case of Sutton’s Hospital* (1612) 10 Co Rep 1a, 77 ER 937 (*‘Sutton’s Hospital Pleadings’*); P Temple (n 12) 59.

¹⁷ Orders and Rules for the Establishment of Thirteen Poor Knights (Sutton’s Hospital at Hallingbury, Essex) (16__), LMA, ACC/1876/F/06/012.

¹⁸ ‘Deed, Articles and Orders for the Intended Hospital at Hallingbury (1596)’ (n 16); ‘Deed, Articles and Orders for the Intended Hospital at Hallingbury (1598)’ (n 16); ‘Deed, Articles and Orders for the Intended Hospital at Hallingbury (1599)’ (n 16); ‘Deed, Articles and Orders for the Intended Hospital at Hallingbury (1601)’ (n 16); ‘Deed, Articles and Orders for the Intended Hospital at Hallingbury (1601)’ (n 16).

extended family was heavily involved in the Virginia Company and the drafting of its charters.¹⁹

Following the property transfers, Sutton sought Parliamentary authorization to incorporate the governors as a hospital at Little Hallingbury to be known as the 'Hospital of King James'. In early 1611 Parliament passed, 'An act to confirm and enable the erection and establishment of an hospital, a free grammar school, and sundry other godly and charitable acts and uses, done and intended to be done and performed by Thomas Sutton, esquire' (the 'Hallingbury Act').²⁰ James I then ordered the dissolution of Parliament and it would not be called again until 19 February 1613/14.²¹

Shortly after the issuance of the Hallingbury Act, Sutton became aware of a large property in London known as the Charterhouse. It was a fourteenth century Carthusian monastery that had become a lavish private residence after succumbing to Henry VIII's dissolution of the monasteries in 1537.²² Sutton sold Little Hallingbury and purchased a portion of the Charterhouse on 9 May 1611 for the impressive sum of £13,000 with the intention of relocating the hospital to this site.²³ This palatial

¹⁹ Indenture, Articles and Orders for the Intended Hospital at Hallingbury: Admission of Sir John Popham as a Party to the Venture (1602), ACC/1876/F/07/008. See discussion in Chapter One.

²⁰ An Acte to Confirme and Enable the Ereccion and Establishment of an Hospitall a Free Grammar Schoole and Sundrye Other Godlye and Charitable Actes and Uses Donne and Intended to be Done and P[er]formed by Thomas Sutton Esquire (7 Jac I c 27). The text of the Hallingbury Act was not published on the roll but is reprinted at *Sutton's Hospital Pleadings* 2a-5b. With respect to a precise date for this act, note that the Charterhouse Letters Patent records the Hallingbury Act as passing in the 'last session of Parliament last past'. Anonymous (ed) *Charter, Acts of Parliament, and Governors' Statutes for the Foundation and Government of the Charterhouse* (London: Printed for the Use of the Governors 1832) s 2. The last session of that parliament was 16 October until 6 December 1610. However, Coke assigns the Hallingbury Act a date of 9 February 1610/1611, which was the actual dissolution date of that parliament. *Sutton's Hospital* 24b.

²¹ By the King, A Proclamation signifying his Majesties pleasure for dissolving the Parliament (31 December 1610) reprinted in *Stuart Proclamations*.

²² P Temple (n 12) 18-22.

²³ The recent historical and archeological account of the Charterhouse by Philip Temple contains the wry observation:

residence within the Charterhouse had housed both Elizabeth I and James I *en route* to their respective coronations in London; now Sutton was proposing to make it a hospital for the poorest and most destitute individuals of London. The property would require extensive and expensive renovations²⁴ to fit the practicalities of Sutton's charitable vision. Just six weeks after purchasing the property within the Charterhouse, Sutton obtained letters patent from the Crown on 22 June 1611 authorizing the incorporation of the hospital at the new Charterhouse location (the 'Charterhouse Letters Patent').²⁵ The preamble to the Charterhouse Letters Patent acknowledges the Hallingbury Act but does not mention its legal standing, *i.e.*, whether it was superseded:

WHEREAS at the last session of parliament last past, one act was made and passed instituted An act to confirm and enable the erection and establishment of an hospital, a free grammar school, and sundry other godly and charitable acts and uses, done and intended to be done and performed by THOMAS SUTTON Esquire (as by the same act of parliament more at large it doth and may appear); AND WHEREAS [since] the said act the said Thomas Sutton hath purchased to him and his heirs, a great and large mansion house, commonly called the late dissolved CHARTERHOUSE besides Smithfield, ... which mansion house and other the premises the said Thomas Sutton doth conceive to be a more fit and commodious house and place to place, erect, and ground the said hospital and free school, and other the godly and charitable uses aforesaid, than in Hallingbury alias Hallingbury Bouchers in the said act mentioned, and to that end the said Thomas Sutton hath been an humble suitor unto us, that we would be graciously pleased to give license, power, and authority unto him...and to incorporate the governors of the same, hereafter named, to be a body corporate and politic, and to have perpetual succession for ever, in fact deed, and name, and by such name of incorporation as is herein-after mentioned to have full authority and lawful capacity and ability to purchase, take, hold, receive, and have, to them and their successors for ever, manors, lands, tenements, tithes, rents, reversions, annuities, pensions,

[The Charterhouse] was also a place of the highest status, a palace in its own right, where successive monarchs had held court and which could match the dignity of governors. In other respects it was ill-suited to the new purpose; and there was something shocking about what Sutton was proposing to do with it.

Ibid 55, 59.

²⁴ Ibid 59.

²⁵ Letters Patent of James I for the Foundation of Sutton's Hospital with Pendant Seal, and Copies (1611), LMA, ACC/1876/G/01/001/001 .

hereditaments, goods, and chattels whatsoever, as well of us, our heirs
and successors, as of any other person and persons whatsoever...²⁶

The Charterhouse Letters Patent incorporated the same charitable venture, with the same governors, and some of the same property as had already been conveyed and was described under the Hallingbury Act. It is not clear how, or if, Sutton intended the Hallingbury Act and the Charterhouse Letters Patent to be reconciled. The preamble just quoted acknowledges that the charitable venture described by the Hallingbury Act was to be located at Little Hallingbury but that Sutton changed his mind, and therefore the venture's domicile, from Little Hallingbury to the newly acquired Charterhouse. Due to this change in domicile, Sutton sought incorporation for a charitable hospital at Charterhouse but the subsequent charter bears no mention of the legal status of the previous act.²⁷ However, before work even began on the grand scheme to convert the Charterhouse residence to a home for the poor, Sutton died on 12 December 1611.

Sutton had been a widower at the time of his death and he did not legally recognize his illegitimate, only son, Roger.²⁸ Historian Neil Shipley has estimated: 'at his death in 1611, [Sutton] left an estate worth approximately £4,836 per annum in real property and personal property worth over £50,000, consisting mostly of recognizances and other forms of obligations.'²⁹ A bulk of the estate was left to the corporation with

²⁶ Anonymous, *Charter, Acts of Parliament, and Governors' Statutes for the Foundation and Government of the Charterhouse* 5-7. The text of the Charterhouse Letters Patent is also reprinted in *Sutton's Hospital Pleadings* 8a-17a.

²⁷ Brief of Thomas Sutton's Act of Parliament Moving the Site of His Hospital from Hallingbury, Essex to Charterhouse (1610), LMA, ACC/1876/F/08/005. It has been speculated by historians such as Stephen Porter, that Sutton anticipated a challenge to the Hospital, which is why he sought both the act of parliament and the charter from the Crown. See Stephen Porter, *The London Charterhouse* (Chalford: Amberley Publishing 2009) 8-11.

²⁸ P Temple (n 12) 59; H Trevor-Roper (n 12).

²⁹ NR Shipley (n 12) 461.

relatively small sums to his nephew, Simon Baxter, and to his son, Roger.³⁰ A contemporary account by the Lord Chamberlain described the situation as follows:

I cannot yet learn many particulars of his [Sutton's] will, but thus much hath been told me from the mouth of auditor Sutton one of his executors, — that he hath given 20,000*l.* ready money to charitable uses, to be disposed by the Archbishop of Canterbury, the Bishop of Ely, and the Bishop of London. He hath left 8000*l.* lands a year to his college or hospital at the Charterhouse (which is not bestowed on the Prince, as was given out), to the maintenance of eight score soldiers [gentle]men(?), who are to have pensions according to their degree, as they have borne places of captains, lieutenants, or ancients, or the like. There is a school likewise for eight score scholars, with 100*l.* stipend for the schoolmaster, and other provision for ushers; with 100 marks a year wages for a gardener, to keep the orchard and gardens in good order. Many other legacies I hear of, which you shall have together if I can get them. I cannot learn of much that he hath left to his poor kindred: not above the value of 400*l.* a year.³¹

With such a large estate going to the eleemosynary corporation, the largest charitable donation at the time, it is perhaps no surprise that almost immediately upon Sutton's death, there were several challenges to his will.³² One notable, but quickly dismissed, claim was by Sutton's step-daughter and her husband, Sir Francis Popham,³³ the son of a hospital governor and original judge in *Sutton's Hospital* before his death, Sir John Popham. But, it was the suit of the nephew, Simon Baxter that would give rise to *Sutton's Hospital*.³⁴

By the following January 1611/12, the Privy Council had heard Baxter's claims challenging the will and the validity of the corporation that inherited pursuant to it.

³⁰ *Sutton's Hospital Pleadings* 21a; P Temple (n 12) 61.

³¹ Letter from Chamberlain to Carleton (18 December 1611) reprinted in James Spedding (ed) *The Letters and Life of Francis Bacon*, vol 4 (London: Longmans, Green, and Co 1868) 248. See also Probate Copy Will of Thomas Sutton (November 1611), LMA, ACC/1876/F/11/007. For Coke's opinion on the purpose of the will, see The Preface, 10 Co Rep vi-vii.

³² (8 Jan 1611/12) CSPD 68: James I, 1611-18 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp109-117> accessed 1 August 2015 ('[m]uch talk about rich Sutton's bequest of 200,000*l.* for charitable uses, which is so great that the lawyers are trying their wits to find some flaw in the conveyance.').

³³ P Temple (n 12) 61.

³⁴ *Ibid.*

Although he was permitted to move forward with his cause of action, the Privy Council ordered that should Baxter prove successful at court, he would be limited in the amount of his recovery.³⁵ In preparation for such Sir Francis Bacon, then Solicitor General, had composed his advice to the Crown on the questions regarding the legitimacy of Sutton's will, and more specifically, the validity of the substantial bequest to the hospital.³⁶ In his advice to the Crown on the 'chaos' that followed Sutton's death, Bacon advised:

Wherein I desire to be thus understood, that if this foundation [of Sutton's hospital] (such as it is) be perfect and good in law, then I am too well acquainted with your Majesty's disposition to advise any course of power or profit that is not grounded upon a right: nay further, if the defects be such as a court of equity may remedy and cure, then I wish that as St. Peter's shadow did cure diseases, so the very shadow of a good intention may cure defects of that nature. But if there be a right and birth-right planted in the heir, and not remediable by courts of equity, and that right be submitted to your Majesty, whereby it is both in your power and grace what to do; then I do wish that this rude mass and chaos of a good deed were directed rather to a solid merit and durable charity than to a blaze of glory, that will but crackle a little in talk and quickly extinguish.³⁷

Bacon continued at some length expressing concern that the vast wealth would be almost certainly subject to abuse from greedy governors and that the majestic Charterhouse was too grand for the lowly poor of the city.³⁸ Meanwhile, Baxter proceeded with his challenge filing on 30 May 1612 a bill of trespass with the King's Bench against the executors of the estate, Richard Sutton and John Law.³⁹ It was

³⁵ Letter from Chamberlain to Carleton (15 January 1611/12) reprinted in J Spedding (n 31) 248 (stating: 'a certain tanner, pretending to be his heir at common law. He was called to the Council table on Sunday, and there bound in 100,000*l.* (if he do evict the will) to stand to the King's award and arbitrement.').

³⁶ Ibid 248-53. Its editor, James Spedding's observation that the Privy Council ruling just cited is the likely reason for Bacon's composition of 'Advice to the King, Touching Sutton's Estate'. Ibid 248-49.

³⁷ Ibid 250.

³⁸ Ibid 248-253. This is also in keeping with the thought of the day, see the policy examples described in John Baker, *Baker and Milsom Sources of English Legal History: private law to 1750* (Oxford: Oxford University Press 2010) 169-89.

³⁹ *Sutton's Hospital Pleadings* 1a-2a; see also *Sutton's Hospital* 23a.

ultimately removed to the Exchequer Chamber for a decision of all the ‘Judges in England’, including the Court of Common Pleas and the Barons of the Exchequer and observed by June of 1613 that, ‘The case of Sutton's hospital is arguing before all the Judges, most of whom incline towards it.’⁴⁰ The narrow issue before the judges was whether a charitable hospital was validly incorporated, for if not, then the transfer of the Charterhouse property would be void and remain part of the estate passing by operation of law to Sutton’s heir, Baxter.⁴¹

III. Coke’s Report of *Sutton’s Hospital*

A. Participants

The assessment of Coke’s report of *Sutton’s Hospital* benefits from knowing the individuals involved and the political constraints affecting the outcome of this case. In fact, there was tremendous overlap between those involved in this case and those involved in drafting the charters of the Virginia Company. Noting the presence of these same legal minds allows a broader perspective on the contemporary understanding and importance of the corporation at common law. The most remarkable name involved with both the Virginia Company, the hospital, and *Sutton’s Hospital* was Coke himself. He participated in the drafting of the 1606 Virginia Charter representing the Crown’s interest as Attorney General, he was a former debtor client of Sutton’s, a current governor of the hospital,⁴² and was now hearing the case of *Sutton’s Hospital* as the Chief Justice of the Court of Common Pleas.

⁴⁰ (10 Jun 1613) CSPD 74: James I, 1611-18 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp186-189> (accessed 1 August 2015) (lending further support to a date of mid-1613 for the decision). See also *Sutton’s Hospital* 24b.

⁴¹ *Ibid* 23a.

⁴² *Ibid* 34b.

Other notable names include Sir Francis Bacon, who now represented the plaintiff, Baxter, as well as serving as the Solicitor General, and Sir Henry Hobart as the Attorney General representing Richard Sutton and John Law, the executor defendants.⁴³ Bacon had provided assistance to Edwin Sandys in the drafting of the 1609 Virginia Charter and was a founding member of the Newfoundland Company. Hobart's position as Attorney General from 1606 until 1613 meant that he was likely involved in the final drafting of all three charters of the Virginia Company. Moreover, since Hobart's personal legal papers relating to *Sutton's Hospital* have not survived, it is unclear whether the substance of these responses should be credited partially or wholly to Hobart as counsel to the defendants, governor of the hospital, and key draftsman of the Virginia Company charters.

As briefly mentioned above, the hospital governors were the political elite of the day. By the time of *Sutton's Hospital*, that list included: George Abbott, the Archbishop of Canterbury; Thomas Lord Ellesmere, Lord Chancellor of England, who was also a judge in this case; Sir Thomas Foster, a Justice of the Court of Common Pleas and another judge in this case; Hobart, attorney for the defense; Henry Thusby, a Master of the Chancery; and Sir James Altham, Knight, a Baron of the Exchequer, who was again, also a judge in this case. And lest this list is not sufficiently impressive, James I himself became the visitor of the hospital upon Sutton's death.⁴⁴

The most powerful political and legal individuals in England were involved in varying capacities with *Sutton's Hospital* just as many of them had been in the successive charters issued to the Virginia Company. The final decision upholding the validity of the incorporation was nearly unanimous: '[t]he decision on Sutton's [will] case given in

⁴³ Ibid.

⁴⁴ Ibid 34a-b.

its favour by ten judges against one.⁴⁵ Furthermore, in light of Coke's long-standing reputation of taking liberties in his reports, it is worth noting that this case was not included among those corrected by his greatest contemporary critic, Lord Ellesmere.⁴⁶ This suggests that this report of Coke's is a more accurate reflection of the debates and conclusions reached by the judges. This is further supported as the conclusions on logistical elements and underlying theory that are presented as applicable to all corporations bear remarkable similarity to those appear in the Incorporating Provisions of the royal charters just examined in Chapter One. This is not to say there was suddenly a definitive corporate form. Contemporary secondary literature and later corporate charters presented in this dissertation would question the degree to which Coke's *Sutton's Hospital* truly impacted contemporary debate as opposed to conservatively reflected that debate.

B. The Elements of Incorporation in Contemporary Context

Coke's report of *Sutton's Hospital* is most often noted for distilling the required elements essential to incorporation, and identifying and elaborating upon the associated rights and privileges that may be granted. The opinion begins with a list of Bacon's ten objections followed by Coke's dismissive statement that:

I will report the effect of the reasons and causes affirming and confirming the resolutions of the Judges, which are of so great authority, perspicuity, and gravity, that it is not necessary that the objections should have any particular answer, and yet for the satisfaction of all, every one of them shall be particularly answered.⁴⁷

⁴⁵ (Jun 1613) CSPD 74: James I, 1611-18 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp186-189> (accessed 1 August 2015).

⁴⁶ See Louis A Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press 2008). See also Ian Williams, 'The Tudor Genesis of Edward Coke's Immemorial Common Law' (2012) 43 *Sixteenth Century Journal* 103; John Baker, 'Coke's notebooks and the sources of his reports' in *Collected Papers on English Legal History*, vol II (Cambridge: Cambridge University Press 2013).

⁴⁷ *Sutton's Hospital* 24b. Note that Coke and Bacon had long been political enemies by this time and such derisive statements as to the merits of the case are likely due to the conflict of personalities more than

The famous holding of *Sutton's Hospital* is tucked away in response to Bacon's fourth alternative objection that the Charterhouse Letters Patent do not adequately describe the location of the corporation established. Coke's response was a listing of elements comprising the 'essence of a corporation' that must be present for successful incorporation.

The first on his list is that the incorporation be sourced in the proper legal authority. Coke writes that there were four sources of authority for valid incorporation: by royal charter (such as the Charterhouse Letters Patent); by prescription;⁴⁸ by act of Parliament (such as the Hallingbury Act); or by the common law.⁴⁹ Incorporation by royal charter and by prescription were accepted means of incorporation widely discussed at common law, although the later was understood to be a situation wherein the original royal charter had been lost rather than a case of 'self-incorporation'.⁵⁰ Incorporation by an act of Parliament had been inferred in several contemporary cases, and frequently included a parliamentary act confirming a royal intent or a prescriptive incorporation and vice versa, such as the municipality at issue *The Town of Barwick*.⁵¹ Coke's example of incorporation by common law was the king as he possessed both a

the validity of the arguments. See Stephen D White, *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester: Manchester University Press 1979) 3-6; Lisa Jardine and Alan Stewart, *Hostage to Fortune: The Troubled Life of Francis Bacon* (London: Phoenix Giant 1999) 253-55. Coke further attacks Bacon stating: '[w]hich brief report I have made of these objections, because I think them, or the greater part of them, were not worthy to be moved at the bar, nor remembered at the bench: and that this case was adjourned to the Exchequer-chamber by the Justices of the King's Bench, more for the weight of the value, than for the difficulty of the law in the case. *Sutton's Hospital* 24a-24b.

⁴⁸ This would include, for example, those municipal corporations not in possession of a corporate charter but their corporate existence commonly believed to have dated from time immemorial. Or, as William Sheppard remarked, 'How many cities and Burroughs are there in this Nation, whose flourishing estate depends, merely upon the antiquity of their Incorporation?' Sheppard's 1659 Corporate Treatise p 4.

⁴⁹ *Sutton's Hospital* 29b.

⁵⁰ See for example 1702 Corporate Treatise 8 ('[t]hat which hath been and continued time out of Mind a good Corporation, and hath all the Incidents and Badges of a good Corporation, shall continue so, although they cannot shew any Charter for it. For doubtless this was by Charter [made], which has been since lost').

⁵¹ *The Town of Barwick* (1609) 2 Brownl 270, 123 ER 936.

natural capacity and a corporate capacity as the head of a political state.⁵² These sources of authority were listed as equals with no one form given superiority over another. Coke does not explicitly contemplate the possibility of devolving this power in the manner that Walter Raleigh believed he possessed under his charter, and which historically had been considered within the powers of the English palatinate lords.⁵³ Knightley D'Anvers's early eighteenth century translation of Henry Rolle's early seventeenth century abridgement (*Rolle's Abridgement*) cites to *Sutton's Hospital* for the proposition that: '[t]he King may give Power to a common person to name the persons, and the name of the corporation; and when he hath done so, this corporation is not said to be made by the common person but by the King.'⁵⁴ Other treatises and restatements from the period, namely *Sheppard's 1659 Treatise* and the *1702 Corporate Treatise* confirm Coke's listing of four permissible authoritative sources, and the latter also includes the paraphrased language from *Rolle's Abridgement*.⁵⁵ It seems reasonable to conclude then that Coke might not have taken issue with such a devolution: that the power to incorporate might be devolved to a 'common person', but that the legal authority for such power remained with the exclusive four sources. This interpretation finds further support in the next chapter where the members of the Virginia Company

⁵² *Sutton's Hospital* 29b. See Frederic William Maitland, *State, Trust and Corporation* (David Runciman and Magnus Ryan ed, Cambridge: Cambridge University Press 2003) ch 2 (providing greater analytical context for this concept). See also Sheppard's 1659 Corporate Treatise 2 (providing further examples such as the Chamberlain of London).

⁵³ See discussion of Raleigh's attempts at municipal incorporation in Chapter One. See also Matthew Hale, *The Prerogatives of the King* (Selden Society 1976) 212 ('A lord of a county palatine may make a corporation, create justices, hath the making of his sheriff, create markets, hath sea ports prisage.').

⁵⁴ Henry Rolle, *A General Abridgement of the Common Law, Alphabetically Digested under Proper Titles...* (Knightley D'Anvers tr, London: J Walthoe 1705-1737) entry for 'corporation'; *Sutton's Hospital* 33b. This abridgement should be considered in light of the continuing debate regarding whether it was truly intended to be an 'abridgement' of the laws or simply Rolle's common place book. See John H Baker, *The Legal Profession and the Common Law: Historical Essays* (West Virginia: Hambleton Press 1986) 441-42.

⁵⁵ Sheppard's 1659 Corporate Treatise 5; 1702 Corporate Treatise 8-9. See also W Blackstone ch 18, p 462 (asserting that derivative incorporation was permissible but that had not always been the case if one looks back to the early part of Henry VII's reign).

not only incorporate a derivative commercial corporation, but envision the incorporation of municipalities in the colony.⁵⁶

The second of Coke's essential elements for incorporation was that there be 'persons to be incorporated' or the corporate members. It was a point not directly challenged by Bacon but is the product of Coke's broader pronouncement on the law. Notably, Coke found that corporate members could have been either natural persons or 'bodies incorporate and political',⁵⁷ such as those guild and municipal corporate members of the Virginia Company.⁵⁸ In borrowing language from the case, *The Hospital of Bridewell*, Coke opines:

[T]hat one corporation may be made out of another corporation, sc. the mayor, citizens, and commonalty of London, are created in their politic capacity governors, &c. of the hospital of Bridewell, ... many corporations may be created one out of another, as the Dean and Chapter of Lincoln are a joint corporation, the dean by himself is a corporation, and every of the Prebends is a corporation by himself...⁵⁹

Coke continues to include specifically, 'bodies incorporate and political' as possible members of a separate legal entity. This suggests the legal possibility of a corporation holding a proprietary interest in another corporation, which appeared in practice clearly in the 1609 Virginia Charter.⁶⁰ Coke did not explain or elaborate upon how this ownership was or should be theoretically considered, but did accept the ownership

⁵⁶ As to the second point, see: The Treasurer and Companie of Adventurers and Planters of the City of London for the first Colony in Virginia to Captain George Yearley Elect Governor of Virginia and to the Council of State there being or to be Greeting (18 November 1618) reprinted in *RVC* ('Yearley's Instructions').

⁵⁷ *Sutton's Hospital* 29b.

⁵⁸ 'The Second Charter of Virginia; May 23, 1609' (*The Avalon Project, Yale Law School*) < http://avalon.law.yale.edu/17th_century/va02.asp > accessed 29 June 2015 s 3.

⁵⁹ *Sutton's Hospital* 31b.

⁶⁰ 1609 Virginia Charter s 3.

structure existing in many of Chapter One's corporate charters as reflecting common law.⁶¹

The third essential element was the corporate name. There must be a specific means of identifying the corporation. Consider the corporate names of the previous chapter, the 1609 Virginia Charter provided for the *Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia*, and the 1610 Newfoundland Company Charter provided for the, *Tresurer and the Companye of Adventurers and planter of the Cittye of London and Bristoll for the Collonye or Plantacon in Newfoundland*.⁶² They both include the title of the head officer, the domicile of their membership, and the location of their corporate purpose. Coke noted it sufficient to name the corporation according to the names of the governing members.⁶³ The increasing litigation surrounding corporate misnomers may have persuaded Coke to take a broad approach to corporate naming and identification. Even a near a century later, much of the 1702 Corporate Treatise is devoted to narrative accounts of decisions on corporate misnomers.⁶⁴ Coke was sensitive to problems of fraud raised in many contemporary cases of corporate misnomer. Such a case was, *Mayor v Burgesses of Linn Regis*, which Coke used to introduce the case *Sutton's Hospital* in his reports as follows:

⁶¹ As Paddy Ireland persuasively argues, a complete separation of entity from membership is not historically supported in the eighteenth or even the nineteenth centuries. Paddy Ireland, 'Capitalism Without the Capitalist: The Joint Stock Company Share and the Emergence of the Mordern Doctrine of Separate Corporate Personality' (1996) 17 *Journal of Legal History* 40. See also Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 *Cambridge Journal of Economics* 821 (arguing the shift from a partnership or co-mingled funding structure did not truly begin in England until the mid-nineteenth century). Henry Hansmann, *The Ownership of Enterprise* (Cambridge: Harvard University Press 2000) 1-21; Henry Hansmann, Reinier Kraakman and Richard Squire, 'Law and the Rise of the Firm' (2006) 119 *Harvard Law Review* 1333 1337-40, 1376-79.

⁶² 1609 Virginia Charter s 3; Charter of the London and Bristol Company, Earl of Northampton and Associates (2 May 1610) reprinted in *Dominion of Canada and the Colony of Newfoundland* (ed), *Labrador Boundary Dispute Documentation* 1702 (the '1610 Newfoundland Charter').

⁶³ *Sutton's Hospital* 29b.

⁶⁴ 1702 *Corporate Treatise* 223-33.

Next cometh the case of the Mayor and Burgesses of King's Lynn, in the county of Norfolk, wherein is well discussed what shall be deemed in law the true name of the corporation in substance, to the end that bonds, covenants, leases, grants, or conveyances be not, in respect of too much niceness and curiosity therein, against all honest and just dealing, impeached and overthrown. And to say the truth I find not in any of our books from the beginning of the reign of E. 3. until the reign of E. 6. That any bond, lease, grant, or conveyance have been overthrown by judgment, in respect of the misnaming of the corporation, but after a window was once opened, it is a wonder to consider what light hath been taken by corporations, both spiritual and temporal, by questions and suits in law, to avoid their own leases, grants, and conveyances to the hindrance of multitudes, and undoing many, under colour of misnaming themselves, it grieveth good men to remember... . And this case is reported for [their] surety and quiet as well ... and others claiming from them, as of themselves, for estates, covenants, and other things made unto them....⁶⁵

It may have been that Coke was anxious that every corporation should have a name to identify it but hesitant of creating any further loopholes to be exploited by fraudulent claims.

The third essential element for incorporation was entwined with the matter of corporate misnomer: that of corporate domicile. Coke pronounces that, 'without a place no incorporation can be made.'⁶⁶ Bacon's argument is one of sufficiency. He argues that the Charterhouse Letters Patent failed to describe the hospital's location in metes and bounds, and therefore, that the document did not provide a sufficient description of the entity.⁶⁷ Bacon's objection was not without merit. The hospital did not occupy the whole of the Charterhouse, only a portion of the complex with the other parts being otherwise inhabited. However, the charters issued to the Virginia Company or any of the great trading companies varied in their description of a corporate domicile. They listed the city in which the membership group was based in

⁶⁵ The Preface, 10 Co Rep xviii - xix. Note that this case involving the Mayor and Burgesses of Lynne Regis in Norfolk is not connected to the Lyme Regis of Dorset discussed at Chapter One.

⁶⁶ *Sutton's Hospital* 29b.

⁶⁷ *Ibid* 23a-b.

England, such as London or Bristol.⁶⁸ Interestingly Coke himself in the 1588 case of *Marriot and Pascalls Case in a Writ of Error* argues a position similar to that now taken by Bacon. At the center of that case was a hospital named in its royal charter, ‘the Master and Chaplains of the Hospital of King Henry the seventh, de le Savoy...’. The property was then leased and such lease was signed by: ‘W. Holgil master of the hospital, Henrici nuper Regis Angliæ septimi vocat. Le Savoy & Capellani Hosspitalis prædict’.⁶⁹ Although the case settled, the description of the hospital as ‘vocat Le Savoy’, or ‘called the Savoy’ rather than ‘the Savoy’ was potentially sufficient to invalidate the lease according to Coke’s argument.⁷⁰ Yet here, Coke finds that ‘Charterhouse’ was a sufficient description.⁷¹ Coke’s domicile must be, ‘by words sufficient in law, but not restrained to any certain, legal, and prescript form of words.’⁷² Again, he may have been considering the frequency of fraudulent claims of corporate misnomer or to accommodate the trading companies’ domiciles of ‘London’ and the like. But, Coke also reminded the parties that corporate domicile was not simply for identifying the entity but also for ensuring its access to justice. Proper domicile was necessary for proper pleadings.⁷³ Coke cited the example of the ancient guilds incorporated by prescription to support his conclusion that domicile could be described sufficiently

⁶⁸ 1609 Virginia Charter s 1 (giving a location of London); 1610 Newfoundland Company Charter p 1702 (giving a location of London and Bristol).

⁶⁹ *Marriot and Pascalls Case in a Writ of Error* (1587) 1 Leon 159, 74 ER 147, 159.

⁷⁰ *Ibid* 165.

⁷¹ This is actually consistent with David Seipp’s observation of inconsistencies in legal positions taking by medieval judges and lawyers with respect to the law of corporations. David J Seipp, ‘Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural’ in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge: Cambridge University Press 2002).

⁷² *Sutton’s Hospital* 29b.

⁷³ WS Holdsworth (n 8), vol 5, 117-18. Susan Reynolds observes for fifteenth century that ‘[a]nyone trained in the Common Law knew how important it was to make sure that the defendant was correctly and consistently named in writs’ and that its importance also applied to group activity as demonstrated in the Year Books. S Reynolds (n 7) 13.

without the use of metes and bounds.⁷⁴ Accordingly, Coke found the Charterhouse Letters Patent to contain a reasonably definite description of the corporation's domicile at the Charterhouse.

These essential elements track the initial wording in each of the Incorporating Provisions discussed in Chapter One. In looking forward, *Sheppard's 1659 Corporate Treatise* would be devoted to a lengthy analysis of corporate charter terms used during the period of the Protectorate with particular attention to municipal corporations and the procedural issues affecting such entities.⁷⁵ Sheppard recites a nearly identical list of essential elements adding 'words of incorporation' to Coke's list of four.⁷⁶ His treatise references *Sutton's Hospital* as a source of authority for the list as well as for other tangential points, including that the words, 'Fundo, Erigo, or Stabilio are not necessary', and that the case is an example of a corporate charter held valid.⁷⁷ Yet, there is nothing to suggest that these conclusions of Coke were perceived as anything more than a restatement of the contemporary understanding of the corporation. This is also true of *Rolle's Abridgement*, which begins with a sketched an outline of a corporation paralleling Coke's essential elements: '[1] b]y what Means a Coporation [sic] may commence, and by what Words and Names, and by whom, & econtra.... [2] Who may make a Corporation... [3] Of what Persons a Corporation may be made....'⁷⁸ The *1702 Corporate Treatise*, after distinguishing between secular and ecclesiastical incorporations, begins its analysis as well with the five necessities of incorporation: 'I. Lawful

⁷⁴ *Sutton's Hospital* 30a.

⁷⁵ See Nancy L Matthews, *William Sheppard, Cromwell's Law Reformer* (Cambridge: Cambridge University Press 2004) especially 136-42.

⁷⁶ Sheppard's 1659 Corporate Treatise pp 5-24.

⁷⁷ Ibid 5, 23, 24-26. Noticeably, and perhaps unsurprisingly given his relationship with Cromwell, Sheppard omits any mention of the royal charter incorporating the hospital and refers only the act of parliament. Ibid 24.

⁷⁸ H Rolle (n 54) entry for 'corporation'.

Authority. II. Persons to be incorporated. III. A Name of Incorporation. IV. A Place. V. Words of Incorporation.’⁷⁹ This treatise identifies *Sutton’s Hospital* as providing legal authority for its list and as a specific example of Parliamentary incorporation.⁸⁰ It also credits the case with resolving which incidents of incorporation need not be stated in the incorporating documents.⁸¹ It is this latter point that hints at the novelty of *Sutton’s Hospital*. While each of these secondary sources cite to *Sutton’s Hospital* in their deduction of essential elements for incorporation, these elements were already established at common law by 1613 and as evidenced by the Incorporating Provisions described in Chapter One. Coke’s statement, for example, that a corporation must have a name, did not necessarily resolve nuanced questions on permissible variations or issues of misnomers. He did not dictate a particular form in which these essential elements were to appear in an incorporating document, only that they be by, ‘words sufficient in law, but not restrained to any certain, legal, and prescript form of words.’⁸² In this respect, Coke was not adding to the general understanding of corporations but rather conservatively restating a current understanding of important elements appearing among the many elements listed in the Incorporating Provision of contemporary corporate charters. Rather, it was his declaration that the essential elements be limited to just those listed that was novel and revolutionary even if unacknowledged during the Stuart period.

⁷⁹ 1702 Corporate Treatise p 5. See also, W Blackstone ch 18, *esp* 463 (using a very similar listing of essential elements to define his corporations in the 1760s).

⁸⁰ 1702 Corporate Treatise 9.

⁸¹ *Ibid* 16.

⁸² *Sutton’s Hospital* 29b.

C. The Revolutionary Pronouncement of Unnecessary Provisions

Having declared four elements necessary for incorporation, Coke catalogues the charter provisions that he considers ancillary to a question of valid incorporation. In a list similarly buried in the text of the report, Coke states, '[t]hat when a corporation is duly created, all other incidents are tacitè annexed....',⁸³ continuing to say that, 'divers clauses subsequent in the charters [that] are not of necessity, but only declaratory, and might well have been left out.'⁸⁴ Several of these were particular to the charitable nature of the corporation at hand, but most applied more broadly to secular corporations.

First was the corporate privilege of a seal, a signature capable of legally binding the corporation. Coke finds that, 'when they are incorporated, they may make or use what seal they will.'⁸⁵ John Cowell's 1607 definition had begun: 'a bodie politique authorised by the kings charter, to have a common seale...'⁸⁶ But Coke held that there was no need to specify the details of such seal in an incorporating document. The 1609 Virginia Charter, the 1610 Newfoundland Company Charter, and the 1612 Virginia Charter each contain provision for a corporate seal in their Incorporating Provision although not a description.⁸⁷ The 1612 Virginia Charter simply acknowledges that the corporation is in possession of a seal.⁸⁸ Looking forward, each of the charters presented in this study contains a reference to a corporate seal. Moreover, the

⁸³ Ibid 30b.

⁸⁴ Ibid 30b-31a. However, Coke made the practical point that the, 'survivors shall be the corporation, but it is a good clause to [include to] oust doubts and questions which might arise.' ibid 30b.

⁸⁵ Ibid 30b.

⁸⁶ J Cowell (n 4) entry for 'corporation'.

⁸⁷ 1609 Virginia Charter s 3; 1610 Newfoundland Company Charter p 1702.

⁸⁸ 'The Third Charter of Virginia: March 12, 1611/12' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va03.asp> accessed 29 June 2015 (the '1612 Virginia Charter') s 16.

Charterhouse Letters Patent make mention of a corporate seal.⁸⁹ It may have been an ancillary provision but it does not appear that the drafters of corporate charters would risk its omission in practice.

Second, the corporate right to defend and enforce its rights at law through the right to sue and be sued, and to implead and be impleaded, should be assumed according to Coke; as should the right to corporate self-governance through the adoption of ‘ordinances’ or bylaws.⁹⁰ Teased apart, it was an interesting legal concept: that a private legal person existing only at law possessed the right to further create and devolve rights and privileges upon itself.⁹¹ Corporate bylaws were generally bound by the ‘laws of England’, but they were highly specific to the purpose of the corporation and so few overarching legal restrictions to their validity.⁹² In mentioning this mechanism of self-governance, Coke makes no mention of the need for a president or presiding officer as was included in Cowell’s 1607 definition.⁹³ The corporation in *Sutton’s Hospital* did not have president or the like but rather a board of governors. Blackstone cites to this point noting that it was a departure from the traditional corporate structure.⁹⁴

⁸⁹ Anonymous, *Charter, Acts of Parliament, and Governors’ Statutes for the Foundation and Government of the Charterhouse*.

⁹⁰ *Sutton’s Hospital* 30b.

⁹¹ See for example *Dr Bonham’s Case* (1609) 8 Co Rep 113b, 77 ER 646.

⁹² JH Baker, *The Oxford History of the Laws of England* (n 46) 82 (discussing permissible specificity of corporate bylaws and their common law limits). See for example *Dr Bonham’s Case*; *Waggoner v Fish* (1609) 2 Brownl 284, 123 ER 941 (holding a corporation may make bylaws ‘for the benefit of the commonwealth, [in which case] it shall be good, otherwise not.’); *The Case of the Tailors, &c. of Ipswich* (1614) 11 Co Rep 53a, 77 ER 1218. Compare with the example discussed in Chapter One of the Virginia Company’s power to enact ordinances or bylaws under martial law, which was prohibited at common law.

⁹³ J Cowell (n 4).

⁹⁴ W Blackstone ch 18 p 466.

A fourth ancillary provision was that a corporation had the ‘authority, ability, and capacity to purchase property.’⁹⁵ Coke further noted that the ability to purchase property necessarily included the power to alienate. The transfer of real property required a license to free the corporation from the strictures of mortmain, but as a pure matter of legal capacity, the corporation could own property.⁹⁶

[T]hese rights and privileges are] not of the essence of the corporation, for the corporation is perfect without it, so that by what has been said, it appears what things in genere are requisite to complete body incorporate, and which are verba operativa in this case (which are necessary to be known in every case), in the resolution whereof it appears how necessary it is, that the law and experience should joint with their hands together.⁹⁷

Cowell’s definition included a statement that, ‘to graunt or to receive in law any thing within the compas of their charter: even as one man may doe by law all things, that by lawe he is not forbidden.’⁹⁸ The capacity of a corporation to own property had been widely accepted since at least the early medieval period when mortmain legislation was introduced.⁹⁹

This list of ancillary elements was in fact a listing of common powers, rights, and capacities that had become intrinsic to the seventeenth century corporate form. They were logistical elements that were not necessary for identifying a particular corporation, as with the essential elements, but were features broadly necessary for the operation of a corporation.

⁹⁵ *Sutton's Hospital* 31a.

⁹⁶ *Ibid* 31a.

⁹⁷ *Ibid*.

⁹⁸ J Cowell (n 4) entry for ‘corporation’.

⁹⁹ See S Raban (n 6). See also S Reynolds (n 7); JH Baker, *The Oxford History of the Laws of England* (n 46) 622.

D. Coke's Underlying Theory of Corporations

Scattered throughout this report are references to two points that shed light on Coke's perception of the underlying theory of the corporation. Coke observes that is unnecessary to specify, '[t]hat the survivors shall be the corporation,'¹⁰⁰ but includes a caveat noting 'that is a good clause to oust doubts and questions which might arise, the number being certain.'¹⁰¹ This is a key to the theory of a corporation, that it may have succession permitting it to exist beyond the natural life of its original membership. Here that feature is considered so intrinsic to the corporation that it need not be stated. The sixteenth century had been a period when the law grappled with distinguishing between a corporation and its members, but by the early seventeenth century Coke viewed it as possessing widespread acceptance in the common law.¹⁰² He asserts that it is this separate perpetual existence, unique to corporations, which made it the ideal legal form for a 'pious venture' such as this:

The charter itself shews it in effect in this manner: it is impossible to take in succession for ever without a capacity; and a capacity to take in succession [sic] cannot be without incorporation; and the incorporation cannot be created without the King; for this reason the charter saith, 'And for the maintenance and continuance of the said hospital, &c. and that the same may take the better effect, that the said persons, &c. be one body corporate and politick, to have perpetual succession for ever to endure; we do by these presents for ever hereafter fully and really incorporate, &c. to have capacity and ability to take, &c.'¹⁰³

¹⁰⁰ *Sutton's Hospital* 30b.

¹⁰¹ *Ibid* 30b.

¹⁰² For sixteenth century observations, JH Baker, *The Oxford History of the Laws of England* (n 46) 623; see also, Matthew Hale observing that:

The quality of a corporation in general is this, that it puts a several capacity upon the persons incorporate . . . And upon this reason it is why upon a judgment given against a corporation, the goods of any person being a member of that corporation shall not be delivered in execution, unless it be in the case of the king who by special prerogative for issues levied or a fine imposed upon a corporation may seize the goods of any single person being a member of that corporation.

M Hale, *The Prerogatives of the King* (n 53) 243.

¹⁰³ *Sutton's Hospital* 26b.

Coke further points out as his sixth ancillary provision that, '[i]f the revenues increase, that they shall be employed to increase the number of poor...'¹⁰⁴ It builds upon a related concept that the Charterhouse Letters Patent, or any corporate charter, creates a continuing legal entity with a specific purpose that continues even if funding expands or new members succeed those names in the charter. This corporation is bound under the charter terms in perpetuity. It is important to remember that this does not mean the aggregate nature of Coke's corporation in the seventeenth century, or even today, was wholly ignored at law.¹⁰⁵ Rather, the importance is that a group could possess a singular nature even if not exclusive and that Coke considered it inherent to the corporation.

IV. *Sutton's Hospital: Conclusions and Legacy*

The resolution of the legal status of the corporation, however, did not mean a resolution for the funds directed to it under Sutton's will. The same month that Coke held in favor of the defendants and upheld the incorporation under the Charterhouse Letters Patent, the governors of the hospital made a donation to the Crown in the amount of £10,000 for a royal infrastructure project in the town of Berwick-upon-Tweed. As Temple observed, 'this very large sum (two-thirds of the final cost) was half of a contingency fund set up by the will to be put towards the hospital or the poor, or some other purpose.'¹⁰⁶ The executors were also instructed by James I to better provide for Roger Sutton, the illegitimate son, and provide him with an allowance.¹⁰⁷

¹⁰⁴ Ibid 30b.

¹⁰⁵ See for example Bacon's previously state preference for a corporate monopoly since it was to a group rather than a singular entity.

¹⁰⁶ Temple (n 12) 61.

¹⁰⁷ (? June 1613) CSPD 74: James I, June 1613 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp186-189> (accessed 15 July 2015). The entry reads: '[t]he King to the

The corporation faced liquidity problems from the near start. In addition to the donation to the Crown, provision for Roger Sutton and then for Simon Baxter, and legal fees associated with bringing the case to trial, the governors of the corporation were unable to collect on several outstanding debts owed to the corporation.¹⁰⁸ In the face of financial difficulty, the governors petitioned Parliament for an act confirming their incorporation and the status of their foundation. The request was declined amid discussion of the corporation's practice of agreeing to certain below-market rents that further reduced its revenue stream.¹⁰⁹ A further attempt was made in 1624, which met the same result, but was finally passed in 1628 with much credit given to an intervention by Coke.¹¹⁰ These repeated requests for parliamentary confirmation even after a favorable decision in *Sutton's Hospital* underscores the potentially precarious

Executors of Thos. Sutton, of Cambridgeshire, and the Governors of the Charter House, Middlesex. Requires them to assign a meet allowance to Roger Sutton, son of the late Thos. Sutton, who was overlooked in his father's disposition of his large estates.' The juxtaposition between these reallocations of funds and the relatively recent proclamation of James I regarding a respect for donor intent, indicates that such reallocation was not considered contrary as the hospital would still be funded. It was perhaps more of a refinement of Sutton's desires. See:

That the said good and godly uses & intents may be duely & speedily employed, as is abovesaid, And that no person or persons, bodies Politique or Corporate (presuming to passe away with impunity) neglect, or not performe their duties in that behalf, ... Doeth ... as all other person and persons, bodies Politique and Corporate whatsoever having any Lands, Tenements, Hereditaments, Proffits, Goods, Chattels, Summes of money, or toher things mentioned to be given, limited, assigned or appointed to or for any of the good and charitable uses above said, That they and every of them doe well and faithfully imploy the said Lands, Tenements, Hereditaments, Goods, Chattels, Summes of money or other things, according to the true meaning, ordinance, and institution of the Founders, or Givers of the same, upon paine of his Majesties high displeasure, and of such penalties and punishments, as they shall justly deserve for contemning of his Royall commaundments, in a cause so just and necessary to be performed, and for their demerits in that behalfe.

By the King, A Proclamation to Redresse the Mis-employment of Lands, Goods, and other Things given for Charitable Uses (11 August 1605) reprinted in *Stuart Proclamations* 120. the

¹⁰⁸ S Porter (n 26) 20-24.

¹⁰⁹ (09 May 1614) HCJ 1: 1547-1629. See (04 May 1614) HCJ 1: 1547-1629. See also, Copies of the Act of Parliament Confirming the Foundation of Sutton's Hospital (1614), LMA, ACC/1876/ G/01/015 (the archival title is misleading as these are copies of the proposed act to confirm).

¹¹⁰ (13 March 1624) HCJ 1: 1547-1629; (08 April 1628) HCJ 1 1547-1629; (20 May 1628) HLJ 3: 1620-1628. See M Sewell, *Charterhouse, Its Foundation and History; with a Brief Memoir of the Founder, Thomas Sutton, Esq* (London: self-published 1849) 42, 54-56.

position of a corporation that was challenged by changing circumstances undermining its ability to fulfill the corporate purpose: a situation reminiscent of that facing the Virginia Company.

The continued importance of *Sutton's Hospital* lays also with the rarity of a wide-ranging assessment of corporations as they stood at common law in the early part of the seventeenth century. Coke certainly believed in the significance of the case:

For the confirmation of incorporations founded for works of piety and charity in time past. 2. For the better instruction how they which shall be founded hereafter shall be so established and that no exception may be taken to them. 3. For the resolving of certain opinions and questions which were moved at the bar, and which might have disturbed the peace of the law.¹¹¹

Coke's buried statement of the four essential elements for incorporation appears an accurate reflection of contemporary common law. These elements were repeated throughout the secondary literature of the period, though not attributed to a novel pronouncement in *Sutton's Hospital*. These elements also appear in the opening lines of the Incorporating Provisions of contemporary corporate charters. The drafting of those charters and the operation of the corporations created thereunder, involved many of the same legal and political minds as touched this case. There was a network of those considering the form of the corporation in practice and those grappling with its place at common law. The Virginia Company was in the thick of this network.

The truly revolutionary aspect of *Sutton's Hospital* was that the essential elements were limited just a few necessary for identifying the entity. Labeling other rights and

¹¹¹ *Sutton's Hospital* 34b. Coke further notes that:

I have reported in the first place, (though it be not the first in time) the case of the Hospital of King James, founded by Thomas Sutton, Esq. for that in mine opinion, it doth merit to have the precedency for two causes. First, for that it was an Exchequer-chamber case, where by the verdict of the grand jury of all the Judges of England, it was for the Hospital found *billā vera*: 2. For that the foundation of this Hospital is *opus sine exemplo*.

The Preface, 10 Co Rep v.

privileges of incorporation as ancillary suggests they were understood points of commonality among corporations but were adaptable to the given situation. Coke goes further opining that the range of rights and privileges that could be ascribed to a corporation and its capacity of separate personhood in perpetuity distinguished it from other legal forms. We now turn back to Virginia to continue the legal history of this corporation evolving along with emerging social, political and economic interests in the colony as they interact with the metropolitan governments.

CHAPTER THREE:

The Corporation and Changing Interests in Stuart Virginia

The Virginian corporate experience had begun in 1609 with the incorporation of the Virginia Company. Originally organized as an association of proprietor adventurers under the 1606 Virginia Charter, the Virginia Company quickly became desperate for a more efficient management structure and attracting investment. The resolution was the 1609 Virginia Charter pursuant to which the group was granted the corporate form used by its profitable contemporaries. Further refinement of the legal terms binding the corporation came with the 1612 Virginia Charter. The practical realities made apparent in the terms of these corporate charters were then considered by common law jurists for their abstract legal meaning as reported by Coke in 1613's *Sutton's Hospital*.¹ His distillation of essential elements for incorporation and restatement of the criticality of separate and perpetual legal personhood to corporate status was a conservative reflection of the corporate form in practice; his designation of ancillary elements was novel. However, just as the corporation in *Sutton's Hospital* would come to face difficulties in fulfilling its corporate purpose even after its corporate form was upheld, so too did the Virginia Company.

The financial and political stresses eventually caused the dissolution of the Virginia Company in 1624. The corporate landscape of the colony remained barren for much of the period until well after the Glorious Revolution. In an alignment of local educational and religious interests and the personal interests of William III and Mary II, the College of William and Mary was incorporated by the College of William and Mary

¹ *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960 (*Sutton's Hospital*).

Charter in 1693.² It was followed in 1705 by a colonial statute incorporating a series of fifteen municipal incorporations (the ‘1705 Act for Establishing Ports and Towns’) with the intention of increasing the organization of the colony’s trade and therefore tax collection, which was more critical with the onset of Queen Anne’s War in 1702. The statute was ultimately repealed because of the unintended consequences of improved trading efficiency: increased competition for English woolen manufacturing.³ The debates and discussions surrounding these incorporations coupled with an analysis of the precise legal terms of incorporation reveal the manner in which these private interests sought legal protection and encouragement in the unique setting of colonial Virginia and what it meant for the evolution of the Anglo-American corporation.

I. The Fate of the Virginia Company

A. The Rigidity of the Corporate Form at Odds with Emerging Local Interests

By the end of the first decade of settlement, the Virginia Company and the colonists had identified tobacco as their primary source of potential profit.⁴ The physical nature of the plant and the desire to grow as much tobacco as quickly as possible meant that planters were constantly looking for new expanses of arable land.⁵

In 1616 certain governing members of the Virginia Company formed a subordinate

² *The Charter of the College of William and Mary (8 February 1693)* (Thomas Nicolson 1800) (the ‘College of William and Mary Charter’).

³ An Act for Establishing Ports and Towns 1705 (3 Henings 404) (the ‘Act for Establishing Ports and Towns’). For a comprehensive discussion of the development of the general assembly of the Virginia Company into the House Burgess, see Jon Kukla, *Political Institutions in Virginia, 1619-1660* (New York: Garland Press 1989).

⁴ Robert Brenner, *Merchants and revolution : commercial change, political conflict, and London's overseas traders, 1550-1653* (Cambridge: Cambridge University Press 1993) 93-95; Bernard Bailyn, *The Barbarous Years*: (New York: Alfred A Knopf 2012) 98-99.

⁵ James P Horn, *A Land as God made it: Jamestown and the birth of America* (New York: Basic Books 2005) 40-42, 236. See William Nelson, *Common Law in Colonial America: The Chesapeake and New England, 1607-1660*, vol 1 (New York: Oxford University Press 2008) 13 (discussing the tobacco plant as being particularly soil-depleting and the entrepreneurial spirit that developed from this cash crop).

joint-stock company, *Society of Particular Adventurers for the Traffic with the People of Virginia in Joint Stock*. The hope was that separating the purely commercial activity of the Virginia Company, namely the importation of supplies and the exportation of tobacco, into a separately managed account would improve efficiency and provide quicker returns for the London investors.⁶ This same year, the Virginia Company adopted a 'headright system' as means of encouraging individuals to settle and cultivate the land. The size of the lot received was based upon the number of 'heads' they brought with them.⁷ In 1619 James I gave the corporation's tobacco trade a significant economic boost with a monopoly prohibiting the growth of English tobacco in exchange for an increased import duty to be paid on sales in England.⁸ The Virginia Company also expanded its 1616 land distribution scheme and sent large groups of private individuals to work the land but also to ensure the planting of food crops necessary for the sustainability of the colony.⁹ Tobacco quickly came to dominate the colony. The resulting settlement pattern was one of singular, mobile plantations that were widespread along major rivers throughout the Chesapeake region. It was not a pattern that naturally lent itself to community-based organization.¹⁰

The Virginia Company did not create formal derivative municipal or ecclesiastical corporations. The minimal evidence of any communities formed during

⁶ Wesley Frank Craven, *Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (New York: Oxford University Press 1932) 33-34.

⁷ R Brenner (n 4) 93-94.

⁸ Forbidding Planting of Tobacco in England (30 December 1619) reprinted in *Stuart Proclamations*. See John Cramsie, *Kingship and Crown Finance under James VI and I, 1603-1625* (London: Royal Historical Society 2002) 167.

⁹ R Brenner (n 4) 95.

¹⁰ Thomas Jefferson, *Notes on the State of Virginia* (William Peden ed, Chapel Hill: University of North Carolina Press 1996) 108. See Peter Charles Hoffer, *Law and People in Colonial America* (Baltimore: Johns Hopkins University Press 1992) 24.

this period does not even suggest that they possessed a collective personality characteristic of medieval communities described by Susan Reynolds:

At this period [900-1140] all sorts of groups were allowed to act in a way that later centuries would associate with corporate status. Every community had its customs, which seem to have involved some hazy right of legislation—the making of by-laws in terms of the later English law of corporations. Many villages or groups of tenants owned land or rights over land—and this distinction is another which is more or less meaningless in terms of early medieval land-law.¹¹

The formally designated communities that did emerge under the Virginia Company were administrative designations to facilitate governance of the colony but without any particularly ascribed privileges or rights. Although Coke did not directly address powers of derivative incorporation in *Sutton's Hospital*, the Virginia Company was not without contemporary examples to assume it did possess the power incorporate municipal corporations. The English palatinate lords had long been considered by common law to hold a prescriptive power to incorporate within their jurisdictions.¹² Fellow settlement charter recipient Walter Raleigh, had issued a corporate charter in 1587 for a 'Cittie of Raleigh' that was well known by contemporaries.¹³ Sir Ferdinando Gorges believed he possessed such power under his 1639 proprietary charter for the 'Province of Maine'.¹⁴ He subsequently issued a charter of incorporation for the municipal corporation of Acomenticus,¹⁵ which reads in pertinent part:

¹¹ Susan Reynolds, *Kingdoms and Communities in Western Europe 900-1300* (Oxford: Oxford University Press 1997) 35. On the status of medieval 'soft incorporations' see also Frederic William Maitland, *Township and Borough* (Cambridge: Harvard University Press 1898) 18-22. See David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press 1997) 108-09.

¹² Matthew Hale, *The Prerogatives of the King* (Selden Society 1976) 212, 241.

¹³ Karen Ordhal Kupperman, *Roanoke: the abandoned colony* (Lanham; Plymouth: Rowan & Littlefield Publishers 2007) 105-118.

¹⁴ 'Grant of the Province of Main to Sir Ferdinando Gorges April 3, 1639', reprinted in Ebenezer Hazard, *Historical collections; consisting of state papers, and other authentic documents; intended as materials for an history of the United States of America.*, vol 1 (Philadelphia: Printed T Dobson for the author 1794) 442 -55.

¹⁵ The town is alternatively spelled Agamenticus and is present day York, Maine. Charles McLean Andrews, *The Colonial Period of American History* (New Haven: Yale University Press 1934-1938) 424.

I the said Sir Ferdinand Gorges have erected made ordained and established And by the Tenor of theis presents doe for me my heires and assignes create make ordaine and establishe the Planters and Inhabitants of Acomenticus aforesaid into one bodie politique and corporate in fact deed and name from henceforth hereafter to continue by the name of the Maior Aldermen and Towne of Acomenticus within the Province of Maine and by that name to have perpetuall Succession forever...¹⁶

Gorges' charter tracks the essential elements of *Sutton's Hospital* establishing himself as the source of authority for incorporation as it was devolved to him by the Crown. His municipal corporate charter further includes several of the ancillary provisions described by Coke. For example, Gorges states that by this charter Acomenticus is, 'to make such by laws orders and ordinances as are accustomed to be made in Townes Corporate in England...'¹⁷ A catch-all provision modeling the colonial municipality on its English counterparts but notably leaving specificity minimal in light of the unknown circumstances of colonial life.

As other settlement proprietors had, and would, interpret their charters as granting the power to incorporate, the Virginia Company could have as well. The 1606 Virginia Charter charged the group of adventurers: 'to make Habitation, Plantation, and to deduce a colony of sundry of our People into that part of America commonly called VIRGINIA.'¹⁸ To this end, the adventurers were to:

[N]ominate and assign all the lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, ...All which Lands, Tenements, and Hereditaments, ... so distributed and divided amongst the Undertakers for the Plantation of the said several Colonies, and such as shall make their Plantations in either of the said several Colonies, in such Manner and Form, and for such Estates, as shall be

¹⁶ 'First Charter of Acomenticus, 10 April 1641', reprinted in E Hazard (n 14) 470 (the '1641 Acomenticus Charter'). See also 'Second Charter of Georgeana 1 March 1641', reprinted in *ibid* 480.

¹⁷ 1641 Acomenticus Charter p 473.

¹⁸ 'The First Charter of Virginia: April 10, 1606' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va01.asp> accessed 17 July 2015 (the '1606 Virginia Charter') s 1.

ordered and set down by the Council of the said Colony, or the most part of them. . . .¹⁹

The Council of Virginia in London was charged with the power to distribute land and to 'make their Plantations' as desired. This power of local governance and organization was then devolved to the corporate Virginia Company under their 1609 Virginia Charter:

[I]o make, ordain, and establish all Manner of Orders, Laws, Directions, Instructions, Forms and Ceremonies of Government and Magistracy, fit and necessary for and concerning the Government of the said Colony and Plantation...²⁰

Since many of the documents that relate to this precise moment of the corporation's history have been destroyed, a degree of educated conjecture is necessary. However, the above examples suggest it reasonable to assume the Virginia Company's expansive powers would have been perceived to also include the formation of municipal incorporations. This conclusion is further evidenced by the later 1618 instructions issued by the Virginia Company to its the newly elected governor, George Yeardley ('Yeardley's Instructions'):

And forasmuch as our intent is to Establish one Equal ... Plantations, whereof we shall speak afterwards, be reduced into four Cities or Burroughs Namely the chief City called James town Charles City Henrico and the Burrough of Kiccowtan And that in all these foresaid Cities or Burroughs the ancient Adventurers and Planters which [were] transported thither with intent to inhabit at their own costs and charges before the coming away . . . shall have upon a first division to be afterward by us augmented one hundred Acres of land for their personal Adventure and as much for every single share of twelve pound ten Shillings paid [for such share] allotted and set out to be held by them their heirs and assigns forever...²¹

¹⁹ Ibid s 20. See also ibid ss 18, 19.

²⁰ 'The Second Charter of Virginia; May 23, 1609' (*The Avalon Project, Yale Law School*) < http://avalon.law.yale.edu/17th_century/va02.asp > accessed 29 June 2015 (the '1609 Virginia Charter') s 13.

²¹ The Treasurer and Companie of Adventurers and Planters of the City of London for the first Colony in Virginia to Captain George Yeardley Elect Governor of Virginia and to the Council of State there being or to be Greeting (18 November 1618) reprinted in *RVC* 1, 98 ('Yeardley's Instructions').

Yeardley has been given directions to establish a capital city, Jamestown, the cities of Charles City Henrico and a borough, Kiccowtan. There is no discussion of a legal distinction between the intended 'Cities or Burroughs'. However, it is only these four communities that are assigned a specific designation of borough or city; the others are described as hundreds or plantations²² as may be seen in the 22 July 1619 report from a meeting of the House of Burgesses:

[C]onsisting of Governor Sir Geo. Yeardley, the Council of State, and two Burgesses elected from each *incorporation and plantation* ; dissolved on 4th August. The following places sent two Burgesses each, viz :-- James, Charles, and Henricus cities, Kiccowtan, Capt. John Martin's plantation, Smythe's hundred, Martin's hundred. Argoll's gift, Flowerdieu hundred, and Capt' Lawne's and Capt. Warde's plantations . . .²³

The hundreds and plantations had been formed as part of the Virginia Company's private settlement scheme but it not clear whether the designation carried a legal meaning beyond administrative convenience for the Virginia Company and the facilitation of sending representatives to the House of Burgesses.²⁴ There is no evidence of a formal conveyance of jurisdictional powers through the establishment of courts or of economic powers through the creation of regulated markets or any other

²² See an example of a land patent for the settlement of a hundred appearing most similar to a joint tenancy with the four unities of time, possession, title, and interest, To Sir William Throkmorton, Sir George Yeardley, Richard Berkeley, George Thorpe, and John Smyth of Northnibley, made on Feb 13 1619 by which Berkeley Hundred was settled on the upper James reprinted in Nell Marion Nugent (ed), *Cavaliers and Pioneers: Abstracts of Virginia Land Patents and Grants 1623-1800* (1934) 59.

²³ Reporting of proceedings in the General Assembly convened at James City in Virginia (30 July 1619) JHB 1619-1658/59, 22.

²⁴ Robert Brenner describes the hundred or plantation as a purely commercial arrangement until about 1622 where:

A number of stockholders would combine their company shares, receive as dividends substantial grants of land (called hundreds or plantations) over which they were given limited governmental powers and attempt to develop them from England at their own expense.⁷

R Brenner (n4) 95-96. See also George MacLaren Brydon, *Virginia's Mother Church and the Political Conditions under which It Grew* (Richmond: Virginia Historical Society 1947) 37 (discussing the vagueness of the political designation and its lack of effect on the settlement patterns of early Virginians).

traditional municipal power. The designation does not appear to connote any sort of legal formality or protection to group activity like that which would appear in the Act for Establishing Ports and Towns.

Yet when one remembers the commercial drive of the Virginia Company and its settlers and the dispersed settlement pattern that tobacco cultivation created, then it is not necessarily surprising that municipal incorporations did not appear. The legal certainty that a corporation provided, the formal rigidity of the corporate charter as a statement of rights, powers, and obligations, this was appealing to London investors pooling their resources for a risky overseas venture. It did not hold the same appeal in a colony of sprawling plantations independently managed by entrepreneurial colonists.²⁵ Moreover, the establishment of municipal locales that incorporation would create was contrary to the business practice of these colonists planting along the rivers and frequently dealing individually and directly with the merchants.²⁶ The corporate form would not, and did not, hold an appeal in this situation.

The realities of colonial life also impacted the creation of ecclesiastical corporations, or lack thereof. In 1619 the new House of Burgesses confirmed the authority of the Church of England in the colony and directed that regular church services be attended.²⁷ There is evidence of the establishment of several parishes but

²⁵ William Scott has quantified the precise degree to which Virginia had become economically dependent upon private investment as opposed to that of the Virginia Company:

The outlay on account of the general stock may not have exceeded £10,000, but the great bulk of the expense was defrayed outside of this by particular adventurers. Taking this fact into account, the estimate of the capital from all sources, devoted to developing the plantation from 1619 to 1623, of between £80,000 and £90,000, becomes intelligible.

William Robert Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720*, vol 2 (Cambridge: Cambridge University Press 1910) 286.

²⁶ R Brenner (n 4) 95.

²⁷ James Thayer Addison, *The Episcopal Church in the United States, 1789-1931* (New York: Scribner 1951) 19.

there is no evidence as to their legal organization beyond small land grants for parish churches.²⁸ The best contemporary reference to their existence is from Yeardley's Instructions requiring that lands in each of the larger communities, the cities or boroughs, be set aside for the building of church:

We further will and ordain that in every of those Cities or Burroughs the several quantity of one hundred Acres of Land be set out in quality of Glebe land toward the maintenance of the several Ministers of the parishes to be there limited and for a further supply of their maintenance there be raised a yearly standing and certain contribution out of the profits growing or renewing within the several farmes of said parish and so as to make the living of every minister two hundred pounds Sterling p annum or more as hereafter there shall be cause...²⁹

In fact, there is no mention at any point in the Stuart period of incorporating these Church of England parishes. But again, in light of the particular circumstances of Virginia it is perhaps not that surprising. Unlike its northern colonial neighbors in New York or Massachusetts, the Church of England held an established and premier position. The property and responsibilities that would have been ordinarily assigned to an ecclesiastical corporation, such as the collection of tithes or maintenance of the poor, seems to have been effectively administered by the House of Burgesses.³⁰ But what was likely the biggest influence was the simple reality that there were not nearly enough ministers to serve as the heads of these colonial parishes. Looking forward, it has been

²⁸ Instructions to Governor Wyatt 1623/24 (1 Henings 122). See GM Brydon (n 24) 40 (noting that it was intended at some point that each 'city' was to be a parish as well); Virginia Historical Society, 'The Episcopal Church in Virginia, 1607 - 2007' (2007) 115 *The Virginia Magazine of History and Biography* 163, 163-199. George Mason, an editor of the Virginia Historical Society wrote extensively on the history of these individual colonial parishes in the 1940s. See George Carrington Mason, 'The Colonial Churches of Nansemond County, Virginia' (1941) 21 *The William and Mary Quarterly* 37; George Carrington Mason, 'The Colonial Churches of Norfolk County, Virginia' (1941) 21 *The William and Mary Quarterly* 139; George Carrington Mason, 'The Colonial Churches of Warwick and Elizabeth City Counties' (1941) 4 *The William and Mary Quarterly* 371, 372; George Carrington Mason, 'The Colonial Churches of Prince George and Dinwiddie Counties, Virginia' (1943) 23 *The William and Mary Quarterly* 249; George Carrington Mason, 'The First Colonial Church of Denbigh Parish' (1949) 57 *The Virginia Magazine of History and Biography* 286. See also Morgan P. Robinson, 'Henrico Parish in the Diocese of Virginia: and the Parishes Descended Therefrom' (1935) 43 *Virginia Historical Magazine* 8.

²⁹ Yeardley's Instructions (n 21) 102.

³⁰ GM Brydon (n 24) 94-95; JT Addison (n 27) 29-30.

estimated that in 1661 there were ten ministers shared by an estimated fifty parishes.³¹ Formal incorporation would have been unable to provide any benefit to the ecclesiastical life of Virginia that was operating on such a small scale and entwined with civic life. More broadly, for most of the seventeenth century the colony simply lacked the group activity or interests that would warrant or benefit from incorporation.

B. The Dissolution of the Virginia Company by the writ of *Quo Warranto*

The instability of the colony at Virginia was inextricably linked with and exacerbated by the failures of the Virginia Company. The ever-increasing political rivalries pitting the factions of the current treasurer, Sir Edwin Sandys, and former treasurer, Sir Thomas Smythe against one another, did nothing to support the precarious nature of the venture.³² Having discovered tobacco, the entrepreneurial colonists wanted to grow nothing but tobacco. Food was scarce and in 1622 the colony was dealt another blow as Powhatan led a systematic attack throughout the settlement. The colony that already struggled with a high mortality rate was decimated.³³ The Virginia Company of 1623 was bankrupt, mismanaged, and proven wholly unable to protect its colony from starvation or attack.³⁴ It had become abundantly clear

³¹ GM Brydon (n 24) 175.

³² The classic account of the demise of the Virginia Company remains, WF Craven (n 6). Note further that the intense rivalry between these two men and their followers was not limited to the Virginia Company as both held stakes in the East India Company and the Somers Isles Company. Robert Ashton, *The City and the Court, 1603-1643* (Cambridge: Cambridge University Press 1979) 115.

³³ B Bailyn (n 4) 100-07. Bernard Bailyn presents the sobering statistic:

A polyglot, polyethnic collection of more than 8,000 men, women and children from parts of England, the continent of Europe, and Africa had arrived in Virginia under the company's auspices. A census of 1625 listed 1,218 still alive. In the single year 1622 close to 1,000 had died of disease or starvation or had been killed by the Indians.

Ibid 111.

³⁴ The editor of their corporate records, Susan Myra Kingsbury, gives an account of the dominant concerns of the corporation after 1622 as: '[t]he questions arising concern the transportation of dissolute

that the Virginia Company could not fulfill the purpose for which it had been originally incorporated. The Crown demanded that the corporation turn over its corporate record books and seal in the spring of that year:

That the Commisioners require all the Recorde of the Court to be brought in unto them together wth the Duplications thereof, and the Court Bookes w^{ch} should warrant the sd Recorde, and the Blurr books w^{ch} should warrant the Court Booke and is the first ground of the Record: that it may [be] discovered whether there be any differences betweene them.³⁵

The surrender of the seal in particular meant that the Virginia Company lost its corporate signature rendering it wholly unable to transact business. Further information requests followed, which focused on the amount and manner in which real property was distributed; proof that interactions with neighboring Native American tribes prioritized trade and minimized violence; and whether all of management had taken the Oath of Supremacy to the Church of England as was now required by James I.³⁶ It was a search for definitive evidence of the Virginia Company's failure.

i. The Split with Somers Islands Company

A motivation for the issuance of the 1612 Virginia Charter had been the inclusion of a group of islands known as Bermuda, which were discovered when a supply ship for the colony at Virginia was blown off course in 1608.³⁷ The geographic parameters of the colony were expanded to include: ‘all the islandes lying within one

persons to the colony, the right of the King to nominate men from whom the treasurer should be chosen, the restriction on trade to other countries, the refusal of a new charter to the company, and the dissolution of the lotteries.’ Susan M. Kingsbury, *An Introduction to the Records of the Virginia Company of London* (Washington: Government Printing Office 1905) 101. A good summary of the financial state of the Virginia Company is presented by: Jerry W. Markham, *A Financial History of the United States: From Christopher Columbus to the Robber Barons (1492-1900)*, vol 1 (London: M.E. Sharpe 2002) 24-26.

³⁵ Sir Nathaniel Rich, Draft of Instructions to the Commissioners to Investigate Virginia Affairs (14 April 1623) reprinted in *RVC* 4, 116.

³⁶ Rich’s Instructions to the Commissioners to Investigate reprinted in *RVC* 4, 117-18. See Paul Halliday, *Dismembering the Body Politic* (Cambridge: Cambridge University Press 1998) 150.

³⁷ See Charles E Hatch, *The First Seventeen Years: Virginia 1607-1624* (Charlottesville: The University Press of Virginia 1957) 8-9.

hundred miles along the coast of both the seas of the precinct aforesaid'.³⁸ Later that year, on 23 November 1612, the Virginia Company sold the Bermuda to Sir William Wade for £2,000.³⁹ The islands were in turn surrendered back to the Crown on 23 November 1614.⁴⁰ The islands were renamed the 'Somers Islands [sic]'⁴¹ and were granted to Wade and many of the governing members of the Virginia Company, now as part of a new incorporation:

That they their heires and assignes which at any tyme hereafter shall-bee lawfull owners of the said Somers Islands ... And that they and their Successors shall be knowne and called and incorporated by the name of the Governour and Company of the City of London for the Plantacon of the Somers Islands, and that they and their Successors shall-bee from henceforth foreuer enabled to take acquire and purchase by the Name aforesaid....⁴²

The interrelationship between the Virginia Company and this new corporation, the 'Somers Island Company', was present from the beginning. Their corporate membership, management, and governing councils overlapped significantly.⁴³ The first governor of the new Somers Island Company, Daniel Tucker, was an early settler of

³⁸ 'The Third Charter of Virginia: March 12, 1611/12' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va03.asp> accessed 29 June 2015 (the '1612 Virginia Charter') s 2.

³⁹ 'Charter for the Governour and Company of the City of London for the Plantacon of the Somers Islands, 29 June 1615' reprinted in John Henry Lefroy, *Memorials of the Discovery and Early Settlement of the Bermudas or Somers Islands 1515-1685*, vol 1 (London: Longmans, Green, and Co 1877) 84-85.

⁴⁰ Ibid 85.

⁴¹ Ibid 83.

⁴² Ibid 87.

⁴³ See Richard S. Dunn, 'The Downfall of the Bermuda Company: A Restoration Farce' (1963) Vol. 20, No. 4 *The William and Mary Quarterly* 487; Virginia Bernhard, 'Bermuda and Virginia in the Seventeenth Century: A Comparative View' (1985) Vol. 19, No. 1 *Journal of Social History* 57; Peter Thompson, *Paradise Lost: The Founding of Bermuda* (2009). Perhaps not surprising giving the entwined origins of the two corporations, the classic histories of the Somers Island Company is: Wesley Frank Craven, 'An Introduction to the History of Bermuda' (1937) 17 *The William and Mary Quarterly* 317; John Smith, *The Generall Historie of Virginia, New-England, and the Summer Isles: With the Names of the Adventurers, Planters, and Governours From Their First Beginning Ano: 1584 To This Present 1624* (London : ID and IH for Michael Sparkes 1624).

Virginia.⁴⁴ Their governing councils would hold joint meetings.⁴⁵ They issued remarkably similar instructions for their governors.⁴⁶ The overlap also meant that the Somers Islands Company was not immune to the political conflict that plagued the Virginia Company. For example, in 1621 Sir Edwin Sandys, the treasurer of the Virginia Company, managed to oust the Smythe sympathizers from their management positions within the Somers Islands Company.⁴⁷ The key difference between the two corporations though: the Somers Islands Company was profitable.⁴⁸

Despite its profitability, when investigations into the affairs of the Virginia Company began, the entwined nature of the two corporations meant that the solvency of the Somers Islands Company was also investigated. In May of 1623 the Crown issued a proclamation to the Somers Islands Company to distance itself operationally and financially from the Virginia Company:

[A]nd further taking notice that of late in a confused manner, the two Companies of Virginia and the Summer Islande have binne warned to meete together, at one time, and place, wch Wee by no meanes like, they being two severall bodies and injoying their owne particular Governours, and Officers, Therefore to p^rvent theis and the like disorders hereafter... that you doe not for this yeare ensueinge make Choice [independently select officers, etc.]⁴⁹

The Somers Islands Company was ultimately proven solvent and it was dismissed from any further investigations.⁵⁰ Perhaps it should not be surprising that the profitable

⁴⁴ JH Lefroy (n 39) 105. See List of Persons Fit to be Governor and Deputy Governor of Virginia and Somers Islands Companies (April/May 1623) reprinted in *RVC* 1, 90-91.

⁴⁵ See Order of Court for Virginia and the Somers Islands (7 March 1622/3) reprinted in *RVC* 1, 42-43.

⁴⁶ Compare Yeardley's Instructions (n 21) with the Bermuda Company instructions reprinted at JH Lefroy (n 39) 182-228. CM Andrews (n 15) 222-23.

⁴⁷ R Ashton (n 32) 115.

⁴⁸ See RS Dunn (n 43) 489.

⁴⁹ Letter from the King to the Governor and Company of the Somers Islands (May 20, 1623) reprinted in *RVC* 4, 198.

⁵⁰ Certified Copy of Order of Commissioners Respecting the "Public Charges" of the Summer [sic] Islands (8 July 1623) reprinted in Royal Commission on Historical Manuscripts (ed) *Eighth Report of the*

corporation was permitted to continue. Yet, it is an interesting example of the degree to which the formalities of separate corporate personhood could be respected in the early seventeenth century. James I was willing to accept the wholly independent legal status of the Somers Islands Company if it in turn respected those legal boundaries and severed ties, both formal and informal, with the Virginia Company. This move is demonstrative of the importance and strength of this legal form within early seventeenth century corporate law. The corporate form of the Somers Island Company protected its members and their interests from meeting the same fate as the Virginia Company.

ii. Tightening Royal Control over the Colony in Virginia

Simultaneous with the split with the Somers Islands Company, the Crown moved towards greater control over the colony managed by the Virginia Company. Its next step was to dissolve the regular assembly of Virginian colonists known by this time as the House of Burgesses, and for the Crown to directly assume management responsibilities. The assembly pleaded for its reinstatement, but to no avail:

In Conformitie whereof and most humble obedience to yo^r . . . Comaud, they are resolved no more to assemble without yo^r gracious assent, although this suspension may happen to prove infinitelie priudiciall to the Collonie. And yo^r ma^{ty} said Suppliante shall according to their bouden dutie pray for yo^r ma^{ty} health and happines long to Continew.⁵¹

Attorney General Lord Thomas Coventry and Solicitor General Sir Robert Heath, as legal advisors to the Crown at the time, recognized the political and legal chaos that this suspension would cause for the colonists. Accordingly, their recommendation to the Crown was to separately consider the dual roles exercised by the Virginia Company.

Royal Commission on Historical Manuscripts: Appendix - (Part II) (London: George Edward Eyre and William Spottiswoode 1881) 47; Draft Preliminary Report of Commissioners upon the Condition of the Summer [sic] Islands (June or July 1623) reprinted in *ibid.*

⁵¹ Petition to the King (24 May 1623) reprinted in *RVC* 4, 247.

While corporate operations were suspended pending review, the civic operations occurring under the auspices of the Virginia Company might continue in order to minimize disruption and ensure adequate government of the colonists:

But seeing it is yo^r good pleasure not to avoid the private interest of any of yo^r subjecte which have bene adventurers either in parson or purse wee conceive and humbly offer it also to yo^r Ma^{ties} judgment that for avoiding the inconvenienc which may ensue by suspension of the present government untill a better be resolved on it wilbe fitt that yo^r Ma^{ties} first determin of that which yow shall think best to establish for the government of that colony before yow publish yo^r intention by proclamacion or otherwise and then att the same instant subjecte may have knowledge both of the necessity of this alteracion and of yo^r grace to the adventurers in settling and upholding their private intereste⁵²

A version of the assembly continued to manage the day-to-day governance of the colony but under increased supervision.⁵³ The repercussions of this would carry through into Revolutionary Era of the eighteenth century.⁵⁴

iii. The *Quo Warranto* Proceedings

The prerogative writ of *quo warranto*⁵⁵ was described by William Blackstone as follows:

A WRIT of quo warranto is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right . . . being a writ commanding the defendant to shew by what warrant he exercises such a franchise . . . and writs of quo warranto (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. . . . in case of judgment for the king . . . the franchise is either seised into the king's hands, to be granted out

⁵² Attorney-General Coventry and Solicitor-General Heath Letter to the King (31 July 1623) reprinted in *RVC* 4, 256.

⁵³ See J Kukla (n 3) 65-122.

⁵⁴ The reinstated House of Burgesses, meeting at the Crown's pleasure, would not hold the same degree of power, perceived or otherwise. Alison G. Olson, 'Eighteenth-Century Colonial Legislatures and their Constituents' (1992) 79 *The Journal of American History* 543; Alvin Rabushka, *Taxation in Colonial America* (Princeton: Princeton University Press 2008) 350 (noting that not even the Glorious Revolution affected a change constitutionally or politically in Virginia); Brent Tarter, *The Grandees of Government: the origins and persistence of undemocratic politics in Virginia* (Charlottesville: University of Virginia Press 2013).

⁵⁵ The other possible method of charter revocation would have been using the equitable writ of *scire facias* as in the case against the Massachusetts Bay Company discussed in Chapter 4. A good narrative of the process may be read at J Kukla (n 3) 65-122.

again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped it.⁵⁶

It was the post-Restoration Stuarts who would become known for the deluge of *quo warranto* proceedings against corporations, particularly municipalities.⁵⁷ But, it was not uncommon in the era of the earlier Stuarts. Historian, Catherine Patterson has estimated that there were 121 *quo warranto* proceedings initiated against municipal corporations during the time of James I and Charles I. This is out of a total of 175 chartered corporations in England and Wales at that time.⁵⁸ Patterson's systematic survey of these proceedings questions the motivations for their initiation. She argues that *quo warranto* proceedings during this period were likely to be initiated as result of local conflict or debate rather than a pure royal objective.⁵⁹ In this case, the local conflicts between Sandys and Smythe had certainly reached a heightened level and they each wielded great political power beyond the colony. There seems little doubt that Smythe had been angling for the dissolution of the corporation now controlled by Sandys.⁶⁰ There was also motivation for James I to support a dissolution because of the

⁵⁶ William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Oxford: Clarendon Press 1765-1769) vol 3, 254-55. For a additional contemporary definitions of the writ, see M Hale (n 12); William Sheppard, *OF CORPORATIONS, Fraternities, AND GUILDS, OR a Discourse, wherein THE LEARNING of the LAW touching Bodies-Politique is unfolded, shewing the USE and NECESSITY of that INVENTION, the ANTIQUITY, various Kinds, Order and Government of the same* (2nd edn, London: Printed for H. Twyford, T. Dring, and H. Place 1659) ('Sheppard's 1659 Corporate Treatise') 301-20.

⁵⁷ P Halliday (n 36) 189-236.

⁵⁸ Catherine Patterson, 'Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Court' (2005) 120 *The English Historical Review* 879, 884 (raising the more altruistic perspective that the frequency could be due to a royal interest in ensuring good government or simply an increased interest in patentees enforcing their monopolies).

⁵⁹ Patterson observes: '[q]uo warranto always served to show corporations that they existed at the will of the monarch alone, but it could also be manipulated by parties who saw the advantage of having the apparent will of the monarch on their side.' *ibid* 880, 889.

⁶⁰ An example of the political war waged between the factions may be found in: The Tragical Relation of the Virginia Assembly, 1624 reprinted in Lyon Gardiner Tyler (ed), *Narratives of Early Virginia, 1606 -1625* (New York: Barnes & Noble, Inc. 1907) 419-425. The political background provided by the editor:

The effort of the faction of Sir Thomas Smith in the Virginia Company to secure a dissolution was heartily reprobated by the Virginia Assembly, and in January, 1624,

extreme problems faced in the colony coupled with his broader preferences for administrative power to be more centralized in his metropolitan government, which included overseas trade.⁶¹ The proceedings against the corporate charter of the Virginia Company seem likely the result of this alignment these private interests of Smythe and James I, coupled with the unrest in the colony.⁶²

The intention to dissolve the Virginia Company's corporate charter was confirmed in the July 1623 opinion of Coventry and Heath underscoring their legal opinion that this charter was a conveyance of rights and capacities, revocable by exercise of the royal prerogative:

But for the manner because the resuming of theyr privilege in a legall course must be the worke of tyme and the distresse of yo^r Ma^{ties} subjecte in that colony (as seemeth by the commission^{es} certificates) doth necessarily require more expedicion wee humbly offer it to yo^r Ma^{ties} judgment whether yow will not think it fitt in a case of this nature according to the prsident in the case of the marchant adventurers by yo^r Ma^{ties} royall proclamacion to command the forbrearas of the exeucion of those [letters] patente and of the authority thereby given and committed vnto them And that then if the company shall not *upon consideracio of theyr owne weaknes voluntarily yeld vp theyr privilege there may be a legall pceeding against them for calling in the same.*⁶³

A writ of *quo warranto* was issued to the Virginia Company in early November 1623 but with the Crown in possession of the court books until late that month, and a 24

they drew up a paper denouncing the administration of Sir Thomas Smith and extolling that of Sandys and Southhampton. The exact truth cannot be expected of such a paper, but after its perusal there can be but one opinion of the merits of the two parties.

Ibid 421.

⁶¹ Tim Harris, *Rebellion: Britain's First Stuart Kings, 1567-1642* (Oxford: Oxford University Press 2014) especially ch 7. See also C Patterson (n 58) 895.

⁶² A rich area for further exploration will be the further transatlantic contextualization of the *quo warranto* proceedings against the Virginia Company and compared to the municipal corporation examples, particularly Maidstone in Kent and Canterbury. It would further address the interesting absence of other proceedings against trading companies in this window, which could be explained by a simple lapsing of charters mooting the need for revocation, or a matter of profitability.

⁶³ Attorney-General Coventry and Solicitor-General Heath Letter to the King (31 July 1623) (n 52) 255-56 [emphasis added].

December deadline for the named defendants to respond,⁶⁴ charter revocation seemed inevitable:

The Board being made acquainted by Mr. Attorney general That whereas a Quo Warranto was issued out of the King's Bench against the Company of Virginia, for the questioning of their Charters, and thereupon a Rule given, for the said Companie to make their answeres by Christmas Eue next. And that the said Company pretend, they cannot make perfect answer tervnto, without the sight and vse of all such Bookes and writings, as have beene by them formerly delivered unto the hands of his maiesties Commissioners appointed for the Examination of the business concerning the Virginea and Summer Island Companies. Their llordships having Considered thereof, did thinke fitt and accordingly order, that all the foresaid Bookes and writings, whether remayneing in the hands of the Commissioners or els wher, shall be forthwith delivered by Inventorie unto the said Company.⁶⁵

A transcription of the *quo warranto* proceedings in the King's Bench reveals the charges against certain named individuals as usurpers of the corporate powers granted to the Virginia Company by the royal charters:

[F]or the space of three years now last past and more used and still use and claim to have and use . . . without any warrant or regular grant, the following liberties, privileges, and franchises, namely, to be incorporated by the name of Treasurer and Company of Adventurers and Planters of the City of London for the First Colony in Virginia, and by that name to plead and be impleaded in all courts and places whatsoever and before whatsoever . . . to be persons able and in law capable of acquiring, holding, receiving, taking, and possessing to themselves and their successors, both of our said lord the King and of any other persons or bodies corporate, any demesnes, manors, lands,

⁶⁴ Record of Proceedings upon Information of Quo Warranto (4 November 1623 to 24 May 1624) (transcribed by Miss ML Moore under the direction of Dr. Hubert Hall) reprinted in *RVC* 4, 296 (the 'Virginia Quo Warranto (Proceedings)'). Kingsbury has deduced the precise timeline of the action:

The writ of quo warranto was issued out of the Kings Bench on the Tuesday next after the morrow of All Souls (November 4, 1623). The suit was opened on the Friday after the quindecim of St. Martin's (November 28), and was then postponed until the eighth of Hilary (January 20). It was postponed a second time to the quindecim of Easter (April 11), and judgment was finally rendered on the morrow of Trinity (May 24, 1624).

RVC 4, 103.

⁶⁵ (14 November 1623) APCC 1: 1613-1680, 72-73. See C Patterson (n 58) (discussing the chaotic and unpredictable manner in which *quo warranto* proceedings could and did occur).

[etc.] and also, to have divers common seals for all and singular causes and business requiring to be transacted⁶⁶

Nearly every provisions of all three charters issued to the Virginia Company were then recited in detail, the focus being on those pertaining to the management and operational structure of the corporation and its ownership of real property in Virginia. Reference was made to the royal authority to order and investigate the actions of any corporation, as well as to dissolve the entity upon an unfavorable conclusion:

which liberties, all and singular, privileges and franchises the same Nicholas ffarrer, [*et al.*]...through the whole time aforesaid have usurped and still usurp over our said lord the King to the grave loss and prejudice of our said lord the King who now is and his royal prerogative and in great contempt of the crown and dignity of our said lord the King who now is, whereupon the same attorney of our said lord the King for our same lord the King seeks the advice of the court in the premises and that a due process of law be made against the same Nicholas ffarrer [*et al.*]...to answer to our said lord the King by what warrant they claim to have the liberties, privileges, and franchises aforesaid, etc., whereby the sheriff was directed that he should not fail, etc., to make them come to answer, etc.⁶⁷

The charges conclude that the individuals had usurped corporate powers granted to the Virginia Company:

Wherefore, for default of sufficient response of the same Nicholas ffarrer [*et al.*], in this cause he seeks judgment, and that the same Nicholas ffarrer [*et al.*] be convicted, etc., of and for the usurpation of those liberties, privileges, and franchises last recited . . . for themselves.⁶⁸

⁶⁶ Virginia Quo Warranto (Proceedings) (n 64) 360. As later commented upon in the 1702 Corporate Treatise:

If a *Quo Warranto* be brought for usurping a Corporation it must be brought against particular Persons, because it goes in disaffirmance of the Corporation, and Judgment shall be given, that they be ousted of the Corporation; but if it be for Liberties claimed by a Corporation, it must be brought against them as a Corporation.

Anonymous, *The Law of corporations : containing the laws and customs of all the corporations and inferior courts of record in England* (1 edn, London: R. and E. Atkins for I. Cleeve 1702) (the '1702 Corporate Treatise') 305.

⁶⁷ Virginia Quo Warranto (Proceedings) (n 64) 358-98.

⁶⁸ Ibid 398.

The corporate charter was revoked by judgment of the King's Bench and the corporation dissolved.⁶⁹ It is not entirely clear on which legal point the decision was made, but it seems probable that it was based upon a technical error of the defendants.⁷⁰ The records of the Virginia Company contain a reference reading in pertinent part:

But afterwards in o^r reply to his pleading, wthout further enquiry of the former allegation, advantage was taken vpon o^r misleading, & in fine wthout any further ground that wee know of, the Patent was in Trinity terme following Condemned: But for anything that wee haue yet seene no iudgement entred.⁷¹

The precise legal status of the colony owned by the Virginia Company was then appointed the responsibility of a newly organized royal panel of commissioners:

Whereupon Wee entering into mature and deliberate consideracon of the pmisses did by the advise of the Lordes of our Privie Councell resolve by altering the Charters and lres Patentes of the saide Company as to the pointes of governmente Wherein the same might be found defective to settle such a course as mighte best secure the safety of our people there and cause the saide plantacon to florishe and yet with p[r]servacon of the intereste of everie planter or Adventurer soe farre forth as their p[r]sent inte[re]ste shall not [prejudice] the publike plantacons but because the saide [Treasurer] and Company did not submit their Charters to be reformed our peedinge therein were stayed

⁶⁹ For information, Hale recites the general effects of such a dissolution in the mid-seventeenth century would be:

The consequences of a corporation dissolved: (a) A returning of the lands by the corporation undisposed to the founder by an implied condition in law. . . . (b) All the stock of such corporation undisposed shall, as it seems, go to the king as *bona vacantia*. (c) All debts contracted by the corporation seem in law to be lost, but (i) In equity the persons that were of the corporation shall be liable to make good these debts according to the proportion of benefit they had thereby. (ii) In case of the king's debts, they are first a real charge upon the lands of such corporation, secondly upon the persons as before. And therefore notwithstanding the dissolving thereof the persons formerly members of that corporation are liable.

M Hale (n 12) 246.

⁷⁰ Court of King's Bench, Report of Case Quo Warranto (16 June 1624) Decision against NF reprinted in *RVC* 4, 484. Note also the general demurrer of the Attorney General on each of the plea raised by the Virginia Company, which further supports a conclusion that the decision was based upon a technicality.

⁷¹ Virginia Company. Discourse of the Old Company (April ?, 1625) reprinted in *RVC* 4, 539 (beginning on 519).

for a tyme vntill vpon a Quo Warranto brought and a legall and iudiciall peeding therein by due course of lawe the saide charters are avoided...⁷²

The instructions of James I reference the need to ensure the safety of the colonists and the protection of real property interests in the colony, and that a new, revised charter was imminent.⁷³ As to the particular legal form that this would take, it seems likely that the intent was to revert to the proprietary structure similar to the 1606 Virginia Charter:

And to that [purpose] that yf our first graunte herein menconed [the 1606 Virginia Charter] and our most prudente and princely instruccions given in the beginyng of the plantacon for the direcon of the affaires thereof by thirteene Councillors in Virginia and as manye here all nomynted by vs had beene [pursued] much better effectes had beene [produced] then had beene by the alteracon thereof into soe populer a course and amongst soe manye handes as then yt was which caused much contencon and confusion...⁷⁴

James I, however, died early the next year on 27 March 1625. There was never a new charter for Virginia.

The dissolution of the Virginia Company marks the end of the first period in Virginia's corporate history. It had been the first permanent corporation in the British North American colonies that would become the United States, and its charters defined all aspects of colonial life from governance structure to property ownership to trade restrictions. The need for such formal protection of group property would arise again in the period just following the Glorious Revolution when reignited local interests in establishing college for the spreading of Christianity aligned with the evangelical predilections of William III and Mary II. The corporation would be the chosen tool

⁷² James I, Commission to Certain Lords of the Privy Council and Others for Settling a Government in Virginia (15 July 1624) reprinted in *RVC* 4, 493-94.

⁷³ Ibid 494-95 (stating that the Crown will issue a new charter, but in the meantime a panel of named individuals will select six commissioners to manage the colony); Commissioners for Virginia, Orders set down at a Meeting (16 July 1624) reprinted in *RVC* 4, 495-500 (implementing above); James I, Commission to Sir Francis Wyatt as Governor and to the Council in Virginia (26 August 1624) reprinted in *RVC* 4, 501-04 (declaring Sir Francis Wyatt as new governor by nomination of the Commission).

⁷⁴ Commissioners for Virginia, Orders set down at a Meeting (16 July 1624) (n 72) 493.

for holding, managing, and developing the property granted to the college from the Crown as well as private donors.

II. A Royal Colonial Corporation: The College of William and Mary

Under Yeardley's Instructions delivered in 1618, Governor George Yeardley was instructed by to designate certain real property and allocate certain Virginia Company funds for the building of an educational institution in the colony:

And whereas by a special grant and license from his majesty a general contribution over this Realm hath been made for the building and planting of a college for the training up of the children of those Infidels in true Religion moral virtue and civility and for other Godly uses. We do therefore according to a former grant and order hereby ratify, confirm and ordain that a convenient place be chosen and set out for the planting of a University . . . and that in the mean time preparation be there made for the building the said college for the children of the Infidels according to such Instructions as we shall deliver. And we will and ordain that ten Thousand acres partly of the Lands they impaled and partly of other Land within the territory . . . be allowed and set out for the Endowing of the said University and college with sufficient possessions.⁷⁵

The series of near constant crises afflicting the colony slowed any real progress toward this goal. A rector of a college was appointed on 3 July 1622 but the Powhatan Massacre struck before it could take effect.⁷⁶ Then with the dissolution of the Virginia Company in 1624, mention of a college went silent.⁷⁷ In the next seventy-years the colony saw increases in aspects of political and economic stability but not without periods threatening to completely undermine that, most notably Bacon's Rebellion in 1676.⁷⁸

⁷⁵ Yeardley's Instructions (n 21) 158-59.

⁷⁶ GM Brydon (n 24) 59.

⁷⁷ There was a second intervening attempt to form the college but not much came of the effort beyond a passing mention. Ibid 289.

⁷⁸ David S. Lovejoy, *The Glorious Revolution in America* (Hanover, New Hampshire: Wesleyan University Press 1972) especially c 3, 4.

When William III and Mary II assumed the throne after 1688, they, particularly Mary, brought with them a personal interest in expanding and solidifying the Protestant faith in England.⁷⁹ A similar interest was exhibited in Virginia by its Commissary, James Blair, appointed by the Bishop of London and the highest-ranking clergyman in Virginia.⁸⁰ His interest in establishing the envisioned college for the education and spreading of Christianity was bolstered in 1691 by the £4,000 bequest of Sir Robert Boyle to be used for such a charitable purpose.⁸¹ Blair headed efforts to raise additional funding within the colony and was then sent by the House of Burgesses to seek a charter of incorporation for the proposed college.⁸² The College of William and Mary is one of the few educational incorporations under the Stuarts, and the only direct royal

⁷⁹ Jonathan Israel makes the interesting observation that the godly propaganda espoused by William III and his supporters in 1688 was just that; that William III had not previously demonstrated any avid religious leanings so much as anti-French and therefore anti-Catholic passion. Jonathan I. Israel, 'William III and Toleration' in Jonathan I. Israel and Peter Grell, Nicholas Tyacke (ed), *From Persecution to Toleration: The Glorious Revolution and Religion in England* (Oxford: Clarendon Press 1991) especially 143-44. See Tony Claydon, *William III and the Glorious Revolution* (Cambridge: Cambridge University Press 1996) 53-63 (discussing the propaganda used in supporting William III over James II as the 'longed-for godly magistrate, who might crush the false church and could inspire the lead in the purgation which might restore England's holiness.') *ibid* 53; Steve Pincus, *1688: The First Modern Revolution* (New Haven, Connecticut: Yale University Press 2009) 390. At the risk of digression, Jonathan Scott makes the interesting argument that the religious troubles of the seventeenth century should be considered as a process beginning around 1618 and not constrained to the Civil Wars or the Glorious Revolution. He further remarks on the near obsession during this period with fending off 'popery' despite the small number of Catholics present in England itself. Jonathan Scott, *England's Troubles: Seventeenth Century English Political Instability in European Context* (Cambridge: Cambridge University Press 2000) especially 21-34, 133.

⁸⁰ JT Addison (n 27) 30 (describing the vague responsibility the Bishop of London exercised over the colony, the interest in which was much dependent upon the personality in the position).

⁸¹ Boyle had a particular interest in the education of the Native Americans as would be reflected in the College of William and Mary Charter although not in practice. T Jefferson (n 10) Query XV; Herbert Lawrence Ganter, 'The Charity of the Honourable Robert Boyle, Esq., of the City of London, Deceased' (1935) 1 *The William and Mary Quarterly* 1 (published in three parts, see also issues 3 and 4 from that year). See also (20 October 1693) CSPC 14: 1693-1696 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol14/pp183-201> (accessed 28 July 2015) ('The papers concerning the College were read and Mr. James Blair heard thereon').

⁸² Assembly of 1691-1693, First Session (16 April – 22 May 1691) JHB 1659/60-1693 ixiv. See T Jefferson (n 10) 150. See Frank B. Evans, *The Story of the Royal Charter of the College of William and Mary* (Williamsburg, Virginia: Botetourt Bibliographical Society, College of William and Mary 1978) (providing an account of the discovery of an original copy of the in a Harvard College storage room in 1931 after it had been missing since the time of the American Revolution).

incorporation rather than via then Governor Andros.⁸³ The legal terms of the College of William and Mary Charter demonstrates clear continuations of themes from its corporate predecessors as well as marked alterations in the understanding of the corporation over the intervening seventy years.⁸⁴

A. A Charitably Religious Motivation towards an Educational Purpose

Reminiscent of the Hallingbury Act in *Sutton's Hospital*, the College of William and Mary Charter contemplates a future incorporation upon the completion or achievement of certain milestones. The preamble of the College of William and Mary Charter reveals the intention that this educational corporation is focused on the spreading of Christianity in the colony and particularly among the Native American populations:

Forasmuch as our well-beloved and faithful subjects, constituting the General Assembly of our Colony of Virginia, have had it in their minds, and have proposed to themselves, to the end that the Church of Virginia may be furnished with a seminary of ministers of the gospel, and that the youth may be piously educated in good letters and manners, and that the Christian faith may be propagated amongst the Western Indians . . . to make, found and establish a certain place of universal study, or perpetual College of Divinity, Philosophy, Languages, and

⁸³ Compare with the corporate charters of New York that were each incorporated under the authority of the royal governor, see Chapter Five.

⁸⁴ Its closest educational corporate predecessor seems to be the Charter for the School of Bradford, issued in 1662 under Charles II. School of Bradford Charter reprinted in W Claridge (ed), *Origin and History of the Bradford Grammar School: from its Formation to Christmas, 1882* (Bradford: J Green 311 Manchester Road). A further interesting expansion on the transatlantic perspective may be had with additional archival research on: Mary's pet project, the charitable corporation of The Hospital for Seamen, or Greenwich Hospital, incorporated following her death in 1694; the incorporation of Gloucester Hall into a college by the name of Worcester College in 1714 parliamentary considerations began in at least 1698; and the 1701 proposal for a college in Dunlaven, Ireland to be known as the Queen's College and dedicated, 'to the glory of God, for the propagation of true religion and the increase of learning and good manners among your Majesty's subjects of that kingdom.' See for example their mention respectively, (4 October 1698) CSPD: William III, 1698 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/will-mary/1698/pp397-410> (accessed 1 August 2015); (14 April 1701) CSPD: William III, April 1701 available at <http://www.britishhistory.ac.uk/cal-state-papers/domestic/will-mary/1700-2/pp287-310> (accessed 27 July 2015).

other good Arts and Sciences, consisting of one President, six Masters or Professors, and an hundred scholars more or less, according to the ability of the said college . . . to be made, increased, diminished, or changed there, by certain trustees nominated and elected by the General Assembly aforesaid, . . . on the south side of a certain river, commonly called York river, or elsewhere, where the General Assembly itself shall think more convenient, within our Colony of Virginia, to be supported and maintained, in all time coming.⁸⁵

This is a continuing theme among the colonial corporations formed for social purposes examined herein. For Virginia, it was a theme long established in the 1606 Virginia Charter and repeated in the 1609 Virginia Charter and the 1612 Virginia Charter issued under James I.⁸⁶ It is reflective of not simply the period in which the charter was drafted, in this case the Protestant fever of the post-Glorious Revolution era, but the particular interests of the group that sought its drafting represented by Blair, and encouraged its foundation, William III and Mary II.⁸⁷ This is not to say that those incorporations in England were devoid of such religious overtones, but compare for example the preamble of the ‘1662 Patent for the School of Bradford’:

[F]or a Free Grammar School there to be erected and established for ever, for the better teaching, instructing, and bringing up of Children and Youth in Grammar and other good Learning and Literature, for divers and other good cause and considerations...⁸⁸

Although issued in a very different post-Restoration climate under Charles II, it is still worth noting in order to demonstrate that there were alternatives. The corporate purpose for a college need not have been so entwined with an evangelical motivation but the particular nature of the colonial setting provided an outlet for these evangelical interests.

⁸⁵ College of William and Mary Charter p 1-2.

⁸⁶ 1606 Virginia Charter s 3; 1609 Virginia Charter ss 2,3; 1612 Virginia Charter s 4.

⁸⁷ See J Scott (n 79) (arguing the broad thesis that the obsession with religion and Protestantism was not confined to the years of the Civil War or Glorious Revolution, but rather spanned much of the seventeenth century).

⁸⁸ Patent for the School of Bradford I.

B. The Two Stages of the College William and Mary Charter

The College of William and Mary Charter first mentions the matter of why the college in Virginia sought royal incorporation. Local interests had been pooling their donations for the venture but Blair sought a financial contribution from William III and Mary II as well as provision for its future financial stability. As to the successful resolution of the first:

[W]e would be pleased, not only to grant our royal license to the said Francis Nicholson [*et al.*], . . . to make, found, erect and establish the said college, but also to extend our royal bounty and munificence towards the erection and foundation of the said college, in such way and manner as to us shall seem most expedient⁸⁹

The venture is further granted colonial land on which to construct the college. The parliamentary discussion leading up to the issuance of the charter sees debates regarding the best location for this college.⁹⁰ The ‘Middle Plantation’ is ultimately selected, but no precise location beyond the ‘south side of York river’ is ultimately described in the College of William and Mary Charter. The realities of erecting structures in a relatively unknown landscape may have trumped any technical legal doctrine requiring that a corporation possess an accurately described domicile in order to be properly identified. Or, the sparse population and rarity of incorporation may have meant that the ‘south side of York river’ was actually sufficient identification.⁹¹

⁸⁹ College of William and Mary Charter pp 2-3.

⁹⁰ (25 October 1693, 26 October 1693) CSPD: William III, October 1698 available at <http://www.british-history.ac.uk/cal-state-papers/domestic/will-mary/1698/pp397-410> (accessed 1 August 2015).

⁹¹ For perspective, the size of this grant was to be about 20,000 acres. College of William and Mary Charter p 27; T Jefferson (n 10) 150.

Either interpretation shows the influence of the environment on the corporate charter.⁹²

This financial grant does not come without reciprocal obligations and constraints. The first phase described by the College of William and Mary Charter is akin to the establishment of a trusteeship. It is a grant to a group of individuals in perpetual trust until such time as the completion of buildings necessary for a college. Upon satisfaction of the conditions, the trust would be incorporated with the deed of ownership being transferred to the new corporate members. Until such point, the trustees were granted a license in perpetuity for the specific and sole purpose of acquiring and developing land with the pooled funds in order to construct the envisioned college. The conditional nature of this grant is established as follows:

HAVE GRANTED and given leave . . . to the said Francis Nicholson [*et al.*]; That they . . . for promoting the studies of true philosophy, languages, and other good arts and sciences, and for propagating the pure gospel of Christ, our only Mediator, to the praise and honor of Almighty God, may have power to erect, found and establish a certain place of universal study, or perpetual College, for Divinity, Philosophy, Languages and other good Arts and Sciences, consisting of one President, six masters or professors, and an hundred scholars, more or less, graduates and non graduates, as above said, according to the statutes and orders of the said College, *to be made*, appointed and established upon the place by the said Francis Nicholson [*et al.*] . . . upon the south side of York river . . . or if by reason of unwholesomeness, or any other cause, the said place shall not be approved of, wheresoever else the General Assembly of our Colony of Virginia, . . . shall think fit, within the bounds of the aforesaid colony, to continue for all times coming.⁹³

The separate legal status of the college 'to be made' under the College of William and Mary Charter becomes even more apparent when considering the appearance of an Incorporating Provision later in the document. It reads:

⁹² College of William and Mary Charter p 3. See *Sutton's Hospital*, 29a. See also Sheppard's 1659 Corporate Treatise 9-13; 1702 Corporate Treatise 9-20.

⁹³ College of William and Mary Charter p 2-3 (emphasis added).

And further, we will, and for us, our heirs and successors, by these presents, do GRANT, that when the said College shall be so erected, made, founded and established, it shall be called and denominated, for ever, the College of *William and Mary*, in Virginia, and that the President and masters, or professors, of the said college, shall be a body politic and incorporate, in deed and name; and that by the name of the President, and masters, or professors, of the College of William and Mary, in Virginia, they shall have perpetual succession . . .⁹⁴

This Incorporating Provision is unique in its statement of an effective date: when the college is erected. What Coke had described back in 1613 as the essential elements of incorporation are listed in quick order. The authority to incorporate was exercised within the opening premise: ‘we will, and for us, our heirs and successors, by these presents, do GRANT....’ The corporate name shall be ‘College of William and Mary’. The corporation shall be domiciled south of the York River in Virginia. Its corporate membership shall consist of, ‘the President and masters, or professors, of the said college... [who] shall forever be called and denominated the President, and masters, or professors, of the College of William and Mary, in Virginia. . . .’⁹⁵ These members, however, are different individuals from the trustees who are granted control of the venture during the first phase of the College of William and Mary Charter.⁹⁶ The Incorporating Provision also includes the all important statement succinctly distinguishing the corporate form: it ‘shall be a body politic and incorporate’ and ‘they shall have perpetual succession. . . .’⁹⁷ The essential elements espoused by Coke and

⁹⁴ Ibid 6- 7.

⁹⁵ John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of their Relation to the Authority of the State*, vol 1 (New York: G.P. Putnam's Sons 1905) 55-56 (observing that most educational corporations in England did not traditionally include the scholars or students as part of the corporate membership).

⁹⁶ Both Harvard College and College of William and Mary were, ‘formed on the theory that the college, legally and formally as well as practically, should consist of the resident group of academic officers.’ The alternative, the example being Yale College, is ‘that the legal or corporate body should be composed of a group of interested friends and supporters of the college who, in turn, should employ and direct the resident officers of the school.’ John E Kirkpatrick, ‘The Constitutional Development of the College of William and Mary’ (1926) 6 *The William and Mary Quarterly* 95, 95.

⁹⁷ College of William and Mary Charter pp 6-7.

recited in the secondary literature throughout the Stuart period, remained as central to the structure of this 1693 educational corporate charter as they had for the settlement corporate charters nearly eighty years prior.

C. The Overarching Property Provisions Applicable to both Legal Phases

Returning to the language pertaining to the initial trust phase of the college, the College of William and Mary Charter provides:

[S]aid Francis Nicholson [*et al.*] that they . . . may be enabled to take, hold and enjoy, and that they may be persons apt and capable in law, for taking, holding and enjoying all Manors, Lands, Tenements, Rents, Services, Rectories, Portions, Annuities, Pensions and Advowsons of Churches, with all other Inheritances, Franchises and Possessions whatsoever as well spiritual as temporal, to the value of two thousand pounds a year; and all other goods and chattels, monies and personal estate whatsoever, of the gift of any person whatsoever, that is willing to bestow them for this use . . . *But with this express intention, and upon the special trust we put in them that they . . . shall take and hold the premises, and shall dispose of the same, and of the rents, revenues or profits thereof, or of any of them only for defraying the charges that shall be laid out in erecting and fitting the edifices of the said intended college, and furnishing them with books, and other utensils, and all other charges pertaining to the said college, as they or the major part of them, shall think most expedient, until the said college shall be actually erected, founded and established, and upon this trust and intention, that so soon as the said college shall, according to our royal intent be erected and founded . . .*⁹⁸

The license to hold property is granted to the group, 'in special trust' and subject to a value cap, to acquire and hold property for the purpose of constructing a college. Furthermore, any and all profits derived from such property ownership must also be applied toward the construction of the college buildings. Upon completion of construction and, therefore incorporation, all property held pursuant to this section must be transferred to the corporate members, the President and masters, or professors of the college. There is no explicit mention of the tenurial status (*i.e.* held of the Manor

⁹⁸ Ibid 4-5.

of East Greenwich) by which this land is to be held, but presumably this is because the land was already legally within the 'Manor of East Greenwich'. Although Virginia did not have a charter at present, James I had made clear he intended that the colony return to its proprietor status originally described in the 1606 Virginia Charter after 1624.⁹⁹ The *quo warranto* proceedings only touched the corporate 1609 Virginia Charter and the 1612 Virginia Charter but not the underlying proprietary claim made to the region under the 1606 Virginia Charter.

Once this property passes to the corporate members with the erection of the college, the Incorporating Provision recites the well accepted, or ancillary as Coke might have described, capacity of the incorporated College of William and Mary to hold property:

And that the said President, and masters, or professors, and their successors . . . shall be persons able, capable, apt and perpetual in law, to take and hold lordships, manors, lands, rents, reversions, rectories, portions, pensions, annuities, inheritances, possessions and services, as well spiritual as temporal, whatsoever, and all manner of goods and chattels, both of our gift, and our heirs and successors, and of the gift of the said Francis Nicholson, [*et al.*]; or of the gift of any other person whatsoever, to the value of two thousand pounds, of lawful money of England, yearly and no more, to be had and held by them and their successors for ever¹⁰⁰

Under both phases, the college is limited to a property value not exceed two thousand pounds per year.¹⁰¹ The purpose of this provision Stewart Kyd would observe, was to limit the scope of the royal license from the mortmain restrictions that would apply to its corporate phase:

It may be observed, that none of the statutes of mortmain limit the *extent* to which a corporation may purchase lands; but that the object of all of them is to prevent a corporation from making any purchase

⁹⁹ James I, Commission to Certain Lords of the Privy Council and Others for Settling a Government in Virginia (15 July 1624) (n 72).

¹⁰⁰ College of William and Mary Charter p 6-7.

¹⁰¹ *Ibid* 4, 5 (this limit appears applicable to both phases of the venture).

without previous license; with the King's license therefore, as the law at present stands, corporations may, *in general*, purchase lands to any extent they please: but when corporations are erected by act of parliament, for some particular purpose, it is frequently thought prudent to prohibit them, by an express clause, from purchasing lands beyond a certain annual value...¹⁰²

Although a similar provision did not appear in any of the charters of the Virginia Company or of the Massachusetts Bay Company, this annual property value cap is included in every other corporate charter considered herein. It limited the value of the real property that could be acquired by the 'cold, dead hand' of a corporation.¹⁰³

D. The Rights and Privileges of the Corporate Phase

Similar to its listing of essential elements, the other rights and privileges granted to a corporate College of William and Mary are broadly still in keeping with the spirit of *Sutton's Hospital*. In considering the precise legal terms, additional developments in the perception of the corporation and its associated responsibilities do appear and are particular to this situation. These provisions may be grouped as (1) governance provisions, (2) preparatory steps necessary for achieving incorporation, and (3) the enforcement of corporate rights and obligations.

First are those provisions pertaining to the corporate right of internal governance. The general form back in the 1609 Virginia Charter appears once again with a head officer, a deputy, and a council. The interesting aspect of this charter though is the

¹⁰² See Stewart Kyd, *A Treatise on the Law of Corporations* (London, Printed for J. Butterworth, Fleet-Street 1793) 103-04.

¹⁰³ 1702 Corporate Treatise 193. Note that while the property value is capped, there is no mention of the term of leases that the college may make. *Sheppard's 1659 Corporate Treatise* had observed that

But the persons Corporate Colledges or Halls in either [115] the Universities, or elsewhere, the Masters or Guardians of Hospitalls, cannot make any Leases for longer time then for three lives, or 21 years. And these things are requisite to be observed in the making of these Leases also; otherwise they will not be good...

Sheppard's 1659 Corporate Treatise 114-15.

interplay with the House of Burgesses. Powers of appointment are not an exclusively vested in the corporation but rather are shared with the House of Burgesses. The corporate office of President is filled by election of the House of Burgesses.¹⁰⁴ There is a further special provision vesting the power to elect the other corporate officers in Francis Nicolson, as Lieutenant Governor, and the other named individuals in the House of Burgesses.¹⁰⁵ This is also a departure from the norm where the initial corporate officers are appointed by the Crown and then the governing body of the corporation determines successors.¹⁰⁶

The governing council is comprised of named individuals, including James Blair, instructed to serve as both visitors and governors of the college during both the trust and corporate phases of the venture.¹⁰⁷ Although initially royal appointees, with the above exception of the President, they are granted the power to elect their own successors. The College of William and Mary Charter also specifies that the governing board of the corporation have the power to adopt bylaws and ordinances upon the erection of the college. This governing board must number between 18 and 20, meet at least annually, and will be presided over by a Rector selected from the board.¹⁰⁸ This governing board will also meet with the corporate members, which are the President, Masters, and Professors, in connection with these duties of governance. A chancellor is to be elected from the corporate membership, a leading figure to serve as a counterpoint to the Rector selected as the leading member of the governing board.¹⁰⁹

¹⁰⁴ College of William and Mary Charter p 5.

¹⁰⁵ Ibid 4-5.

¹⁰⁶ See for example 1609 Virginia Charter s 14.

¹⁰⁷ College of William and Mary Charter p 10-11.

¹⁰⁸ Ibid 15-16.

¹⁰⁹ Ibid 13-14 (appointing the Bishop of London as the first chancellor).

The two-part governance structure of a Rector and Chancellor is also reminiscent of the Treasurer and Governor positions of the Virginia Company. The College of William and Mary Charter, however, did not require that the governing board do anything beyond consult the corporate membership.¹¹⁰ It need not adhere to such advice.

The second set of provisions in the College of William and Mary Charter relates to the steps necessary for the college to achieve incorporation. The College of William and Mary Charter obligates the charter recipients to spend the allotted funds in a specific manner and order. During the trust phase, it must be used for the purchase and construction of specific buildings:

And that the charge and expense of erecting, building, founding and adorning, the said college at present, and also of supporting and maintaining the said president and masters or professors, for the future, may be sustained and defrayed, of our more ample and bounteous special grace, certain knowledge, and mere motion, we have given, granted, assigned, and made over, . . . the whole and entire sum of one thousand nine hundred and eighty- five pounds, fourteen shillings and ten pence, of good and lawful money of England, that has been received and raised out of quit rents of the said colony, now remaining in the hands of Wm. Byrd, Esquire, our auditor, or in whosoever other hands the same now is, for our use, within the said colony: And, therefore, we command and firmly enjoin the said auditor, or any other person with whom the said money is deposited . . . to pay, or cause to be paid, . . . to be laid out and applied about and towards the building, erecting and adorning, the said college, and to no other use, intent or purpose whatever.¹¹¹

The lump sum donation of collected colonial quitrents may only be used for the construction of the college. Further funding sources for the College of William and Mary are detailed for use during the corporate phase:

Seeing also, by a certain act of parliament, made the twenty-fifth year of the reign of our royal uncle, Charles the Second, of blessed memory, entitled An act for the encouragement of the Greenland and Eastland trades, and for better securing the plantation trade, it was enacted, that

¹¹⁰ Ibid 11-13, 14.

¹¹¹ Ibid 16-17.

... any ship, which by law, might trade in any of the plantations, should come to any of them to load, and take on board tobacco, or any other of the commodities there enumerated, and if bond were not first given, with one sufficient surety, to carry the said tobacco to England, Wales, or the town of Berwick upon Tweed, and to no other place, and there to unload and put the same on shore, (the dangers of the sea only excepted ;) in such case there should be paid to our said uncle, and his heirs and successors, one penny for every pound of tobacco so loaded and put on board, ... but with this express intention, and upon the special trust and confidence we place in the said Francis Nicholson [*et al.*], that they . . . shall take, hold, and possess the said revenue of a penny per pound, for every pound of tobacco aforesaid, with all its profits, advantages, and emoluments, to apply and lay out the same, for building and adorning the edifices and other necessaries for the said college, until the said college shall be actually erected, founded, and established, and . . . that as soon as the said college shall be erected and founded, according to our royal purpose, the said trustees, and the longest livers or liver of them, and his or their heirs, or assigns, shall, by good and sufficient deeds and assurances in law, give, grant, and transfer to the President, and masters, or professors, of the said college, this whole revenue, with all its profits, issues and emoluments¹¹²

The College of William and Mary was granted the right to an income stream from the tax collected on tobacco to provide for its future financial survival.¹¹³ Note that the revenue stream is to be first directed to the named individual trustees serving on the governing board; upon construction completion and therefore incorporation of the college, any unused funds as well as the future income rights are transferred to the corporate members. To further ensure the appropriate use of these donated funds during the trust phase, the College of William and Mary Charter appoints a Surveyor-General to monitor the funds and direct the construction of the buildings with such position ceasing its completion.¹¹⁴

¹¹² Ibid 17-21.

¹¹³ T Jefferson (n 10) 150 (listing the further provisions that would be made for the college's future income stream such as an import duty on furs). A proposed exemption of masters and pupils from levies, however, was rejected. See (31 October 1693) CSPC 14: 1693-1696 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol14/pp183-201> (accessed 28 July 2015).

¹¹⁴ College of William and Mary Charter p 21-23.

As to the geographic location of these buildings, their precise placement is at the discretion of local officials.

[W]e have given, granted, and confirmed, and by these presents, for us, and our heirs, and successors, do give, grant, and confirm, to the said Francis Nicholson . . . and the rest of the trustees above-mentioned, [twenty] thousand acres of land, not yet legally occupied or possessed by any of our other subjects, . . . but with this intention, and upon special trust and confidence, that. . . so soon as the said college shall be actually founded, and established, shall give, grant, let, and alienate the said twenty thousand acres of land to the said President and masters, or professors of the said College, to be had and held by them, and their successors, for ever, by fealty, in free and common soccage, paying to us, and our successors, two copies of Latin verses yearly, on every fifth day of November, at the house of our governor, or lieutenant governor of Virginia, for the time being, for ever, in full discharge, acquittance, and satisfaction of all quit-rents, services, customs, dues, and burdens whatsoever, due, or to be due, to us, or our successors, for the said twenty thousand acres of land, by the laws or customs of England or Virginia.¹¹⁵

The College of William and Mary Charter also specifies the tenurial terms by which the land shall pass from the trust phase to the corporation. It shall be held by the corporation in free and common soccage, to be held of the Crown (not the trustees) and with the nominal rent due of 'two copies of Latin verses yearly'.¹¹⁶

The third and final group of provisions of the College of William and Mary Charter include those by which the charter rights and obligations may be exercised and enforced. The description of a corporate seal, the physical means by which a corporation could contractually bind itself and therefore exercise its corporate rights, is described despite Coke's long ago assertion that it was an ancillary provision.¹¹⁷ The College of William and Mary Charter also states the juridical means by which the corporation could protect and enforce those rights, namely rights to sue and be sued, plead and be impleaded:

¹¹⁵ Ibid 23-24.

¹¹⁶ Ibid p 24.

¹¹⁷ Ibid p 8; *Sutton's Hospital* 30b.

whatsoever courts and places of Judicature belonging to us, our heirs and successors or to any person whatsoever, before all sorts of justices and judges, ecclesiastical and temporal, in whatsoever kingdoms, countries, colonies, dominions or plantations, belonging to us, or our heirs¹¹⁸

The College of William and Mary Charter enables the corporation to bring suit in either a common law court or Chancery, and either at home in the colonies, etc. Interestingly, but perhaps unnecessary, this provision does not state whether this juridical right would bridge the two phases under the College of William and Mary Charter; whether the trustees possessed this right just as the corporation would.

The College of William and Mary is also granted the ability to protect its rights through legislative representation as it may send a burgess to the House of Burgesses. James I had introduced this corporate right early in his reign granting parliamentary representation to the Oxford and Cambridge colleges. It had been a politically loaded right leading to the revocation of many corporate charters by writ of *quo warranto* under the reign of Charles II in his efforts to control Parliament post-Restoration.¹¹⁹ Under the rule of William III and Mary II colonial legislative representation was granted to the corporate College of William and Mary without restraint.

James Blair returned to England having successfully completed his quest for incorporation and was commended by the House of Burgess. The colonial reception to his return is best described in the introductory notes of the pertinent volume of the *Journal of the House of Burgesses*:

Rev. *James Blair* had returned from [England], bringing with him the charter for *William and Mary College*. It remained for the Assembly to select a site for the institution and make provision for its erection and maintenance. . . . The Rev. *Mr. Blair* was liberally rewarded for the successful efforts he had put forth in *England*, where he had secured not only the charter but many substantial gifts for the college.¹²⁰

¹¹⁸ College of William and Mary Charter p 7-8.

¹¹⁹ See P Halliday (n 36).

¹²⁰ Preface, JHB 1659/60-1693, lxxii.

Construction of the college proceeded and soon the college was transferred over to its corporate phase. As a note, it never did become the school for the local Native American population but was rather the colonists' boys' grammar school for much of its early life post-incorporation.¹²¹

The College of William and Mary Charter is particularly striking in this larger empirical study because of its division into two legal states: that of trust and that of corporation. It is not entirely clear, however, that these two legal states were respected in actuality or if they were in fact conflated. Subsequent legislative acts of the House of Burgesses, while alluding to the existence of the trust phase, do not discuss its relationship to the corporate phase of the college. For example, the act establishing the location of the college simply states:

WHEREAS their majesties have been most graciously pleased upon the humble supplication of the generall assembly of this country by their charter bearing date the 8th day of Ffebruary in the fourth yeare of their reign to grant their royall lycence to certain trustees to make, found, erect and establish a college named the college of William and Mary in Virginia¹²²

There is no mention of a later incorporation date for the College of William and Mary. The College of William and Mary Charter date of 8 February 1693 has always been considered the key legal incorporation date. It suggests that the two phases were mere technicalities and the end result was what mattered: a corporation to promote and protect a pooled local and royal investment in the education and evangelization in Virginia.¹²³

¹²¹ GM Brydon (n 24) 298.

¹²² An Act Ascertainning the Place for Erecting the College of William and Mary in Virginia 1693 (3 Henings 122).

¹²³ A good history of the College of William and Mary in the early years following the College of William and Mary Charter is: J.E. Morpurgo, *Their Majesties' Royall Colledge: William and Mary in the seventeenth and eighteenth centuries* (Williamsburg: College of William and Mary 1976) chs 2, 3.

III. A Statute for Simultaneous Municipal Incorporations

Yardley's Instructions in 1618 had provided for the establishment of cities and towns in Virginia. Sparse communities existed but there was no formal corporate status assigned to them.¹²⁴ By 1700 England's manufacturing industry was on the steady increase and slowly chip away at its agrarian heritage.¹²⁵ Increased manufacturing and increased overseas trading networks also meant that English ports had only become increasingly important and there was a new southwestern focus with the Atlantic trade.¹²⁶ The creation of ports provided formal tax collection posts and points of trade for the lucrative tobacco industry. Moreover, the Crown held a prerogative right to establish ports and the collection of duties and tolls at such ports.¹²⁷ Although Queen Anne's personal policies particularly during these initial years of her reign were to focus on domestic issues, her attention though was directed by Sir Sidney Godolphin, then Lord High Treasurer, to lack of ports in Virginia and the consequential loss of revenue:

I am of opinion ... that it will be for the benefit of the Revenue to have a settlement of such ports and places as the merchants propose for the exclusive discharge and lading of ships to ... Virginia, but how far this settlement may be for the advantage of Trade in generall, etc., I

¹²⁴ Noting that it was peculiar to have had so few towns established during this period: John C. Rainbolt, 'The Absence of Towns in Seventeenth-Century Virginia' (1969) 35 *The Journal of Southern History* 343.

¹²⁵ S Pincus (n 79) 52 (observing that '[b]y 170 the manufacturing and commercial sectors were responsible for fully one-third of English national product). See Douglas Bradburn, 'The Visible Fist: The Chesapeake Tobacco Trade in War and the Purpose of Empire, 1690-1715' (2011) 68 *The William and Mary Quarterly* 361.

¹²⁶ S Pincus (n 79) 62.

¹²⁷ M Hale (n 12) 294-295 (also stating that once a port was established, it could not be dissolved without the consent of Parliament since doing so would be a property taking from the perspective of the Crown and merchants). See also Stephen Dowell, *A History of Taxation and Taxes in England: from the earliest times to the present day*, vol 1 (London: Longmans, Green 1884) xii-xix; or a modern approach, A Rabushka (n 54) 28.

conceive most proper to be considered by the Council of Trade and Plantations.¹²⁸

The Council of Trade and Plantations duly supported his motion reporting that:

It has been found by experience that by the present practice of ships lying dispersed up and down, at the election of the masters, far remote from the officers' abodes, they have not been able to attend the due delivery and lading. *Pray* that the Governor of Virginia be recommended to establish ports by an Act of Assembly¹²⁹

From the local independent, entrepreneurial perspective, this increased efficiency was not necessarily desirable. The establishment of ports would be burdensome for the tobacco planters due to the cost of hauling their product across substantial distances to one particular point of trade.¹³⁰ Minutes from a debate in the House of Burgesses on 7 May 1684 reveal: '[t]he House being divided Concerning a Clause in y^e said Bill Concerning bringing and selling tobacco at the Appointed places and Concerning y^e forfeiture of Tobacco at other places shipt of or sold and about the time y^e Act shall take place.'¹³¹ The unstated thought was that the establishment of ports would also subject the planters to the watchful eye of the Crown's customs agents. In other words, it would make smuggling more difficult. However, there was also the view that if the colony acceded to the wishes of the Crown, or the Council of Trade and Plantations, to establish ports for the better collection of royal duties, then such cooperative action would ultimately be rewarded with greater independence and advantages.¹³²

¹²⁸ Order of the Queen in Council, Lord High Treasurer to the Queen (29 March 1705) CSPC 22: 1704-1705 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol22/pp456-475> (accessed 28 July 2015) 989.

¹²⁹ Order of the Queen in Council, Commissioners of Customs to the Lord High Treasurer (29 March 1705) *ibid.*

¹³⁰ W Nelson (n 5) 38.

¹³¹ A Bill Intituled an Act Repealing the former Act of Cohbitation and directing a way more practicable for that purpose & for building townes Read the second time (7 May 1684) JHB 1659/60-1693, 213.

¹³² Preface, JHB 1659/60-1693, xxii-xxiv. See also JC Rainbolt (n 124) 309-14.

Against this background, in October of that year, the House of Burgesses adopted the Act for Establishing Ports and Towns. The statute created fifteen ports, towns, and burghs to be organized as municipal corporations. Its passage is significant for the legal history of the corporation in colonial Virginia for two standout reasons. First, because it was among the first attempts at creating a general form of incorporation rather than the historical individual charters. Second, it marked a defining departure for the municipal corporation as a creature of legislative action. The enactment of the Act for Establishing Ports and Towns was an attempt to incorporate without member consent or action. The entity was to be a branch of the administration imposed upon a group rather than granted as a result of petition by a group bound with a common interest.¹³³

A. A Single Corporate Municipal Purpose

The recitals of the Act for Establishing Ports and Towns begin with a broad statement of authority and single purpose generally applicable to the fifteen corporations created thereunder:

WHEREAS her most sacred majesty, Queen Anne, out of her princely care of this her colony and dominion of Virginia, by instructions to his excellency Edward Nott, Esq. her majestys lieutenant and governor-generally here, has been pleased to take notice that the building of towns, warehouses, wharfs and keys, for the more expeditious lading and unloading of ships at proper places in this colony, exclusive of others, will be particularly usefull and serviceable to her majesty, in bringing our people to a more regular settlement and of great advantage to trade, and has therefore caused it to be recommended by her said governor to this general assembly to pass an act for that purpose, suitable to the interests and conveniencys of this colony, *Be it therefore enacted, by the Governor, Council, and Burgesses of this present General Assembly, and it is hereby enacted, by the authority of the same,* That from and after the twenty-fifth day of December, which shall be in the year of our Lord 1708, all goods, wares and merchandises which shall be imported into this colony by water (servants, slaves and salt, excepted) shall be entered, allowed and landed

¹³³ John P. Davis describes it as a move towards establishing the municipal corporation as an administrative entity. JP Davis (n 95) 1-19.

at some one or other of the ports, wharfs, keys or places hereafter mentioned and appointed in this act, and at none other place whatsoever . . .¹³⁴

This statute is intended to systemize trade in order to improve customs collections and therefore increase the wealth of the metropole. The singular near generic statement of corporate purpose is a marked difference from the tailored singular purpose that had been discussed in *Sutton's Hospital* or even just a decade prior with the College of William and Mary Charter.¹³⁵ This was a single statement of a corporate purpose to be broadly shared among several, separate entities.

B. Trade and Economic Privileges

The Act for Establishing Ports and Towns does contain an Incorporating Provision, however, it appears near the end of the statute after a detailed description of the bounds of the corporate status imposed upon its members rather than as a result of an interest group's petition.¹³⁶ The first of these requirements relates to the geographic and commercial bounds placed on each municipal corporation:

Be it therefore enacted, That a township or burgh be established at each of the places hereinafter appointed by this act for ports, and that from and after the said twenty-fifth day of December, 1708, all goods, wares and merchandises whatsoever, which shall be imported for sale into this colony (servants, slaves and salt, excepted) shall be bought and sold in one or other of these towns hereinafter appointed, or not within five miles of any of them water born[e] or on the same side the great river the town shall stand upon, except such persons as are already inhabited, and . . . having been for the space of three years inhabitants of this colony, shall reside at the time of claiming such privilege within the

¹³⁴ Act for Establishing Ports and Towns p 404.

¹³⁵ Respectively, *Sutton's Hospital* 26b-27a; College of William and Mary Charter pp 1-3.

¹³⁶ The corporation proposed under this statute, completely devoid of any contractarian features, is a near pure example of the concession theory of corporations as a pure franchise of the state. The prevalence of this legal theory Maitland observed: '[n]owhere has the Concession Theory been proclaimed more loudly, more frequently, than in America . . .' Otto von Gierke, *Political Theories of the Middle Ages* (Frederic William Maitland ed, Frederic William Maitland tr, Cambridge: Cambridge University Press 1987) xxxi.

said five miles, on pain of forfeiting and paying by the vendor the full value . . .¹³⁷

The geographic bounds of each designated municipality includes economic and trade restrictions radiating five miles binding all those in the municipality unless specific exemption is sought. It further requires those within the bounds to comply with the trading directive by a date certain, December 1708. The jurisdiction of this corporation is defined, enforced, and regulated by imposition of the statute.¹³⁸

In a provision much like those in the royal charters to the Virginia Company, the Act for Establishing Ports and Towns also suspends certain duties. In the former case it was an effort to encourage and promote trade financed by a private group; here it is to encourage membership in the group, to be members of the municipality. To that effort, the Act for Establishing Ports and Towns grants certain exemptions on taxation thereby creating a, hopefully appealing to the local interests, economic monopoly for each municipal corporation:

That all persons whatsoever, coming to live and reside in any of the ports and towns by this act to be constituted, or that at any time of them shall after shall [sic] come to live and reside in any of them shall be thereafter free and acquit from all levys that shall be laid on the poll in tobacco for the space of fifteen years next after the five and twentyeth day of December, 1708, except for their slaves only, and also except for the payment of parish levys where the church already stands, or shall hereafter be built within any of the said ports or towns respectively.¹³⁹

The caveat for the slave trade reflects its monetary value to the Crown by this time. The caveat to continue the collection of parish levys is further insight into how the Church of England was supported in these small communities as part of civic life.

¹³⁷ Act for Establishing Ports and Towns p 405.

¹³⁸ See generally Gerald E. Frug, 'The City as a Legal Concept' (1980) 93 Harvard Law Review 1057.

¹³⁹ Act for Establishing Ports and Towns p 406.

The municipalities' intended monopolistic control over the economic life of the inhabitants is further enforced by oddly ancient rhetoric:

That each town to be erected by virtue of this act, be constituted, and every of them, singly and apart, is hereby constituted and established a free burgh, shall have a market at least twice a week, and a fair once a year, at such times as hereafter appointed, shall have a merchant guild and community with all customs libertys belonging to a free burgh . . .¹⁴⁰

The 'merchant guild' seems a reference to the ancient Gild Merchant or *gilda mercatoria* that appeared in increasing frequency during the medieval period.¹⁴¹ It is not clear what was intended here by the grant of a merchant guild.¹⁴² In fact, municipal historian, Charles Gross has specifically questioned what the Virginia colonists would have thought of such a provision given the definitional uncertainty at that time as to grants of an ancient merchant guild.¹⁴³ Yet even without knowing the precise intention of including the phrase 'merchant guild', when read together these provisions make clear that the corporations created by the Act for Establishing Ports and Towns were intended to exert extensive control over the economic life of the inhabitants through regulation of the domestic trade as well as through exclusive exemption that encouraged preferred trading practices.

¹⁴⁰ Ibid 413.

¹⁴¹ The classic and comprehensive legal history of the development of the town in England is: FW Maitland (n 11).

¹⁴² Charles Gross, *The Guild Merchant* (Oxford: Clarendon Press 1890) 2-7, 93-102 (discussing the origins of the Gild Merchant in the medieval period and the level of confusion it evoked by the turn of the eighteenth century).

¹⁴³ Ibid 163 -165 (also tracing more broadly the vague status of the merchant guild as a distinct set of privileges in this period). See for example that neither William Sheppard nor the author of the 1702 Corporate Treatise provide a defined account of a merchant guild. Sheppard's 1659 Corporate Treatise; 1702 Corporate Treatise.

C. Establishing Local Jurisdictions

The Act for Establishing Ports and Towns next addresses the juridical bounds of the municipal corporations. This subgroup of provisions begins with a devolution of jurisdiction to municipal courts:

That as soon as and whenever a court of Hustings¹⁴⁴ shall be established in any of the burghs shall thereafter be held to plead or go to court for any summons or law business, without the burgh, except in local actions, where the cause shall arise without the jurisdiction of such town, or where the value of the thing in demand shall exceed thirty pounds sterling, or in the general court or to bear evidence in some court as the laws of this country direct, neither shall they be forced to serve on a jury in any court without such burgh except in the general court.¹⁴⁵

The jurisdiction of the municipal courts was first restricted by the amount in controversy. A subsequent section of the Act for Establishing Ports and Towns provides the causes of action to be heard by these municipal courts:

[E]very which court shall be held, deemed, and taken, to be a court of record within this colony, shall make to themselves one comon seal, with liberty at any time to break or change it, shall have jurisdiction of all causes of meum and tuum, bargain, traffic and trade within their town, and the road and harbor thereto belonging, or wherein any inhabitant of the town is or shall be concerned, not exceeding the value of thirty pounds sterling, and all penal statutes of this country, as also of every thing relating to the town lands, saving and reserving always a liberty to any party not content with their judgment, to have an appeal to the generall court¹⁴⁶

The Act for Establishing Ports and Towns grants these municipal courts original jurisdiction for disputes directly affecting the corporations, but it also importantly preserves the right of the colonists to appeal judgments of the municipal courts to the general court of Virginia.

¹⁴⁴ It is defined later in the statute to mean the meeting of the directors and benchers of a corporation. Act for Establishing Ports and Towns p 410.

¹⁴⁵ Ibid 407.

¹⁴⁶ Ibid 409.

The Act for Establishing Ports and Towns also provided for representation in the House of Burgesses:

That when the constitution of any of the burghs appointed by this act shall become perfect as aforesaid, then such burgh shall have one burgess to represent them in the general assembly of this dominion with the like powers and authoritys to vote and act in the said assembly, as fully and amply as any other burgess hath or ought to have, which burgess shall be returned by the director for the time being of such burgh upon writ to him directed from the governor or commander in chief of this colony for the time being, in the form of the other writs mutatis mutandis, and shall be chosen by the freeholders and house-keepers of the town, being men of twenty-one years of age and upwards.¹⁴⁷

Just as the College of William and Mary was granted the corporate right to send an elected representative to the House of Burgesses in 1693, so too could each municipal corporation.

D. Internal Governance and Use of Public Monies

The Act for Establishing Ports and Towns includes the traditional corporate provision establishing internal governance mechanisms, including a governing board (*i.e.* directors and benchers), to be appointed for each municipal corporation. It further details the manner, time, and place in which directors and benchers shall be elected depending upon the population size of the municipality:

[A]nd when there shall be thirty familys besides ordinary keepers resident in them, such burghs shall have eight of the principal inhabitants who shall be called benchers of the guild hall for the better rule and governance of the town and for managing the public affairs thereof, these benchers shall be chosen by the freeholders and inhabitants of the town of twenty-one years of age and upwards, not being servants or apprentices, to be at first called together by writ from the governor or commander in chief of this colony for the time being . . . once chosen shall continue so long as they well behave or till death or removal from such town . . .¹⁴⁸

¹⁴⁷ Ibid 414.

¹⁴⁸ Ibid 408. See 1702 Corporate Treatise c 2.

These five officers, or benchers, have the traditional corporate right to elect their successors and to appoint a director.¹⁴⁹

Each municipal corporation is then directed to use funds raised during the course of exercising their powers of governance and law enforcement exclusively for the municipality's benefit:¹⁵⁰

That all fines . . . that shall hereafter be laid upon an inhabitant of any of the ports or towns appointed by this act, shall be paid to the director of such town whereto he shall belong, for the use and benefit of the town, and to no other use or purpose whatsoever.¹⁵¹

These municipalities are required to use revenue from fines for the public benefit of the town inhabitants, who may or may not also be corporate members. The prohibition of private inurement from the municipalities' collections of fines seems a far cry from the private profit motivated government of the Virginia Company.

E. The Incorporating Provision

It is after all these pages of provisions stipulating the structure and form to which each corporation must conform that one reaches the Incorporating Provision of the Act for Establishing Ports and Towns. To label this provision an 'Incorporating Provision' necessitates several caveats. It does not contain the corporate purpose, and it does not contain the respective corporate domiciles or names. The singular corporate purpose of trade enhancement and efficiency was included or implied in the opening provisions of the 1705 Act for Establishing Ports and Towns. The specific identification of the corporations that it created, and their corporate name and domicile,

¹⁴⁹ Act for Establishing Ports and Towns p 408.

¹⁵⁰ College of William and Mary Charter pp 4-5, 21.

¹⁵¹ Act for Establishing Ports and Towns p 407.

do not appear until the schedule-like penultimate provision.¹⁵² Nevertheless, it is still appropriate to consider the provision as an example of an Incorporating Provision because it evidences the authority and intention to incorporate several separate legal entities existing in perpetuity, and includes a broad statement of corporate name and domicile.¹⁵³ It reads in pertinent part:

And be it further enacted, That the director and bencher of every burgh respectively to be chosen by virtue of this act, shall be, and they are hereby erected and constituted to be a body corporate and politick, and to have a continual succession forever, by the name of the director and benchers, with power to implead, sue and be sued, to purchase and enjoy lands, tenements, and other estate, real and personal, of whatsoever nature and quality, and to dispose off and alienate the same or any part thereof at their pleasure, with power likewise by subscription and other voluntary gifts and bequests, to raise a joint stock or capital ffund for the use and benefit of their burgh, and the public necessary charges thereof, and to build and keep a place or tenement within their burgh, where they think most desent and honourable to erect a guild hall and such other usefull and necessary buildings as they, with the advice of the common council, shall think fitt.¹⁵⁴

These last lines acknowledge the corporate capacity to hold property, to raise funds to purchase property through the issuance of stock, and to construct public buildings as advised by the governing body. The concluding mention of the ‘guild hall’ once again, seems at the very least to reinforce the theme of this statute, which is to encourage, organize, and regulate the trade through the formation of these locales.

F. Property Ownership

The 1705 Act for Establishing Ports and Towns specifically provides that landholding colonists must hold their real property directly from the municipal corporation when applicable. To formally document this ownership structure, the statute requires

¹⁵² Ibid 404, 416-17. Future research for this subsection includes the contextualization of this charter with those appearing in England particularly those rights granted to port towns that were expanding at a rapid rate at the turn of the eighteenth century.

¹⁵³ The structure of the statute actually suggests that the separate schedule for the corporate names and domiciles was a matter of drafting convenience more than anything else.

¹⁵⁴ Act for Establishing Ports and Towns 411.

that all claims to real property within the designated geographic regions be surrendered to the respective municipal corporations and then re-purchased from the municipality for a nominal sum:

And when the director and benchers shall be thus constituted in any of the burghs appointed by this act, the ffeoffees of such burgh or town shall transfer all their right to such director and benchers, and their successors forever, who shall thereafter parcel out the land and lots in town in such manner and under such rules and limitations as is appointed by law to the ffeoffees, and that by transfer and assignments made and entered in their own books and records, without any other formality of law reserving to themselves and their successors forever, to the use of the town, one ounce of flaxseed and two ounces of hempseed, for every lot or piece of land so parcelled out.¹⁵⁵

It is further provided, or indeed confirmed, all real property would continue to be held in free and common soccage subject to an annual rent charge due the Crown:

That thereafter the director and benchers of every such burgh as aforesaid, shall hold the lands within the precincts of their said burgh to them and their successors for ever, in free and common soccage, yielding and paying to her majesty, her heirs and successors, the annual quit rent of twelve pence for every fifty acres¹⁵⁶

The Act for Establishing Ports and Towns also contemplates the situation of a pre-existing town falling within the bounds of these future municipal corporations in which case the governing board of the municipality to force a sale of such land up to fifty acres in size for a 'reasonable' price.¹⁵⁷ The end result is a reorganization of existing dispersed settlement and economic arrangements within a defined and localized corporate framework.

¹⁵⁵ Ibid 412.

¹⁵⁶ Ibid 412. Note that the quitrents from the Virginia colony were not an insubstantial sum, so it should not be assumed that this was a nominal amount. A Rabushka (n 54) 236.

¹⁵⁷ Act for Establishing Ports and Towns pp 417-18. In the event the proprietor is unwilling to sell, then an independent committee will determine a fair value for the land and then force a sale, upon which the proprietor will be deemed in possession of a vested 'form absolute and indefeasible estate in fee simple.' The municipality will therefore succeed to that real property interest. *ibid*.

G. Corporate Names and Domicile

In the penultimate provision of the Act for Establishing Ports and Towns, the fifteen individual municipal corporations are listed by corporate name and domicile, as referenced in the Incorporating Provision:

That at each of the said ports there be forthwith laid out by the common consent of the burgesses and justices of the county wherein such port shall be fifty acres of land, which land so laid out shall be appropriated, and is by virtue hereof appropriated to a town for every such port respectively, and all the lands so laid out or to be laid out and appropriated at the ports aforesaid, and every tract thereof severally and the inhabitants of each of them respectively, are and shall be accounted the free burghs and burghers, meant mentioned and intended by this act, and the inhabitants thereof shall enjoy the libertys, freedoms and benefits thereof accordingly, and that the said burghs be named as followeth:

That at Hampton in Elizabeth City county to be called Hampton . . . That at Norfolk town to be called Norfolk . . . That at Nansemond town to be called Nansemond . . . That at James City to be called James City . . . That at Flower de Hundred to be called Pohatan . . . That at York Town to be called York . . . That at Black Water to be called Queensborough . . . That at West Point to be called Delaware . . . That at Corrotomen to be called Queens town . . . That at Middlesex to be called Urbanna... That at Hobbs Hole to be called Tappahannock... That at Wicocomoco to be called New-Castle... That at Potomac Creek to be called Marlborough... That at Kings Creek in Northhampton county to be called Northhampton.. That of Orancock to be called Orancock...¹⁵⁸

With that is the end of a remarkable piece of legislation. The 1705 Act for Establishing Ports and Towns did not require the consent of its members, which seems to run contrary to traditional thought on incorporation.¹⁵⁹ Matthew Hale writing in mid-seventeenth century stated, 'wherein nevertheless it is to be observed that the king cannot incorporate any without their own consent, or if he do, yet the persons so

¹⁵⁸ Ibid 416-417.

¹⁵⁹ See for example Brian Tierney, 'Corporatism, Individualism, and Consent: Locke and Premodern Thought' in Kenneth Pennington Melodie Harris Eichbauer (ed), *Law as Profession and Practice in Medieval Europe: Essays in Honor of James A Brundage* (Burlington, VT: Ashgate Publishing Ltd 2013).

incorporated may renounce the incorporation'.¹⁶⁰ Or the closer contemporary writing the 1702 Corporate Treatise, observing that: '[c]orporation aggregate of many Lay Persons, is an Assembly of many Persons gathered or joined together in a City, Town or Burrough, into one Fellowship, because they hold by mutual Consent (created by the King's Charter usually) to support the common Charge...'.¹⁶¹ Unfortunately for this theoretical inquiry, the 1705 Act for Establishing Ports and Towns would never come to fruition. A re-evaluation of its effects prompted a change in policy:

Though we are still of the same opinion that it will be more for the ease of collecting ye duties in the country, yet we have great reason to fear from the improvment, in the woollen and other manufactures already begun and still carrying on in Virginia and other parts of the Continent, that the establishment of towns and incorporating the planters and others there with the priviledges intended by this Act will put them upon further improvements in the like manufactures, not only for themselvs but other of the Plantations, and take them off from planting tobacco, which would be of a very ill consequence to this Kingdom, both in respect to the exports of clothing, and all other necessaries from hence thither, and their dependance on this Kingdom, but lessening the importation of tobacco hither for the home consumption and supply of foreigners, besides a further injury in point of shipping and navigation, and therefore, rather than put this trade upon such hazardous points, we would humbly advise that the said Act may be rejected, and that all due encouragement may be given to the Planters for turning their hands to manuring and cultivating their wast lands for tobacco, and diverting them from other manufactures.¹⁶²

The organization and systemization of trade using the corporate form had the unintended effect of carrying over beyond that of the tobacco industry and was resulting in an increase in woolen exports competing with the English merchants. Moreover, colonists on whom they imposed this corporate status did not prove eager to implement and so Council of Trade and Plantations advised: 'and in regard (as we

¹⁶⁰ M Hale (n 12) 244.

¹⁶¹ 1702 Corporate Treatise 223.

¹⁶² Commissioners of H.M. Customs to the Lord High Treasurer, Report upon the Act of Virginia for settling the towns, ports, wharfs and keys, etc., (28 July 1709) CPSC 24: 1710-1711 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol24/pp426-437> (accessed 28 July 2015) 661.

have been informed) that nothing has yet been done in Virginia towards the settlement of such ports; we humbly offer that your Majesty be pleased to signify your disallowance and disapprobation of the said Act.¹⁶³

Nevertheless, the simultaneous statutory incorporation of fifteen municipal corporations is a remarkable advancement in the broader picture of corporate law. This was a move towards a more general conceptualization of the corporation, as well as a redefinition of municipal corporations as an administrative instruments of a metropolitan government.

IV. Conclusion

The corporation in Virginia had a remarkable history particularly given the paucity of examples. In picking up with the final days of the Virginia Company, one quickly sees the effect of the emerging economic circumstances of a tobacco-based colony through the sparse settlement. The lack of any community centers because of economic realities also means that the corporate form with its formal centralizing effect would be of no benefit; and this also holds true politically and socially for much of the seventeenth century. These local dispersed interests further exacerbate problems facing its colonial government, the Virginia Company with an inability to attract investment, provide effective local governance, or control the political factions occurring within its membership. The inability of these conflicting interests to operate within the formal corporate structure eventually leads to the dissolution of the corporation under *quo warranto* proceedings.

¹⁶³ Council of Trade and Plantations to the Queen. *Representation upon an Act of Virginia for establishing ports and towns*. (30 Nov 1705) CPSC 24: 1710-1711 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol24/pp426-437> (accessed 28 July 2015) 883.

The corporate form next appears in this colony in 1693 when the personal charitable Protestant interests of William III and Mary II align with a long desired interest in a college championed by James Blair. In many respects, the College of William and Mary Charter follows the Incorporating Provision formula used nearly one hundred ago and as enshrined in common law by *Sutton's Hospital*. It also diverges at several points in ways that seem attributable to the unique uncertainty of circumstances surrounding the establishment of a colonial college. This would notably include the two-stage process of trusteeship during construction and incorporation upon completion with particular rules of guidance, and the tweaking of the traditional corporate governance model to allow oversight from the House of Burgesses. The corporate form was next seen with the Act for Establishing Ports and Towns, which was most notable for its simultaneous municipal incorporation without the consent of its membership. The corporate form was intended to provide centralized, formal organization to the economy and therefore improve tax collection. The irony is that the intended centralization unexpectedly promoted all colonial industry, including woolens, which conflicted with English manufacturing and led to the statute's repeal. In this way, the legal history of the corporation in Virginia also tells the history of the colony and the evolving relationship between the local social, political, and economic interests and the metropolitan government.

CHAPTER FOUR:

The Corporations of Rebellious Massachusetts during the Stuart Age

Another initially corporate colony, Massachusetts, provides examples of local interests keen for rights and privileges associated with the corporate form but averse to seeking metropolitan authorization, or even knowledge, for their activities. In 1629, a group of adventurers heading to settle the Massachusetts Bay area (the 'Massachusetts Bay Colony') were granted a charter of incorporation (the 'Massachusetts Bay Charter') and became known as the Massachusetts Bay Company.¹ The corporate experience within the Massachusetts Bay Colony was based upon its general assembly's quiet assertion of an exclusive authority to incorporate. The Massachusetts General Court covertly incorporated an educational corporation, Harvard College, in 1650 and attempted a further public utility incorporation in 1652, both occurring during the Commonwealth period. In the Massachusetts Bay Colony, the evolving private interests sought the legal protection and certainty afforded by the corporate form but under the authority of its own local government independent from that of the metropole.

I. The Corporate Model for the Plymouth Colony

The story of the Massachusetts Bay Colony must begin with an understanding of the conflicting claims to proprietary and governmental power in the region. The 1606 Virginia Charter had provided for a first colony, the Virginia Company of

¹ 'The Charter of Massachusetts Bay: 1629' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/mass03.asp> accessed 30 September 2014) (the 'Massachusetts Bay Charter').

Plymouth, and a second colony, the Virginia Company of London.² The Virginia Company of Plymouth attempted a 1607 settlement at Sagadahoc in Maine, but it failed within a year.³ In 1617, a group of English Separatists living in Leiden, Netherlands, approached the council for this second colony looking to form an English settlement in North America.⁴ They were granted a portion of land near Hudson Bay, but their ship the *Mayflower* landed on 11 November 1620 near Cape Cod (the 'Plymouth Colony'). Moreover, these settlers, commonly referred to as the 'Pilgrims', had only been given a grant of land; they had no direct authorization from the Crown to settle and govern a colony.⁵ Nevertheless, before going ashore the Pilgrims drew up an agreement among themselves known as the 'Mayflower Compact.' Importantly, the brief agreement tracked the language of the Incorporating Provisions appearing in the earlier corporate charters of its neighbors, such as the Virginia Company and the Newfoundland Company:

Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of *Virginia*; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by Virtue hereof do enact, constitute, and

² 'The First Charter of Virginia: April 10, 1606' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va01.asp> accessed 17 July 2015 (the '1606 Virginia Charter') ss 4, 5.

³ Thomas Hutchinson, *The History of the Colony of Massachusetts Bay*, vol 1 (3d edn, London: M. Richardson, Pater-noster Row 1765) 2. See discussion in Chapter One.

⁴ *Ibid* 4 (noting the disarray and confusion with respect to the governance and records of the Northern Colony at this time); Benjamin Woods Labaree, *Colonial Massachusetts: a history* (Millwood, New York: KTO Press 1979) 23-27 (discussing the private financing arrangements for the venture made with an a group of English merchants led by ironmonger Thomas Weston). See also William Bradford, *History of Plymouth Plantation 1620-1647*, vol 1 (Massachusetts Historical Society ed, Houghton Mifflin Company 1912) c 5, 6; Samuel Eliot Morison, *The Story of the "Old Colony" of New Plymouth, 1620-1692* (New York: Knopf 1956).

⁵ William Douglass, *A summary, historical and political, of the first planting, Progressive Improvements, and Present State of the Birtish Settlements in North-America*, vol 1 (London: Re-printed for R. Baldwin 1755) 394-96. See also Theodore Busfield, 'Plymouth Plantation (1617-1660)' in Albert Bushnell Hart (ed), *Commonwealth History of Massachusetts*, vol 1 (New York: Russell & Russell 1966) 66-92, 69.

frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience...⁶

Under the Mayflower Compact, certain named individuals agreed that for the purpose of advancing Christianity and the settlement of a colony, they would come together as a singular entity, ‘a civil Body Politick’, in order to better achieve that purpose. But, the Mayflower Compact did not create, nor did it truly attempt to create a legal incorporation. The group had no recognized legal standing beyond that of a joint venture arrangement. The interest of the group appears not to have lain with the legal corporate form itself, but with modeling the corporation’s intrinsic right to self-governance at common law. Coke had observed ten years prior that the corporate elements so innate to the legal form that they need not be explicitly stated included the right, ‘to make ordinances; that is requisite for the good order and government ... but not to the essence of the incorporation.’⁷ It was a right generally constrained only by the ‘laws of England’.⁸ In modeling the Incorporating Provision formula the group demonstrated the importance of perception as a basis for exerting powers of self-governance.⁹ It also prefigures further strivings for corporate and political independence from an overarching metropolitan authority.

⁶ ‘Agreement Between the Settlers at New Plymouth: 1620’ (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/mayflower.asp> accessed 30 September 2014.

⁷ See *The Case of Sutton’s Hospital* (1612) 10 Co Rep 23a, 77 ER 960 (‘Sutton’s Hospital’), 31a.

⁸ See for example ‘The Third Charter of Virginia: March 12, 1611/12’ (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va03.asp> accessed 29 June 2015 (the ‘1612 Virginia Charter’). Section 10 of the 1612 Virginia Charter typifies the bounds of the right of self governance: ‘[A]nd shall likewise have full power and authority to ordaine and make such lawes and ordinances for the good and welfare of the said plantacion as to them from time to time shalbe thought requisite and meete: soe allwaies as the same be not contrary to the lawes and statutes of this our realme of England...’ *ibid* s 10. For an extended discussion on this corporate right serving as the basis for the theory of a ‘transatlantic constitution’ and using neighboring corporate Rhode Island as the example, see Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Massachusetts: Harvard University Press 2004).

⁹ Mary Sarah Bilder, ‘English Settlement and Local Governance’ in Christopher Tomlins Michael Grossberg (ed), *The Cambridge History of Law in America*, vol I (Cambridge: Cambridge University Press

II. Conflicting Claims to New England

The adventurer members directed to establish the first colony of the 1606 Virginia Charter had been incorporated as the Virginia Company under the 1609 Virginia Charter. The second colony that had the failed attempt at Sagadahoc in 1607, eventually sought separate incorporation, which was ultimately granted by James I on 3 November 1620, its Incorporating Provision reading:

And for the better Plantacion, ruling, and governing of the aforesaid New-England, in America, We will, ordaine, constitute, assigne, limits and appoint, and for Us, our Heyrs and Successors, Wee, by the Advice of the Lords and others of the said privie Councill, do by these Presents ordaine, constitute, limett, and appoint, that from henceforth, there shall be for ever hereafter, in our Towne of Plymouth, in the County of Devon, one Body politicque and corporate, which shall have perpetuall Succession, which shall consist of the Number of fourtie Persons, and no more, which shall be, and shall be called and knowne by the Name the Councill established at Plymouth, in the County of Devon for the planting, ruling, ordering, and governing of New-England, in America...¹⁰

This corporation of forty members, chief among them being Sir Ferdinando Gorges, was domiciled in England, ‘at Plymouth in the County of Devon, for the planting, ruling, ordering and governing of New England in America’ (the ‘Council for New England’). From afar it controlled English claims to the swath of land between the

2008) 67-72 (tracing this modeling of corporate governance through the early settlements in colonial America observing the appearance of, ‘[t]he perception that corporate governance practices created lawmaking authority—in essence, a government...’). Ibid 72. See Julius Goebel, ‘King's Law and Local Custom in Seventeenth Century New England’ (1931) 31 *Columbia Law Review* 416, 428 (observing that the modern historian should not ‘look too much into frontier laws’ such as the Pilgrim's body politic, but to not dismiss such laws and agreements as haphazard and without reason). But see also Maitland's argument that the Mayflower Compact was an anomaly in the history of the corporation in what would become the United States. He ignores the point that modeling the corporate form could have benefits, particularly in an uncertain colonial environment, despite its lack of the legal franchise. He argues that it is widely accepted that, ‘[a] classical definition has taught that “a Corporation is a Franchise” and a franchise is a portion of the State's power in the hands of a subject.’ Otto von Gierke, *Political Theories of the Middle Ages* (Frederic William Maitland ed, Frederic William Maitland tr, Cambridge: Cambridge University Press 1987) xxxi. This is an area of tracking the corporate form for purposes of asserting self-governance worthy of further exploration and it might prove valuable to compare with grants given to groups settling Ireland.

¹⁰ ‘The Charter of New England: 1620’ (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/mass01.asp> accessed 30 September 2014 s 2 (the ‘New England Charter’).

fortieth and forty-eighth northern parallels, modern-day Pennsylvania to New Brunswick, from the Atlantic Ocean to the Pacific. Rather than establish a settlement there, the Council for New England continued the business model it had established under the 1606 Virginia Charter acting as a middleman and issuing grants of their land to companies such as they had to the Pilgrims, as well as their own members, as they notably would to Gorges.¹¹

The Council for New England had been incorporated and granted land, all powers of governance as well as an extremely valuable monopoly of all ports and fishing rights in the region.¹² Although the proven value and desirability of the monopoly would contribute to the corporation's downfall;¹³ in the shorter term it provided motivation for settling the region to the profit of the Council for New England. The fish were not only for the English market but the rapidly expanding market of Catholics in the West Indies and around the Mediterranean.¹⁴ Nevertheless,

¹¹ Sir Ferdinando Gorges, 'A Briefe Relation of the Discovery and Plantation of New England (1622)' in James Phinney Baxter (ed), *Sir Ferdinando Gorges* (Boston: Prince Society 1890) (discussing Gorges claims to a huge swath of land stretching from modern-day Massachusetts through Maine). See also T Hutchinson (n 3) 13-16; Bernard Bailyn, *New England Merchants in the Seventeenth Century* (New York: Harper Row ed, 1962) 1-15 (explaining the failure of Gorges' dream for a feudal estate was because of 'misconceptions of economic possibilities').

¹² New England Charter ss 1, 7. It was the value of this monopoly that would ultimately cause problems for the Council of the New England. See Abner L. Braley, 'Sister New England Settlements (1620-1660)' in Albert Bushnell Hart (ed), *Commonwealth History of Massachusetts* (New York: Russell & Russell 1966) 191-225 (discussing the value of the fishing monopoly on the settlement of the region); Richard A Preston, 'Fishing and Plantation' (1939) 45 *The American Historical Review* 29 (recounting the parliamentary debates regarding the Atlantic fishing industry).

¹³ (3 May 1624) JHC 1, 696-97. See Lorenzo Sabine, *Report on the Principal Fisheries of the American Seas: prepared for the Treasury Department of the United States* (Submitted by the Honorable Thomas Corwin, Secretary of the Treasury as a Part of his Annual Report on the Finances Washington: Robert Armstrong, Printer (1853)) (providing a comprehensive history of the fishing monopolies in the British Atlantic) 43-46. See also B Bailyn (n 11) 10-15 (giving a detailed account of the convoluted and overlapping grants made by the Council for New England and their misguided dreams of early economic prosperity).

¹⁴ John Gould Curtis, 'The Geographic Background (1630-1689)' in Albert Bushnell Hart (ed), *Commonwealth History of Massachusetts*, vol 1 (New York: Russell & Russell 1966) 25-48, 34; John Dickinson, 'The Massachusetts Charter and the Bay Colony (1628-1660)' in Albert Bushnell Hart (ed), *Commonwealth History of Massachusetts*, vol 1 (New York: Russell & Russell 1966) 93-126; Samuel Eliot Morison, *Builders of the Bay Colony* (Oxford: Oxford University Press 1930) 27.

time quickly proved for most settlers that the potentially lucrative commercial market was not the instant success envisioned.¹⁵

III. The Incorporation of the Massachusetts Bay Company

A. A Contentious Start

The inefficiencies of the Council for New England had been apparent since its early days. The most troublesome of these problems proved to be the overlapping and poorly enforced boundaries of their land grants, such as to that of the Plymouth Colony. On the 10 August 1622 the Council for New England had granted a large swath of land to Gorges, the southern boundary of which would overlap with its subsequent grant to a group, 'The New England Company for a Plantation in Massachusetts Bay' on 19 March 1627/8.¹⁶ Moreover, this was land with existing Dutch settlements, which was expressly excluded from the original charter to the Council for New England since it belonged to other 'Christian princes'.¹⁷ The Council for New England was granting land to which it had no claim.

Concerned over the validity of their grant, the New England Company for a Plantation in Massachusetts Bay sought direct royal support for their claims to the region. The group was incorporated as 'The Massachusetts Bay Company' by the royal Massachusetts Bay Charter issued on 4 March 1628/9. This corporate charter follows much the same framework as the corporate charters of its now dissolved contemporary,

¹⁵ Robert Earle Moody, 'A Re-Examination of the Antecedents of the Massachusetts Bay Company's Charter of 1629' (Oct. 1947 - May, 1950) Vol. 69 Proceedings of the Massachusetts Historical Society 56, 58-61.

¹⁶ T Hutchinson (n 3) 14-15. See also J Dickinson (n 14) 98.

¹⁷ (15 December 1621) APCC 1: 1613--1680 (acknowledging the existence of Dutch settlements in New England).

the Virginia Company, with an even greater focus on real property ownership in light of the uncertain ownership claims.

B. Repeated Confirmation of The Unbroken Chain of Property Ownership

The first paragraph of the Massachusetts Bay Charter's preamble begins with a description of the conflicting ownership claims to the region. Much like Section 1 in each of the 1606 Virginia Charter, the 1609 Virginia Charter, and the 1612 Virginia Charter, this Section 1 of the Massachusetts Bay Charter establishes the chain of real property ownership of the land to be exclusively granted to the corporation. The preamble begins with a memorialization of the initial 1621 property grant under James I to the Council of New England:

WHEREAS, our most Deare and Royall Father, Kinge James, ... in the eighteenth Yeare of His Raigne, HATH given and graunted vnto the Councell established at Plymouth, in the County of Devon, for the planting, ruling, ordering, and governing of Newe England in America, for ever all that Parte of America, lyeing and being in Breadth, from Forty Degrees of Northerly Latitude from the Equinoctiall Lyne, to forty eight Degrees Of the saide Northerly Latitide inclusively, and in Length, of and within all the Breadth aforesaid, throughout the Maine Landes from Sea to Sea;... PROVIDED alwayes, That the saide Islandes, or any the Premisses ... were not then actuallie possessed or inhabited, by any other Christian Prince or State, nor within the Boundes, Lymitts, or Territories of [the Virginia Company]... To be houlden of our saide most Deare and Royall Father, his Heires and Successors, as of his Mannor of East Greenwich in the County of Kent, in free and comon Soccage, and not in Capite nor by Knight's Service . . .¹⁸

The provision establishes the legal basis of the grant within the royal prerogative because the land was, 'not then actuallie possessed or inhabited, by any other Christian Prince or State.'¹⁹ This statement was not factually accurate as both Dutch and Swedish

¹⁸ Massachusetts Bay Charter s 1.

¹⁹ Ibid.

settlers claimed land within the bounds described by the Massachusetts Bay Charter.²⁰ The qualification that land be uninhabited by another European power did not appear in the royal charters to Virginia; it was reflection of the changing reality of rapid European colonization of North America.²¹

The Massachusetts Bay Charter continues then to restate the geographic bounds of the grant then from the Council for New England to the New England Company for a Plantation in Massachusetts Bay, which stretched from the Merrimack River to the Charles River and was to be held, ‘as of his Mannor of East Greenewich... in free and comon Soccage.’²² The Massachusetts Bay Charter then confirms the validity of this original grant and then re-grants the same land to the group now incorporated Massachusetts Bay Company.²³ The mere frequency and degree of detail with which this provision is included suggests its importance. The numerous reiterations of the conveyance chain and royal confirmation was also a likely preemption to claims that the Crown was infringing upon the private property rights of the Council for New England or those that held by its grants. It would prove a legitimate concern since Sir Ferdinand Gorges would initiate *quo warranto* proceedings against the Massachusetts Bay Company in 1635 for infringing upon his prior

²⁰ See fn 17 and accompanying text.

²¹ The provision laid claim to the region to the extent it was ‘unoccupied’ or *terra nullius*, a concept readily evoked during England’s later imperial expansion. See William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Oxford: Clarendon Press 1765-1769) 105 105 (recognizing that Blackstone never uses this term, but does describe this imperial distinction between lands conquered and lands unoccupied). See also Gavin Loughton, ‘Calvin's Case and the Origins of the Rule Governing "Conquest" in English Law’ [2004] *Australian Journal of Legal History* 8.

²² Massachusetts Bay Charter s 2. Note here that the primary sources use many different spellings of Massachusetts. There are different spellings within the Massachusetts Charter itself, including Mattachusetts, and Massatusetts. Ibid 2. Ultimately ‘Massachusetts’ became the official spelling and was a variant of the preferred ‘Massachuset’ spelling of John Smith. John Smith, *The Generall Historie of Virginia, New-England, and the Summer Isles: With the Names of the Adventurers, Planters, and Governours From Their First Beginning Ano: 1584 To This Present 1624* (London : ID and IH for Michael Sparkes 1624) 208.

²³ Massachusetts Bay Charter s 5.

overlapping claim to the region via grant from the Council for New England.²⁴ He would find support from the Archbishop of Canterbury, William Laud, and his particular desire for colonial religious conformity.²⁵ Although nothing would ultimately come of these proceedings, it exemplified the fact that these charters, although providing a degree of legal certainty, were not impermeable and could, and were, challenged for political as well as legal reasons.²⁶

C. The Incorporating Provision

Finally, in the sixth section of the Massachusetts Bay Charter appears the Incorporating Provision tracking the same language as those corporate charters previously discussed. It reads:

AND FORASMUCH, as the good and prosperous Successe of the Plantacon of the saide Partes of Newe-England aforesaide intended by the said Sir Henry Rosewell [*et al.*] to be speedily sett vpon, cannot but cheifly depend, next under the Blessing of Almightye God, and the support of our Royall Authoritie upon the good Government of the same, To the Ende that the Affaires and Buysinneses which from tyme to tyme shall happen and arise concerning the saide Landes, and the Plantation of the same maie be the better mannaged and ordered, WEE HAVE FURTHER hereby ... doe give, graunt, and confirme vnto our said trustie and welbeloved subjects Sir Henry Rosewell [*et al.*] AND for Us. our Heires and Successors, Wee will and ordeyne, That the saide Sir Henry Rosewell, [*et al.*], and all such others as shall hereafter be

²⁴ A Quo Warranto brought against the Company of the Massachusetts-Bay by Sir John Banks, Attorney-General (1635) reprinted in Ebenezer Hazard (ed), *Historical Collections; consisting of state papers, and other authentic documents*, vol 1 (Philadelphia: self-published 1794) 423. T Hutchinson (n 3) 50-51. The extent of the chaotic overlapping claims as it effected New England settlement is most clearly described in B Bailyn (n 10) especially 10-15.

²⁵ Edward Randolph, *Edward Randolph : including his letters and official papers from the New England, middle, and southern colonies in America, with other documents relating chiefly to the vacating of the royal charter of the colony of Massachusetts Bay, 1676-1703*, vol 24 (Boston: Printed for The Prince Society by John Wilson & Son 1890) 13-16; William Heath, 'Thomas Morton: From Merry Old England to New England' (2007) 41 *Journal of American Studies* 135, 161-162. See James Kendall Hosmer (ed) *Winthrop's Journal: History of New England 1630-1649*, vol 1 (New York: Charles Scribner's Sons 1908); T Hutchinson (n 3) 48 -50, 84-85.

²⁶ See Catherine Patterson, 'Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Court' (2005) 120 *The English Historical Review* 879, 884 (observing that most *quo warranto* suits against municipal corporations in England between 1603-1640 never went beyond the first stage).

admitted and made free of the Company and Society hereafter mencoed, shall from tyme to tyme, and att all tymes forever hereafter be, by Vertue of theis presents, one Body corporate and politique in Fact and Name, by the Name of the Governour and Company of the Mattachusetts Bay in Newe-England, and them by the Name of the Governour and Company of the Mattachusetts Bay in Newe-England, one Bodie politique and corporate, in Deede, Fact, and Name; Wee doe for vs. our Heires and Successors, make, ordoyne, constitute, and confirme by theis Presents, and that by that name they shall have perpetuall Succession, and that by the same Name they and their Successors shall and maie be capeable and enabled aswell to implead, and to be impleaded, and to prosecute, demaund, and aunswere, and be aunswared unto, in all and singuler Suites, Causes, Quarrells, and Accons, of what kinde or nature soever. And also to have, take, possesse, acquire, and purchase any Landes, Tenements, or Hereditaments, or any Goodes or Chattells, and the same to lease, graunte, demise, alien, bargaine, sell, and dispose of, as other our liege People of this our Realme of England, or any other corporacon or Body politique of the same may lawfully doe.²⁷

The Incorporating Provision of the Massachusetts Bay Charter begins with the statement of purpose: incorporation was necessary for the success and prosperity of the colony at Massachusetts Bay as well as to ensure the ‘good Government of the same.’²⁸ The Crown then, by its ‘especial Grace’, or recognized legal authority, incorporates the certain named individuals, ‘and all such others as shall hereafter be admitted’ as the corporate members of ‘one Body corporate and politique’.²⁹ The corporation is given a name, ‘the Governour and Company of the Mattachusetts Bay in Newe-England’ which includes the corporate domicile in the colony rather than the ‘of the City of London’ as appeared in the 1612 Virginia Charter.³⁰ The *Sutton’s Hospital* essential elements are each present: the authority to incorporate; the corporate purpose; the corporate members; the corporate name; and the corporate domicile.³¹

²⁷ Massachusetts Bay Charter s 6.

²⁸ Ibid s 6.

²⁹ Ibid s 6.

³⁰ 1612 Virginia Charter s 1.

³¹ *Sutton's Hospital* 29b.

The latter half of the Incorporating Provision memorializes the intention that the corporation shall have ‘perpetuall Succession’ and an impliedly separate existence from its corporate members. The concentration of these essential elements and statements of the underlying concept of the corporation as a separate legal person appear in the predecessors of the Massachusetts Bay Charter examined herein, like the 1612 Virginia Company Charter, and in its successors, like the Charter for William and Mary College. This continuity of the Incorporating Provision supports the argument that a formula for incorporation had clearly emerged during seventeenth century.

D. Corporate Governance Provisions

The corporate governance provisions begin in Section 7 of the Massachusetts Bay Charter. The freedom granted to the corporation via the imprecision of these internal governance provisions would prove problematic for the Crown in the near future. Similar to its predecessors, the Massachusetts Bay Charter provides the administrative structure for the governance of its subjects:

Wee doe hereby for Vs. [sic] our Heires and Successors, ordeyne and graunte, That from henceforth for ever, there shalbe one Governor, one Deputy Governor, and eightene Assistants of the same Company, to be from tyme to tyme constituted, elected and chosen out of the Freemen of the saide Company, for the tyme being, in such Manner and Forme as hereafter in theis Presents is expressed...³²

The Massachusetts Bay Company would have a Governor, Deputy Governor, and eighteen Assistants forming an advisory council. These officers are charged with the, ‘Care for the best disposing and ordering of the generall buysines and Affaires of, for, and concerning the said Landes and Premisses hereby mencoed, to be graunted, and the Plantacion thereof, and the Government of the People there.’³³ As with each of the

³² Massachusetts Bay Charter s 7.

³³ Ibid 7.

discussed corporate charters in Virginia, the Crown appointed the first officers of the corporation leaving them to determine their successors.³⁴ Section 8 provides further particulars on the framework of governance:

That the Governor of the saide Company ... shall have Authoritie from tyme to tyme upon all Occasions, to give order for the assembling of the saide Company, and calling them together to consult and advise of the Bussinesses and Affaires of the saide Company, and [to] assemble and houlde and keepe a Courte or Assemblie of themselves, for the better ordering and directing of their Affaires, and ... upon every last Wednesday in Hillary, Easter, Trinity, and Michas Termes respectivelie forever, one [great] generall and [solemn] assemblie, which foure generall assemblies shalbe stiled and called the foure [great] and generall Courts of the saide Company . . .³⁵

The Massachusetts Bay Colony was to convene the regular meeting of an assembly of all corporate members for day-to-day management, as well as four larger meetings per year for more substantial matters. Unlike the 1609 Virginia Charter or the 1612 Virginia Charter, however, there is no mention of membership interests, powers of disenfranchisement, or general consensus voting requirements.³⁶ Relative to its predecessors in Virginia, the commercial terms of this charter are minimal.

Section 9 of the Massachusetts Bay Charter devolves unto the corporation powers of governance similar to those under the 1609 Virginia Charter as revised by the 1612 Virginia Charter. Specifically it grants:

[F]ull Power and authoritie to choose, nominate, and appointe, such and soe many others as they shall thinke fitt, and that shall be willing to accept the same, to be free of the said Company and Body, and them into the same to admits; and to elect and constitute such Officers as they shall thinke fitt and requisite, ... And to make Lawes and Ordinances for the Good and Welfare of the saide Company, and for the Government and ordering of the saide Landes and Plantacon, and

³⁴ Ibid s 7; cf *The Charter of the College of William and Mary (8 February 1693)* (Thomas Nicolson 1800) ('the Charter of William and Mary College') 5 (stipulating that certain officers be elected by the House of Burgesses rather than by the educational corporation's own governing council).

³⁵ Massachusetts Bay Charter s 8.

³⁶ See for example 'The Second Charter of Virginia; May 23, 1609' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/va02.asp> accessed 29 June 2015 (the '1609 Virginia Charter') s 16.

the People inhabiting and to inhabite the same,...³⁷

New corporate members may be elected and laws and ordinances may be passed at the discretion of the Governor and his officers. The eventual transfer of the corporate seat of government to Massachusetts itself, rather than maintaining the traditional presence in London, would provide greater logistical independence if nothing else.³⁸

E. Additional Corporate Rights and Privileges

The Massachusetts Bay Charter provides many of the same corporate rights and privileges granted to its Virginia Company predecessor. It recites the corporate capacity to hold real property, as any other English corporation ‘may lawfully doe’; a phrase not included in the 1609 Virginia Charter or the 1612 Virginia Charter.³⁹ It is

³⁷ Massachusetts Bay Charter s 8; but with the standard caveat that they not be contrary to the laws of England.

³⁸ As to the movement of the center of government, debate as to the move began nearly as soon as the charter was issued:

that for the advancemt of the plantacon, the inducing & encouraging persons of worth & qualitie transplant themselues and famylyes thether, & for other weighty reasons therein contained, to transferr the gounm^t of the plantacon to those tht shall inhabite there, and not to continue the same in subordinacon to the Company heer, as now it is. This business occasioned some debate; but by reason of the many great & considerable consequences thervpon depending, it was not now resolved vpon; but those psent are desired privately & seriously to consider hereof, & to sett downe their pticuler reasons in writing & contra, & to pduce the same at the next Genall Court... and in the meane tyme they are desired to carry this business secretly, that the same bee not divulged.

A Genrall Court, holden for the Company of the Mattachusetts Bay, in New England, at Mr Deputyes House (28 July 1629) RCMB 1. The move was confirmed just three months later:

This Court was appointed to treat & resolute, that vpon the transferring of the gounm^t to N. England, what gounm^t shalbe held at London, wherby the future charge of the ioynt stock may beee chereished & pserved, and the body politique of the company remaine and increase. Ultimately appoint someone to handle the stock both in New England in London . . .

A Court of Assistants at the Deputyes House (16 October 1629) RCMB 1. See T Hutchinson (n 3) 19-24; SE Morison, *Builders of the Bay Colony* (n 14) 65-78. As to a complete lack of evidence supporting claims of an omitted domicile charter provision due to bribes or otherwise, see Ronald Dale Karr, ‘The Missing Clause: Myth and the Massachusetts Bay Charter of 1629’ (2004) 77 *The New England Quarterly* 89.

³⁹ Massachusetts Bay Charter s 6.

another reference to the increasingly formulaic nature of some provisions of these corporate charters. It is also a statement towards a more generalized or unified vision of the corporation: that all corporations should possess the same rights of property ownership.

The Massachusetts Bay Colony is granted the corporate seal with which to bind itself, and the right to sue and be sued, and to plead and be implead.⁴⁰ Also granted is the logistically necessary license to transport royal subjects to settle the new colony. The valuable corporate economic monopoly is provided in Sections 7 and 8 of the Massachusetts Bay Charter.⁴¹ Just as in the charters of the Virginia Company, this corporation's import and export of goods in the colony are declared exempt from royal taxes for the same period of seven years. The royal taxes due in England for the Massachusetts Bay Company's imports or exports would be subject to a five percent tax but exempt from all other taxes for 22 years.⁴² As a means of enforcing these and all rights granted under this charter, the Governor and officers appointed in Sections 8 and 9 are empowered with respect to the, '[i]mposicons of lawfull Fynes . . . Imprisonment, or other lawfull Correcon, according to the Course of other Corporacons in this our Realme of England.'⁴³ The 1606 Virginia Charter had given the power to 'expulse, repel, and resist' the interlopers as well as confiscate the contraband, but not imprison.⁴⁴ The 1609 Virginia Charter, like the Massachusetts Bay

⁴⁰ Ibid ss 5, 7.

⁴¹ Ibid ss 6, 8.

⁴² Ibid ss 8, 9. It was the same as the exemption periods granted to the Virginia Company. 1609 Virginia Charter s 17; 1612 Virginia Charter s 8. Alvin Rabushka, *Taxation in Colonial America* (Princeton: Princeton University Press 2008) 37.

⁴³ Massachusetts Bay Charter s 11.

⁴⁴ 1606 Virginia Charter ss 13, 14. Also note that the confiscation of contraband was to be turned over to the Crown. Ibid.

Charter, granted the power to imprison until such time fines were paid.⁴⁵ But, unlike the Virginia Company, the Massachusetts Bay Company would soon come to favor its political identity over its commercial business identity.⁴⁶ Moreover, the members of the Massachusetts Bay Company would have recently witnessed the financial ruin and political chaos that led to the revocation of the Virginia Company's corporate charter in 1624.

IV. A Lack of Further Metropolitan Acts of Incorporation

Similar to Virginia during the Stuart period, there were no ecclesiastical or municipal incorporations in the Massachusetts Bay Colony. The lack in Virginia is likely explained by the settlement patterns and lack of central locales within the colony. The lack of ecclesiastical corporations in Massachusetts is not surprising given its religious demographics as well as the near complete merger of civic and religious life in the colony.⁴⁷ A petition to the Crown for incorporation would run contrary to the Puritans' fundamental desire for religious independence from the Church of England.

The lack of municipal corporations, however, is not quite as obvious. The concept of municipal corporation was undoubtedly known to the lawyer-packed

⁴⁵ 1609 Virginia Charter s 21. For the common law rule on this point see also *Dr Bonham's Case* (1609) 8 Co Rep 113b, 77 ER 646; William Sheppard, *OF CORPORATIONS, Fraternities, AND GUILDS, OR a Discourse, wherein THE LEARNING of the LAW touching Bodies-Politique is unfolded, shewing the USE and NECESSITY of that INVENTION, the ANTIQUITY, various Kinds, Order and Government of the same* (2nd edn, London: Printed for H. Twyford, T. Dring, and H. Place 1659) ('Sheppard's 1659 Corporate Treatise') 92-96 (discussing the reasonableness of permissible penalties that might be imposed by a corporation). See also RH Helmholz, 'Bonham's Case, Judicial Review, and the Law of Nature' (2009) 1 *Journal of Legal Analysis* 325.

⁴⁶ See generally George Lee Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: The Macmillan Company 1960); J Dickinson (n 14) 93-126; Richard D. Brown, *Massachusetts: A Bicentennial History* (New York: WW Norton & Company, Inc 1978) 32; William Nelson, *Common Law in Colonial America: The Chesapeake and New England, 1607-1660*, vol 1 (New York: Oxford University Press 2008) 50-52.

⁴⁷ James Thayer Addison, *The Episcopal Church in the United States, 1789-1931* (New York: Scribner 1951) 39-42.

Massachusetts General Court. Even its troublesome neighbor, Sir Ferdinando Gorges had incorporated a municipality, Acomenticus, in 1639.⁴⁸ The Massachusetts Bay Company did organize townships early in its history. Unlike the widespread tobacco plantations of Virginia, towns in the Massachusetts Bay Company were small, close-knit communities settled by families focused on the town church.⁴⁹ These quaint and remote communities centered on religious life. It has been more recently argued that the insertion of a municipal corporate middleman, such as those existing in the English boroughs, may have been perceived as a limitation on the direct representation, in theory, between inhabitants and the General Court.⁵⁰

The General Court did pass a resolution in 1635 for the organization of several towns, known as the ‘Township Act’:

It is ordered, that there shalbe a plantacon settled, aboute two myles above the falls of Charles Ryver, on the north east syde thereof, to have ground lyeing to it on both sydes the river, both vpland & meadowe, to be layde out hereafter, as the Court shall appoynt. . . . It is ordered, that there shalbe a plantacon att Musketequid, & that there shalbe 6 myles of land square to belong to it, & that the inhabitants thereof shall have three yeares immunities from all publ charges, except traineings; further, that when any that plant there shall have occacon of carryeing of goods thither, they shall repaire to two of the nexte magistrates where the teames are, whoe shall haue power for a yeare to presse draughts, att reasonable rats, to be payde by the owners of the goods, to transport their goods thither att seasonable tymes; & the name of the place is changed, & hereafter to be called Concord. Further, it is agreed, that, hereafter, noe dwelling howse shalbe builte above halfe a myle from the meeteing howse, in any newe plantacon, graunted att this Court, or hereafter to be graunted, without leaue from the Court, (except myll howses & fferme howses of such as have their dwelling howses in some towne;) Ipsw^{ch}, Hingham, Neweberry, & Waymothe to be included in this order.⁵¹

⁴⁸ See Chapter Three.

⁴⁹ Josiah Quincy, *A Municipal History of the Town and City of Boston* (Boston: Charles C. Little and James Brown 1852) c 1. See W Nelson (n 46) 67-68.

⁵⁰ See George Lee Haskins, *Law and Authority in Early Massachusetts* (University Press of America 1985).

⁵¹ Att the Genrall Court, holden att Newe Towne (2 September 1635) RCMB 1.

It was a far-reaching order of local governance and organization, however, it did not incorporate these towns into separate legal entities existing by the ultimate authority of the metropolitan government, most particularly, the Crown. It was an organizational framework that maintained the supremacy of the General Court.⁵² Similarly, to the east, the Plymouth Colony formed informal townships rather than attempting to incorporate a municipality. Take for example Plymouth Colony's formation in 1637 of the Town of Duxbury (formerly Ducksborrow):

It is enacted by the court that Ducksborrow shall become a township, and vnite together for their better securitie, and to haue the p^rueledges of a town; onely their bounds & limmite shalbe sett and appoynted by the next Court.⁵³

The language used does not appear to create a separate legal corporation but rather organizes an association, a community. Interestingly though, the modern town of Duxbury still claims this date of 1637 as its date of 'incorporation'. Moreover, 71 other towns and cities in present-day Massachusetts claim an incorporation date prior to 1714,⁵⁴ and yet, like Duxbury, none appear to possess a foundational document of the stated date declaring the intention to form a separate corporate entity regardless of its source of authority. The reference to a date of 'incorporation' in this instance seems more likely a foundation date and corporation being used metaphorically rather than a precise legal definition.

⁵² In 1641 the northern proprietary neighbor of the Massachusetts Bay Colony, Gorges' Maine, incorporated the municipal corporation of 'The Planters and Inhabitants of Acomenticus'. Although Maine would be subsumed by the Massachusetts Bay Colony for a period in 1652, the long and complicated legal relationship between the colonies means that a proper discussion of Acomenticus is better left for the longer version of this work.

⁵³ 'At the Genrall Court of or Souraigne Lord, the Kinge, holden at New Plymouth the viith Day of June, in the xiiiith Yeare of the Raigne of our Souraigne Lord, Charles, by the Grace of God of England, Scotland, France, & Ireland, Kinge, Defendor of the Fayth, &c.' in Nathaniel Bradstreet Shurtleff (ed), *Records of the Colony of New Plymouth in New England 1633-1640*, vol 1 (Boston: William White, printer to the commonwealth 1835).

⁵⁴ Secretary of the Commonwealth of Massachusetts, 'Massachusetts City and Town Incorporation and Settlement Dates' <<http://www.sec.state.ma.us/cis/cisctlist/ctlistalph.htm>> (accessed 29 July 2015).

The reality was that in both the Massachusetts Bay Colony and the Plymouth Colony, settlements began with small groups of families moving outside of existing town boundaries to form satellite communities. Settlement patterns influenced the need for organizing local governments. Moreover, these towns were small. For example, Boston, only had a population of six thousand in 1687. That was one-eighth of the population of the Massachusetts Bay Colony.⁵⁵ But there was a strong merchant class in the largest of the towns, Boston, Charlestown, and Salem; a group that would not be in favor of the closer inspection of the Crown through a municipal corporate charter.⁵⁶ There were no local private interests being brought together by a common interest until the foundation of the college in Cambridge.

V. The Bold Colonial Corporate Anomaly

The execution of Charles I on 30 January 1649 began the eleven-year Interregnum period, during which a Commonwealth was established. Until the creation of the Protectorate under Oliver Cromwell in 1653, English executive authority was now vested in the Council of State elected by Parliament. It seems no coincidence that during this three-year period, the Massachusetts General Court would assume and assert an exclusive authority to incorporate in the Massachusetts Bay Colony, exploiting the limbo of legal control during the revolutionary period.

⁵⁵ Boston would not be incorporated until 1822. The historian Josiah Quincy observed an isolated, and unsuccessful, colonial promotion for incorporation its 1667:

[T]his desire [to incorporate] had probably no connection with any discontent at that self-government which a town organization secured to its inhabitants; but exclusively with that of getting rid of the Court of Sessions, whose authority it was thought might more properly be vested in the selectmen, and give more efficiency and uniformity to the town.

J Quincy (n 49) 16. See also A Rabushka (n 42) 148.

⁵⁶ B Bailyn (n 11) 96-98. There is room here for expansion with my planned future research of contemporary municipal charters of incorporation.

A. Harvard College

Similar to Virginia's early contemplation of a colonial college, a seminary and school for spreading Christianity among had been authorized early in the Massachusetts Bay Colony's existence. A 1637 meeting of the General Court records: '[t]he Colledge is ordered to bee at Newetowne.'⁵⁷ It was ultimately named Harvard College after donor, John Harvard, and on 31 May 1650, the General Court of the Massachusetts Bay Colony adopted, 'The Charter of the President and Fellows of Harvard Colledge, under the seal of the Colony of Massachusetts Bay' (the 'Harvard College Charter').⁵⁸ The charter's petitioner and first president, Henry Dunster⁵⁹ was said to have modeled the school on the ancient English colleges, particularly Eton and its recent donor's alma mater, Cambridge University.⁶⁰ It was intended as a seminary to provide a steady supply of ministers for the colonial churches.⁶¹ The brief text of the Harvard College

⁵⁷ A Generall Court, held at Newetowne (2 September 1637) RCMB 1.

⁵⁸ 'The Charter of the President and Fellows of Harvard Colledge, Under the Seal of the Colony of Massachusetts Bay, and Bearing the Date of May 31st, A.D. 1650' (*Online Resources, Harvard University Archives*) <<http://library.harvard.edu/university-archives/using-the-collections/online-resources/charter-of-1650>> accessed 30 September 2014 (the 'Harvard College Charter'). The authoritative historian of Harvard College is still Samuel Morison. Samuel Eliot Morison, *The Founding of Harvard College* (Cambridge: Harvard University Press 1935); Samuel Eliot Morison, *Harvard College in the Seventeenth Century* (Cambridge: Harvard University Press 1936).

⁵⁹ The General Court's records the original petition as put forward by Henry Dunster, the first president of the university:

'In answer to the petico of Henry Dunster, psident of Haruard Colledge, in Cambridge, with relation to his desire in fine pticulers, viz, first for the graunt of a corporation for the well ordering & managing the affayres belonging to the colledge, the Court is ready to graunt a corporation to the colledge, so as meete psons be psented to the Courte, [with] a draught of their power & libtie...'

(23 May 1650) RCMB 1, 207-08. None of the great histories of Harvard University, such as those by Samuel Morison, give a definite author for its charter simply mention of Dunster as the petitioner. This would seem an interesting future archival project to determine the exact authors of this document, particularly in light of the number of lawyers on the General Court.

⁶⁰ Samuel Eliot Morison, *Three Centuries of Harvard, 1636-1936* (Cambridge: Belknap Press of Harvard University Press 1936) 3-12 (discussing the great number of Oxford, Cambridge, Trinity, and Eton alumni that were involved in the early few years of the college).

⁶¹ Francis Bremer, *The Puritan Experiment: New England society from Bradford to Edwards* (Hanover, NH: University Press of New England 1995) 109.

Charter is noteworthy as much as for what it implies as for what it includes in its three provisions.

i. The Incorporating Provision

The first provision of the Harvard College Charter closely tracks the Incorporating Provision that has been repeatedly discussed. It begins with the statement of corporate purpose:

Whereas, through the good hand of God, many well devoted persons have been, and daily are moved, and stirred up, to give and bestow, sundry gifts, legacies, lands, and revenues for the advancement of all good literature, arts, and sciences in Harvard College, in Cambridge in the County of Middlesex, and to the maintenance of the President and Fellows, and for all accommodations of buildings, and all other necessary provisions, that may conduce to the education of the English and Indian youth of this country, in knowledge and godliness:⁶²

This language of purpose is very similar to that appearing in the later College of William and Mary Charter of 1693.⁶³ It is for the purpose of educating the English and the local population as well as evangelizing. The Christian mission of the school is much more pronounced in these charters than with, for example, the School of Bradford, founded in post-Restoration 1662 by royal charter (the ‘School of Bradford Charter’).⁶⁴ As previously mentioned, there the corporate purpose was more simply, ‘for the better teaching, instructing, and bringing up of Children and Youth in Grammar and other good Learning and Literature, for divers other good causes and considerations....’⁶⁵ Though, the spreading of Christianity seems given the religious

⁶² Harvard College Charter s 1.

⁶³ College of William and Mary Charter ss 1-2.

⁶⁴ School of Bradford Charter reprinted in W Claridge (ed), *Origin and History of the Bradford Grammar School: from its Formation to Christmas, 1882* (Bradford: J Green 311 Manchester Road) Appendix 1 (the ‘School of Bradford Charter’).

⁶⁵ *Ibid* I.

passion the colony is known to possess.

Critically, as a source of authority for this incorporation, the Harvard College Charter places the authority to incorporate in the executive authority of the General Court with no mention of their metropolitan government:

It is therefore ordered, and enacted by this Court, and the authority thereof, that for the furthering of so good a work and for the purposes aforesaid, from henceforth that the said College, in Cambridge in Middlesex, in New England, shall be a Corporation, consisting of seven persons... shall for ever hereafter, in name and fact, be one body politic and corporate in law, to all intents and purposes; and shall have perpetual succession; and shall be called by the name of President and Fellows of Harvard College, and shall, from time to time, be eligible as aforesaid.⁶⁶

Once again, Coke's essential elements from *Sutton's Hospital*⁶⁷ are recited: the authority to incorporate; the purpose for incorporation; the corporate name; the corporate domicile; and the corporate membership. The Harvard College Charter describes the inherent features of the corporate franchise to be enjoyed by Harvard College, specifically legal separation from its members and perpetual succession. This Incorporating Provision also includes recitation of the corporate power to legally bind itself by a corporate seal.⁶⁸ Derivative incorporations were acceptable to common law during this period. However, unlike those examples, the Massachusetts General Court asserts in this Harvard College Charter that it possesses the sole authority to incorporate and it is not a power derived from their charter, or at the behest of Parliament, or any other reference to a higher sovereign authority.

As a final note, the property rights of Harvard College first appear in the concluding lines of the Incorporating Provision:

And by that name they, and their successors, shall and may purchase

⁶⁶ Harvard College Charter s 1.

⁶⁷ *Sutton's Hospital* 29b.

⁶⁸ Harvard College Charter s 2.

and acquire to themselves, or take and receive upon free-gift and donation, any lands, tenements, or hereditaments, within this jurisdiction of the Massachusetts, not exceeding the value of five hundred pounds per annum, and any goods and sums of money whatsoever, to the use and behoof of the said President, Fellows, and scholars of the said College: and also may sue and plead, or be sued and impleaded by the name aforesaid, in all Courts and places of judicature, within the jurisdiction aforesaid.⁶⁹

The provision states the ability of this corporation to hold real or personal property with an annual value of up to five hundred pounds. It also states that the corporation may enforce its corporate rights within the jurisdiction of the General Court. Perhaps the argument would have been that the Harvard College Charter did not claim to incorporate an English corporation, but only a Massachusetts Bay Colony corporation.

ii. Ancillary Corporate Rights and Privileges

The Harvard College Charter briefly touches on the management of the entity and property ownership. With respect to the former, embedded within the Incorporating Provision is a bare description of the internal management structure of the entity:

[A] Corporation, consisting of seven persons, a President, five Fellows, and a Treasurer or Bursar: and [certain named individuals], all of them being inhabitants in the Bay, and shall be the first seven persons of which the said Corporation shall consist: and that the said seven persons, or the greater number of them, procuring the presence of the Overseers of the College, and by their counsel and consent, shall have power, and are hereby authorized, at any time or times, to elect a new President, Fellows, or Treasurer, ...⁷⁰

The seven corporate members shall serve as the officers of the corporation, answerable to the Overseers of the college, the visitors of the college. The third provision of the Harvard College Charter charges corporate management with the broad duty to act in the best interest of the corporation and to hold regular meetings upon proper notice:

⁶⁹ Harvard College Charter s 1.

⁷⁰ Ibid 3.

And the President and Fellows, [may] make, from time to time, such orders and by-laws, for the better ordering, and carrying on the work of the College, as they shall think fit: Provided, the said orders be allowed by the Overseers . . . [and] shall and may, from time to time, upon due warning or notice given by the President to the rest, hold a meeting, for the debating and concluding of affairs concerning the profits and revenues of any lands and disposing of their goods, (provided that all the said disposings be according to the will of the donors:) ...⁷¹

The Harvard College Charter then imposes a general fiduciary responsibility on its officers to act in the best interest of the educational corporation, including the use of its funds.⁷² The charter contains no discussion of specific duties or spheres of responsibility for the appointed officers. Those details are presumably left to the discretion of management and the oversight of the Overseers, an undefined tier of management that history tells us were intended to be the elite of the Massachusetts Bay Colony.⁷³ The corporate officers are granted the right to act on behalf of Harvard College and the entity is exempted from tax on all property with an annual value up to five hundred pounds.

And also, that the President and Fellows, or major part of them with the Treasurer, shall have power to make conclusive bargains for lands and tenements, to be purchased by the said Corporation, for valuable considerations....And that all the aforesaid transactions shall tend to, and for the use and behoof of the President, Fellows, scholars, and officers of the said College, and for all accommodations of buildings, books, and all other necessary provisions, and furnitures, as may be for the advancement and education of youth, in all manner of good literature, arts, and sciences.... all the lands, tenements, or hereditaments, houses, or revenues, within this jurisdiction, to the aforesaid President or College appertaining, not exceeding the value of five hundred pounds per annum, shall, from henceforth, be freed from all civil impositions, taxes, and rates; all goods to the said Corporation, or to any scholars thereof appertaining, shall be exempted from all manner of toll, customs, and excise whatsoever.⁷⁴

⁷¹ Ibid s 3.

⁷² In nine years time, Sheppard would observe that it was common to include a declaratory provision that, 'if the Revenues increase, they shall be employed to the publique use of the Corporation' Sheppard's 1659 Corporate Treatise 41.

⁷³ T Hutchinson (n 3) 159-60; SE Morison, *Harvard College in the Seventeenth Century* (n 58). See also SE Morison, *Builders of the Bay Colony* (n 14) ch 6.

⁷⁴ See also Harvard College Charter s 3.

The General Court used the grant of economic privilege in order to provide public support for the corporation. It also grants generous exemptions to support the officers of the new college:

And that the said President, Fellows, and scholars, together with the servants, and other necessary officers to the said President, or College appertaining, not exceeding ten, viz. three to the President, and seven to the College belonging, shall be exempted from all personal civil offices, military exercises, or services, watchings, and wardings: and such of their estates, not exceeding one hundred pounds a man, shall be free from all country taxes, or rates whatsoever, and none others.⁷⁵

Note the concluding lines of this provision. The corporate officers are exempted from local public responsibilities, such as military service, as well as certain colonial taxes. It was certainly a demonstration of the high esteem these positions were held. There was no similar exemption appearing in either the School of Bradford Charter or the College of William and Mary Charter.

Finally, the precarious position of Harvard College as a corporation was likely appreciated by the General Court. When the General Court compiled the laws of the Massachusetts Bay Colony in 1660 to be submitted to the newly restored Stuart Crown, mention was made of Harvard College but there was no mention of its corporate status.⁷⁶

B. A Possible Public Utility Corporation

The General Court appears to have made a second attempt at incorporation in June of 1652. The records of the their meeting reveal:

⁷⁵ Ibid s 3.

⁷⁶ See 'Laws of 1660' in *The Colonial Laws of Massachusetts: reprinted from the edition of 1660, with supplements to 1672, containing also, The Body of Liberties of 1641* (Boston: William H. Whitmore, Record Commissioner 1889); John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of their Relation to the Authority of the State*, vol 1 (New York: G.P. Putnam's Sons 1905) 11, 409. See *Publications of the Colonial Society of Massachusetts*, vol 11 (Boston: Publications of the Colonial Society of Massachusetts 1910) 198.

[I]n answe^r to the petition of the inhabitants of the Conduite Streete in Boston, the Court doth graunt their request, that whereas [certain named individuals] tooke into serious consideration their oune [necessities] for the dayly use of fresh water for their several families, and especially the eminent dainger if any scathfier should happen amongst them, (w^{ch} God forbid,) having no water in any readines at all times to bestede them in such extreame dainger, and duely weighing that the procuring of water into the said streete, not only to be a burden to heavy for any one to beare, but the priviledge to be to great for any one solely to enjoy, itt is therefore ordered and enacted by this Courte and the authoritie thereof, that from henceforth the said inhabitants above mentioned shallbe a corporation, and incorporated into one body or company . . . ⁷⁷

The corporate purpose is one of general fire safety, but what is particularly fascinating is the reason for incorporation rather than remaining an informal group. The defined corporate purpose of fire protection is too burdensome for one individual to bear, but the attending corporate rights and privileges are too great for only one person to enjoy. It is also fascinating that the term corporation is consciously used but the formula of the Incorporating Provision that had just appeared in the Harvard College Charter is not. Neither a corporate name nor perpetual succession is provided for in this record.

The General Court minutes continue, requiring an annual meeting of the corporation and the election of governing officials to be called wardens to be charged with coordinating and maintaining the public water utility through public taxes.⁷⁸ These wardens are also granted the power to detain persons for nonpayment as well as to bring suit in the name of the corporation against any individual 'corrupting, wasting, or spoyling' the project.⁷⁹ Membership was open to any proprietor along Conduit Street with majority approval of the existing membership.⁸⁰ Although there is some history of the benefits of the public utility there is no further mention of its corporate status.

⁷⁷ Att a Generall Courte of Elections, held at Boston, 26 May, 1652 (1 June 1652) RCMB 1.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

There was no formal charter or any further record of the corporate status of the public utility. There is a sketch history of the benefits it provided, the fires it put out, and secondary evidence that it was in operation in 1737, or even perhaps 1763, but no further details seem currently available as to the possibility of its corporate form.⁸¹

The point to be taken from these two examples, is the desirability of the corporate form existed for certain groups under certain conditions in the Massachusetts Bay Colony. A colony that was founded by the corporate model eschewed any further incorporations except during this three year window of uncertain executive authority in England. Harvard College and the public utility could have been organized as partnerships or trusts, but they were not. The corporation was the preferred tool for organizing aspects of colonial life but for Massachusetts it was only to the extent that the incorporation emanated from the General Court and not from a metropolitan government.

VI. The Dissolution of the Massachusetts Bay Company

The Massachusetts Bay Company survived the *quo warranto* proceedings of 1635, and decades of a strained relationship between the colony and its metropolitan government.⁸² In the post-Restoration era of Charles II, however, the Massachusetts Bay Company finally reached the limits of its freedom and autonomy.⁸³ This period had already been marked by the Crown's efforts to gain control of Parliament through

⁸¹ *Publications of the Colonial Society of Massachusetts* 310-14.

⁸² See for example A Rabushka (n 42) (stating that the Massachusetts Bay Colony was the most troublesome of the North American colonies in terms of tax collection).

⁸³ Richard L Bushman, *King and People in Provincial Massachusetts* (Chapel Hill: University of North Carolina Press 1985) 11-14.

a steady stream of *quo warranto* proceedings against unruly municipal corporations, such as London.⁸⁴ Coming in the midst of these cases, the Lords of Trade reported to the Privy Council on 11 March 1681/2, that the Crown would instigate *quo warranto* proceedings against certain individuals of the Massachusetts Bay Company:

Upon consideration whereof his Majestie in Council was pleased to Order and it is hereby Ordered accordingly that the said Agents or Messengers doe forthwith procure from his Majesties Governour and Company of the Massachusetts Bay Sufficient Commission and full powers to agree upon the regulation of that Government and to consent to such matters as shalbe thought necessary pursuant to his Majesties Letters to that Colony, and that in the mean time the said Agents continue their attendance here; And in case of Neglect or failure in the particulars above mentioned His Majestie was pleased to decliare that he would cause a Quo Warranto to be brought against the said Governour and Company for the abuses of their Charter, upon the first day of Hilary Terme next.⁸⁵

The charges against the Massachusetts Bay Colony differed from its English counterparts in that they were based on a claim of usurpation of the royal prerogative.⁸⁶

Sir Edward Randolph was sent to Massachusetts in 1683 to deliver the Royal Proclamation announcing *quo warranto* proceedings against the Massachusetts Bay Company had begun in London but assuring the colonists that their private property interests would be protected no matter the outcome of the result:

Although wee haue thought fit to issue our writ of quo warranto against the charter and priuiledges claymed by the Gouno^r and Company of the Massachusetts Bay in New England, by reason of some crjmes and misdemeano^s by them comitted, yet our will and pleasure is, and wee doe hereby declare, that the privat interests and proprietjes of all persons within that our colony shall be continued and preserued to them, so that no man shall receive any prejudice in his [freehold] or estate; and that, in case the said corporation of the Massachusetts Bay

⁸⁴ See generally Paul Halliday, *Dismembering the Body Politic* (Cambridge: Cambridge University Press 1998); Jennifer Levin, *The Charter Controversy in the City of London 1660-88* (London: Humanities Press International 1969).

⁸⁵ (11 March 1681/2) APCC 2: 1680-1720.

⁸⁶ T Hutchinson (n 3) 310-314; WH Whitmore (ed) *The Andros Tracts: Being a Collection of Pamphlets and Official Papers*, vol 3 (Boston: Prince Society 1874). See also Journal of Lords of Trades and Plantations (8 April 1678) CSPC 10: 1677-1680 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol10/pp232-251> (accessed 4 August 2015) 653.

shall, before further prosecution had vpon the sajd quo warranto, make a full submission and entire resignation to our pleasure, wee will then regulate their charter in such manner as shall be for our service and the good of that our colony, withouth any other alterations then such as wee shall find necessary for the better support of our gouernment there. And wee doe hereby further declare and direct, that all those persons who are question in or by the saijd quo warranto, and shall goe about to mainteyne the suite against us, shall make their defence at their oune particular charge, wthout any help by, or spending any part of, the publick stock of our sajd colony; and that as well as those that are not freemen as such as are willing to submit to our pleasure shallbe discharged from all rates, levjes, and contributions towards the expence of the sajd suite, both in their persons and estates.⁸⁷

Lest the General Court thought it could dismiss these proceedings as it had done in 1635, Charles II included an order with his proclamation that: ‘two hundred copies of all the proceedings at the council board concerning the charter of London, which were printed by order of his maj^{ty} at this board, to be dispersed by him in New England.’⁸⁸ The true reality was that the Crown had no intention of permitting the colony to correct its ways. The General Court had barely received notice of the *quo warranto* proceedings charging it of usurpation of Crown authority, when a final judgment by writ of *scire facias* was entered against the Massachusetts Bay Company in the Court of Chancery and the corporation was immediately dissolved.⁸⁹ The dissolution of the Massachusetts Bay Company and revocation of the Massachusetts Bay Charter also called into question the legal status of the prized Massachusetts corporation, Harvard College.

⁸⁷ Att a Gennerall Court called to sitt in Boston 7th November, 1683, by order from the Gounor & Magests, met in Boston, & then satt. (7 November 1683) RCMB 5.

⁸⁸ Ibid.

⁸⁹ Order for bringing a Quo Warranto (13 June 1683) CSPC 12: 1685-1688 and Addenda 1653-1687; Mr Randolph to go to New England with a notification of the Quo Warranto (20 July 1683) CSPC 12: 1685-1688 and Addenda 1653-1687. See T Hutchinson (n 3) 301-14.

VII. A New Provincial Charter and the Uncertain Legal Status of Harvard College

Following the revocation of the Massachusetts Bay Charter, the Massachusetts Bay Colony was left without a charter and in a state of legal limbo much like that of Virginia after the 1624 dissolution of the Virginia Company. This was not to last long, for in 1686, James II appointed Sir Edmund Andros as the Governor of a newly created Dominion of New England, which centralized the administration of several North American colonies, including the Massachusetts Bay Colony.⁹⁰

At the ascension of William III and Mary II to the throne in 1688, Reverend Increase Mather, minister of the Second Church in Boston and a member of Harvard College was sent on behalf of the Massachusetts Bay Colony to petition for a reissuance of the corporate colonial charter, confirmation of the Harvard College Charter, and the dismissal of Governor Andros.⁹¹ In 1689 the Dominion of New England was dissolved and on 7 October 1691 the Crown issued a new charter (the 'Massachusetts Provincial Charter') combining the Massachusetts Bay Colony with Plymouth Colony into a single royal province of Massachusetts Bay (the 'Massachusetts Province').⁹² This Massachusetts Provincial Charter was not the corporate franchise for which the Massachusetts Bay Colony had planned and hoped. The charter begins with return to James I's original grant to the Council for New England on 3 November 1620:

[O]f land Forty Degrees of Northerly Latitude from the Equinoctial Line to the Forty Eighth Degree of the said Northerly Latitude

⁹⁰ See RL Bushman (n 83) 122-132.

⁹¹ See WH Whitmore, *Increase Mather, the Agent of Massachusetts Colony in England for the Concession of a Charter* (Boston: TR Marvin & Son 1869); 'The Province Charter (1689 -1715)' in Albert Bushnell Hart (ed), *Commonwealth History of Massachusetts*, vol 2 (1966) 1-28.

⁹² 'The Charter of Massachusetts Bay: 1691' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/mass07.asp> accessed 30 September 2014 (the 'Massachusetts Provincial Charter').

Inclusively... *Provided* alwayes that the said Lands Islands or any the premises by the said Letters Patents intended or meant to be Granted were not then actually possessed or Inhabited by any other Christian Prince or State or within the bounds Limitts or Territories of the Southern Collony then before granted by the said late King James the First...⁹³

As previously mentioned, this is a re-writing of history because there were pre-existing European claims to the land granted to the Council of New England, but confirming a continuous chain of royal authority was particularly important post-Restoration. The Massachusetts Provincial Charter also recounts the land granted from the Council for New England on 19 March 1627/8 to individuals incorporated into the Massachusetts Bay Company by the Massachusetts Bay Charter because the corporate form was preferential:

And to the end that the affaires and businesse which from time to time should happen and arise concerning the said Lands and the Plantacons of the same might be the better mannaged and ordered and for the good Government thereof Our said Royall Grandfather King Charles the First did by his said Letters Patents Create and make the said Sir Henry Roswell [... et al.] one Body Politique and Corporate in fact and name by the Name of the Governour and Company of the Massachusetts Bay in New England and did grant onto them and their Successors divers powers Liberties and priviledges as in and by the said Letters Patents may more fully and at large appears . . .⁹⁴

Then, the revocation of the corporate status of the colony due to the usurpation of prerogative rights is memorialized:

Judgment was given in Our Court of Chancery then sitting at Westminster upon a Writt of Scire Facias brought and prosecuted in the said Court against the Governour and Company of the Massachusetts Bay in New England that the said Letters Patents of Our said Royall Grandfather King Charles the First ... should be cancelled vacated and annihilated and should be brought into the said Court to be cancelled (as in and by the said Judgment remaining upon Record in the said Court doth more at large appeare)....⁹⁵

⁹³ Ibid 1.

⁹⁴ Ibid 1-2.

⁹⁵ Ibid 2.

The recitation of the history was important for two reasons. First, it traced the legal relationship between the Crown and the corporation ignoring any effect that the Interregnum Period might have had on that relationship. Second, it served as a reminder to the colonists that the corporate privilege had been permanently taken away for poor behavior: a parental-like scolding of the colonists. There is an acknowledgement of Increase Mather's efforts on behalf of the General Court to petition for a resumption of their corporate franchise:

And whereas severall persons employed as Agents in behalfe of Our said Collony of the Massachusetts Bay in New England have made their humble application vnto Vs that Wee would be graciously pleased by Our Royall Charter to Incorporate Our Subjects in Our said Collony and to grant and confirms Into them such powers priuiledges and Franchises as [in] Our Royall Wisdome should be thought most conducing to Our Interest and Service and to the Welfare and happy State of Our Subjects in New England and ...⁹⁶

The colonists at Plymouth Colony had also petitioned for incorporation presenting the corporation as a superior form of government both organizationally and fiscally:

Our good Subjects within Our Collony of New Plymouth in New England aforesaid may be brought under such a forme of Government as may put them in a better Condicon of defence and considering aswell the granting vnto them as onto Our Subejects in the said Collony of the Massachusetts Bay Our Royall Charter with reasonable Powers and Priuiledges will much tend not only to the safety but to the Flourishing estate of Our Subjects in the said parts of New England and alsoe to the advancing of the ends for which the said Plantancons were at first encouraged of Our especiall Grace certaine knowledge and meer Mocon have willed and ordeyned ...⁹⁷

However, the pleas for incorporation were not heeded by the metropolitan government.

This Massachusetts Provincial Charter did not create a corporation, but rather, a royal colony was created by the union of the Massachusetts Bay Colony and the Plymouth Colony.

⁹⁶ Ibid 2; W Whitmore (n 91).

⁹⁷ Massachusetts Provincial Charter (n 92) 2.

As for the status of Harvard College, the Massachusetts Provincial Charter briefly alludes to the existence of ‘Bodies-Politique or Corporate’ within the colony:

Provided neverthelesse and Wee doe for Us Our Heires and Successors Grant and ordeyne that all and every such Lands Tenements and Hereditaments and all other estates which any person or persons or Bodies-Politique or Corporate Townes Villages Colledges or Schooles doe hold and enjoy or ought to hold and enjoy within the bounds aforesaid by or vnder any Grant or estate duely made or granted by any Generall Court formerly held or by vertue of the Letters Patents herein before recited or by any other lawfull Right or Title whatsoever shall be by such person and persons⁹⁸

This is undoubtedly a reference to Harvard College. All the Crown would do is to confirm private property rights; it would not issue a charter of incorporation nor a confirmation of incorporation to Harvard College.⁹⁹ This provision of the Massachusetts Provincial Charter made no reference to whether Harvard College was in fact a corporation in the eyes of the metropole.

VIII. Further Attempts at Incorporating Harvard College

Harvard College during the seventeenth century was a Puritan college.¹⁰⁰ The concerns over its corporate status were rooted in desire to protect the religiously founded corporation from the metropolitan government and its Church of England.¹⁰¹ On 27 June 1692, the General Court took a proactive approach and passed ‘An act for incorporating of Harvard College, at Cambridge New England’ (the ‘Second Harvard College Charter’).¹⁰² The preamble was careful not to mention the Harvard College

⁹⁸ Ibid 3.

⁹⁹ W Whitmore (n 91).

¹⁰⁰ SE Morison, *Harvard College in the Seventeenth Century* (n 58).

¹⁰¹ W Whitmore (n 91) 6.

¹⁰² An Act for Incorporating of Harvard College, at Cambridge New England (27 June 1692) Acts and Resolves 1 (the ‘Second Harvard College Charter’).

Charter, and only described its previous form as being a ‘society’ formed for the employment and education of the colonists:

WHEREAS, there hath been for many years, in the town of Cambridge, in the county of Middlesex, in New England, a society commonly known by the name of Harvard College, where many persons of known worth have, by the blessing of Almighty God, been the better fitted for public employments, both in the church and in the civil state; and *whereas*, the due encouragement of all good literature, arts and sciences will tend to the honor of God, the advantage of the Christian Protestant religion, and the great benefit of their majesties’ subjects inhabiting this province, both in the present and succeeding generations : and considering that many persons have bestowed legacies, gifts, hereditaments and revenues of the said college...¹⁰³

In an obvious attempt at subservience, the Second Harvard College Charter recounts the establishment of a society for the Protestant education and religious fulfillment of the Crown's colonists. It was for that motivation and for the better protection of the college’s existing property, that the General Court, now attempting to act in its capacity as a colonial representative of the Crown, authorized the incorporation:

Be it therefore enacted and ordained by His Excellency the Governor, Council and Representatives of Their Majesties’ province of the Massachusetts Bay, in New England, convened in General Assembly, and by the authority thereof, it is enacted and ordained...¹⁰⁴

The opening statement is politically careful to note that the authority to incorporate is not derived of the General Court but from the Governor as representative of the Crown's authority. The charter then presents an Incorporating Provision reading:

That the said college, in Cambridge, in the county of Middlesex, in their majestie’s province of the Massachusetts Bay in new England, shall be a corporation consisting of ten persons... and they and their successors, shall forever hereafter, in name and fact, be one body politic an corporate in law, to all intents and purposes; and shall have perpetual succession, and shall be called by the name of the President and Fellows of Harvard College . . .¹⁰⁵

¹⁰³ Ibid preamble.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 1.

The Second Harvard College Charter, having named each essential element of incorporation, proceeds to list the intended rights and privileges to be granted this incorporation. The members may elect their own officers with due notice; the college may sue and plead or be sued and be impleaded; it may have a corporate seal; and the members may create bylaws to govern the college.¹⁰⁶

The Second Harvard College Charter imposes the fiduciary duty upon the corporate members to use donated funds in accordance with the wishes of the donors and with the goal of advancing the education purpose, similar to that found in the Crown's College of William and Mary Charter issued the next year in 1693.¹⁰⁷ Furthermore, the Second Harvard College Charter continues the arrangement made under the Harvard College Charter whereby financial support is granted to the corporation in the form of an exemption from provincial taxes. Note that the Second Harvard College Charter does not attempt to exempt the corporation from royal taxes due:

[A]ll the lands, tenements and hereditaments, houses or revenues, within said province, to the aforesaid president, fellows or college appertaining, shall from henceforth be freed from all public ordinary rates and taxes appertaining to the province in general.¹⁰⁸

The fourth section of the Second Harvard College Charter boldly asserts that Harvard College may grant degrees. This was not a corporate power granted under the College of William and Mary Charter, and it was a power challenged by the degree monopoly holders of Oxford University and Cambridge University.¹⁰⁹

¹⁰⁶ Ibid.

¹⁰⁷ Ibid 2; College of William and Mary Charter 4-5, 21.

¹⁰⁸ Second Harvard College Charter (n 102) 3.

¹⁰⁹ SE Morison, *Harvard College in the Seventeenth Century*. The General Court specifically stated that Harvard College would not have the corporate power of degree conferral.

The Second Harvard College Charter was short-lived, it was ultimately disallowed by the Privy Council because neither the Crown nor Governor was appointed visitor.¹¹⁰ Note, however, that the Crown did not deny the capacity of the General Court to incorporate a college. Simply that incorporations would be subject to royal oversight. A third attempt at incorporation was made by the General Court on 4 June 1697, 'An act for incorporating Harvard Colledge, at Cambridge, in New England' (the 'Third Harvard College Charter'). It was again disallowed by the Privy Council.¹¹¹

The Third Harvard College Charter had added a new provision stating:

That his majesty's governour and commander-in-chief of this province, and the council for the time being, shall bethe visitors of the said colledge or academy, and shall have, use and exercise a power of visitation as there shall be occasion for it.¹¹²

The General Court stubbornly granted the power of visitation to the Governor but not to the Crown, and so the act was repealed. It was pointedly explained:

Amongst the Acts repealed you will find that *for incorporating Harvard Colledge at Cambridge in New England*; And we having thereupon been particularly directed to signify to the Government of that Province the reason why the Act has been repealed : We desire your Lordship to inform the Council and General Assembly, when there shall be occasion, that it is because an Act formerly past in that Province to the same purpose having ... been repealed, And the reason thereof signified to the Lt Governor and Council of the sd Province.. Because no power was therein reserved to this Majestie to appoint Visitors for the better regulating of the said College . . . Yet, nevertheless, in the passing of this said Act, that direction has not been observed; But instead thereof the power of visitation is not placed in his Majestie nor singly in his Maj^{ty}s Governor or Commander-in-Chief, but onely... together with the Council of that Province . . .¹¹³

¹¹⁰ Minute of Lords of Trade and Plantation (4 June 1695) CSPC 14: 1693-1696 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol14/pp495-513> (accessed 4 August 2015) 1,870. See CA Cooke, *Corporation Trust and Company* (Manchester: Manchester University 1950) (stating its necessity for corporate regulation by a visitor).

¹¹¹ Council of Trade and Plantations to the Lords Justices of England (28 November 1698) CSPC 16: 1697-1698 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol16/pp564-567> (accessed 4 August 2015) 1,021.

¹¹² *Ibid.*

¹¹³ Province Laws, 4th Sess, 1697 (Notes), Acts and Resolves 1. The visitorial office of the Crown was controversial throughout this period in England too, especially in the run-up to the Glorious Revolution

The General Court had refused to acknowledge the Crown's authority with respect to the colonial corporation, and the metropolitan government had refused to accept anything less than ultimate control.

Yet, Harvard College did not fail. In fact it continued and thrived throughout the colonial period. It was specifically provided for in the state constitution of 1780, which tellingly provided:

Whereas our wise and pious ancestors, so early as the year [1636], laid the foundation of Harvard College, . . . it is declared, that the president and fellows of Harvard College, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy all the powers, authorities, rights, liberties, privileges, immunities, and franchises which they now have, or are entitled to have, hold, use, exercise, and enjoy; and the same are hereby ratified and confirmed unto them, the said president and fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever.¹¹⁴

There is mention of the institution's foundation but none of the 1650 date of incorporation, nor any other incorporation date, just simply that is a corporation in 1780. The continued petitioning for a recognized corporation had demonstrated the perceived desirability of the form for protecting and encouraging the colonial interest in an educational institution. However, this passage demonstrates that for Massachusetts, a deviation from Coke's listed sources of authority had long since happened.

IX. Conclusion

The corporation in Massachusetts had a limited but important legal history. The modeling of the corporate form by Plymouth Colony and incorporation of the

as James II attempted to control the universities. Nathaniel Johnston, *The King's Visitation power asserted: being an impartial relation of the late visitation of St. Mary Magdalen College in Oxford: as likewise an historical account of several visitations of the universities and particular colleges: together with some necessary remarks upon the Kings authority in ecclesiastical causes, according to the laws and usages of this realm* (London: Henry Hills 1688).

¹¹⁴ Constitution of Massachusetts 1780, ch V s 1.

Massachusetts Bay Company to settle the Massachusetts Bay Colony meant that the corporate framework was integral to the early establishment and organization of the settlements. In particular, the terms of the Massachusetts Bay Charter shows the continuity and consistency with which the Incorporation Provision was used and would continue to be used during this period. The interesting twist occurs during the three years between the execution of Charles I and the creation of the Protectorate, when the General Court of the Massachusetts Bay Company assumed the exclusive authority to incorporate and created Harvard College as well as possibly a utility company to serve the public. These acts confirmed the perceived value of the corporation over other organizational forms—provided they might be formed locally, to serve local interests. As the later attempts at incorporating Harvard College evidence, the General Court of Massachusetts refused to share corporate authority with the Crown. The corporation in Massachusetts was not only a tool to protect private interests in establishing a settlement, or an educational institutional, or a public good; but in the latter two it was a political tool whereby the General Court of Massachusetts exercised a degree of independence from the colonial hierarchy well before 1776.

CHAPTER FIVE:

The Active Corporate Landscape of New York in the Stuart Age

The English colony of New York provides a further wrinkle in the evolution of the corporation as it transplanted to British colonial North America. The Massachusetts Bay Colony and Virginia were each newly founded English corporate settlements with a relatively continuous history of English sovereignty and control. New York, by contrast, had not only been an established colony within the Dutch colonial empire, New Netherland, but it also included a settled Dutch and Swedish population, as well as English, inhabitants.¹ Moreover, the colony passed twice from Dutch to English hands between 1664 and 1674. The English common law operated here within an pre-existing colony with a small but diverse population and with an established economy and system of government that had arisen under a foreign power.² As an English colony it was under the direct control of a ducal proprietor who ascended the throne as James II on 6 February 1685. Its location in the heart of the fur trade network on the edges of New France and the Five Nations of the Iroquois, meant the colony was both strategically important to England and vulnerable to attack from its French competitors. The population was never given the degree of representative independence experienced by the corporate colonies of Massachusetts Bay and

¹ See Michael Kammen, *Colonial New York: A History* (Oxford: Oxford University Press 1996) 5-26, 37-43; Mark Meuwese, 'The Dutch Connection: New Netherland, the Pequots and the Puritans in Southern New England, 1620-1638' (2011) 9 *Early American Studies: An Interdisciplinary Journal* 295, 299-306 (discussing the conflicting claims of New Amsterdam with the New Englanders).

² The classic description of applicability of the English common law to conquered land is Blackstone. William Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, Oxford: Clarendon Press 1765-1769) 104-06. Recent examples of further reading on this issue include: Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Massachusetts: Harvard University Press 2004) 31-51; Gavin Loughton, 'Calvin's Case and the Origins of the Rule Governing "Conquest" in English Law' [2004] *Australian Journal of Legal History* 8; Ken MacMillan, *Sovereignty and Possession in the English New World: the Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press 2006).

Virginia.³ New York was decentralized to a degree as municipal and ecclesiastical corporations were the organizational building blocks rather than a centralized local general assembly. The municipal incorporations represented the aligned local and metropolitan interest in protecting and encouraging their mutually beneficial trade network into the interior of North America; the ecclesiastical corporations embodied their alignment for the pursuit of establishing and expanding the Protestant faith against the looming Catholic New France.

I. The Existing Dutch Settlement of New Netherland

The English province of New York had originally been part of the Dutch trading colony of New Netherland.⁴ Following the region's exploration by Henry Hudson in 1609, on 11 October 1614 the States-General of the Netherlands granted a group of pre-eminent citizens exclusive trading privileges in the colony to be known as New Netherland.⁵ The valuable monopoly was intended as compensation for the 'great expenses and damages by loss of ships and other dangers' incurred during the exploration of the North American trade route. The grant provides:

by these presents [we] do consent and grant, to the said petitioners now united into one company that they shall be privileged exclusively to frequent or cause to be visited the above newly discovered lands, situate

³ M Kammen (n 1) 76.

⁴ Michael Kammen noted the settlement of New Netherland occurred:

By more than mere accident, the brief truce between Spain and the northern Netherlands (1609-1621) coincided exactly with Henry Hudson's great voyage of discovery in 1609 and the chartering of the Dutch West India Company in 1621. These two events, more than any others, made possible the settlement of New Netherland, and they occurred because the Dutch desired to best their former Iberian overlords.

Ibid (n 1) 20-23.

⁵ 'Grant of Exclusive Trade to New Netherland by the States-General of the United Netherlands: 11 October 1614' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/charter_011.asp> accessed 24 May 2014).

in America between New France and Virginia, whereof the sea coasts lie between the fortieth and forty-fifth degrees of latitude, now named New Netherland, as can be seen by a figurative map hereunto annexed, and that for four voyages within the term of three years, commencing the first of January, sixteen hundred and fifteen next ensuing, or sooner, without it being permitted to any other person from the United Netherlands, to sail to, navigate, or frequent the said newly discovered lands, havens, or places, either directly or indirectly within the said three years, on pain of confiscation of the vessel and cargo wherewith infraction hereof shall be attempted, and a fine of fifty thousand Netherland ducats for the benefit of said discoverers or finders....⁶

The monopoly, however, expired in 1618 and was ultimately bestowed upon another group of traders, the Dutch West India Company (the 'WIC'). In its charter of incorporation issued in 1621 (the 'WIC Charter') the entity is given sweeping trade monopoly for 24 years and covering Dutch trading networks throughout the Americas and West Africa.⁷ The focus for the Dutch settlement in New Netherland was trade along the Hudson River. It chose for itself a location convenient to the French in Canada, the Five Nations of the Iroquois in modern upstate New York, and the Atlantic Ocean. The second provision of the WIC Charter describes the broad corporate purpose as follows:

That, moreover, the aforesaid Company may, in our name and authority, within the limits herein before prescribed, make contracts, engagements and alliances with the limits herein before prescribed, make contracts, engagements and alliances with the princes and natives of the countries comprehended therein, and also build any forts and fortifications there, to appoint and discharge Governors, people for war, and officers of justice, and other public officers, for the preservation of the places, keeping good order, police and justice, and in like manner for the promoting of trade; . . . Moreover, they must advance the peopling of

⁶ Ibid.

⁷ 'Charter of the Dutch West India Company: 1621' (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/westind.asp> accessed 24 May 2013 (the 'WIC Charter'). See Ron Harris, 'Law, Finance and the First Corporations' in James L Heckman, Robert L Nelson and L Cabatingan (eds), *Global Perspectives on the Rule of Law* (Abingdon: Routledge-Cavendish 2009) (discussing the early years of the Dutch commercial corporations in comparison with the English trading giant, the East India Company). See also Alvin Rabushka, *Taxation in Colonial America* (Princeton: Princeton University Press 2008) 39 (detailing the true financial value of the monopoly). See generally Thomas J Condon, *New York beginnings: the commercial origins of New Netherland* (New York: New York University Press 1968); Oliver A Rink, *Holland on the Hudson: an economic and social history of Dutch New York* (Ithaca: Cornell University Press 1986).

those fruitful and unsettled parts, and do all that the service of those countries, and the profit and increase of trade shall require: and the Company shall successively communicate and transmit to us such contracts and alliances as they shall have made with the aforesaid princes and nations; and likewise the situation of the fortresses, fortifications, and settlements by them taken.⁸

The subsequent 43 provisions of the WIC Charter provide intricate details on the management structure, financial accounting, and meeting organization, among other commercial specifications for the entity, but little mention of the intended corporate powers or privileges with respect to the governance of a colonial settlement.⁹ In contrast to its English contemporaries, the colony is further expanded by way of treaty and purchase directly between the WIC and the Native American populations. For example, the corporation purchased rather than conquered the island of Manhattan from the Lenape in 1626.¹⁰

Under the control of the WIC, the province at New Netherland was settled by those willing to transport themselves to North America. Property was granted directly by the WIC to the settlers and subject to the company's stringent parameters of ownership.¹¹ The relative economic and social stability in the States-General of the Netherlands in the early-mid seventeenth century, coupled with the WIC's miserly property scheme, meant that the Dutch middle classes had little incentive to, and in fact did not, emigrate to the new colony.¹² It was because the colony was well positioned

⁸ WIC Charter (n 7) s 1.

⁹Ibid ss 11-14, 15-17, 17-24, respectively.

¹⁰ 'Notification of the Purchase of Manhattan by the Dutch: November 5, 1626' <http://avalon.law.yale.edu/17th_century/charter_015.asp> accessed 30 September 2014, 5 November 1926. See Robert Steven Grumet, *The Munsee Indians: a history* (Norman: University of Oklahoma Press 2009) 52-53 (describing the Dutch practice of purchasing land from the Munsee). See generally Mark Meuwese, *Brothers in Arms, Partners in Trade: Dutch-Indigenous alliances in the Atlantic World, 1595-1674* (Boston: Brill 2012) (n 1).

¹¹ Jaap Jacobs, 'Dutch Proprietary Manors in America: The Patroonships in New Netherland' in LH Roper and Ruymbeke (eds), *Constructing Early Modern Empires: Proprietary Ventures in the Atlantic World 1500-1750* (Boston: Brill 2007) 304-05; M Kammen (n 1) 34.

¹² See J Jacobs (n 11).

along the Dutch North American trade route, established to compete with the Spanish empire, that the States-Generall itself had a vested interest in encouraging emigration. It intervened and forced the WIC to amend their property ownership policies.¹³

By the time of the English conquest, the WIC had all but lost interest in New Netherland. Its trade in West Africa was proving far more lucrative and the hopes for a booming trading colony in New Netherland had never quite come to fruition.¹⁴ The import of this background history for the transition into the English empire is that there were fewer than 9,000 settlers in New Netherland at the time of the English conquest in 1664. For perspective, New England was nearly five times larger.¹⁵ New Netherland was a population large enough to warrant a sophisticated local government under Dutch rule, but small enough that the steady influx of English settlers both from the motherland and from New England would facilitate the process of Anglicization.¹⁶ Moreover, as indicated above, it was a diverse colony. There was a Swedish population present in nearby New Sweden. There was a prolonged interaction with the English of New England as the Dutch were complicit in the circumvention of the Navigation Acts as well as general defense since they were neighboring colonies.¹⁷ The colonial sovereign borders were fluid and as a result so were their populations.

¹³ M Kammen (n 1) 34. See Christian J Koot, *Empire at the Periphery: British Colonists, Anglo-Dutch Trade, and the Development of the British Atlantic, 1621-1713* (New York: New York University Press 2011).

¹⁴ See J Jacobs (n 11) 324 (concluding that the patroonship scheme was a failure); Russell Shorto, *The Island at the Centre of the World: the untold story of Dutch Manhattan and the founding of New York* (New York: Doubleday 2004) 284-300.

¹⁵ M Kammen (n 1) 38 (observing that '[b]y contrast, the population figures for Virginia and New England in 1664 were about 40,000 and 50,000 respectively').

¹⁶ Ibid (n 1) 75.

¹⁷ See Minutes of the Council for Foreign Plantations (25 August 1662) CSPC 5: 1661-1668 available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol5/pp102-107> (accessed 4 August 2015) 357 (noting, 'a secret trade with the Dutch for tobacco of the growth of the English plantations, to the defrauding of his Majesty's Customs . . .'). See Mary Lou Lustig, *The Imperial Executive in America: Sir Edmund Andros, 1637-1714* (Madison, New Jersey: Fairleigh Dickinson University Press 2002) 42-44; M Kammen (n 1) 69-71.

II. The English Conquest in 1664

The Dutch and the English engaged in three successive wars during the latter half of the seventeenth century. At the onset of the Second Anglo-Dutch War, in March of 1664, the English laid claim to all of New Netherland.¹⁸ The inhabitants of New Netherland and New Sweden formerly surrendered in the autumn 1664.¹⁹ Charles II had already boldly granted the colony to his brother, James, Duke of York in May 1664.²⁰ The final Treaty of Breda ending the war and formally ceding title of New Netherland to the English would not be signed until 31 August 1667.

The province of New Netherland, now New York, was roughly located between New England in the North and Virginia in the South. The grant to the Duke of York was made before boundaries and sovereignty could be settled. The land was held privately by the WIC or private individuals. Moreover, there were questions of boundaries with New Sweden, as well as England's own New England, who fought Dutch claims to what is now Long Island.²¹ Ignoring these questions as to the actual limits of States-General sovereignty in New Netherland, Charles II gifted the renamed province of New York to his Catholic brother.

¹⁸ Mary Lou Lustig, *Privilege and Prerogative: New York's Provincial Elite, 1710-1776* (Madison, New Jersey: Farleigh Dickinson University Press 1995) 6 (telling how New Netherland was taken by Richard Nicolls for the Crown before Nicolls had even landed there).

¹⁹ Agreement between Sir Robert Carr and the Dutch and Swedes on Delaware River reprinted in John Romeyn Brodhead and Edmund B. O'Callaghan (eds), *Documents Relative to the Colonial History of the State of New York* (Weed, Parsons and Company, Printers 1853).

²⁰ Grant to the Duke of York (of New York) (16 March 1664), NYSA, Land Patents 12943-78, vol 1, roll 1 (microfiche) (the 'Grant to the Duke of York').

²¹ See J Jacobs (n 11); OA Rink (n 7).

The 1664 conquest arguably had little effect on the former colony of New Netherland beyond stifling trade.²² In fact, the colony was recaptured by the Dutch in 1673 only to be transferred back again to the English under the Treaty of Westminster in 1674.²³ Statistically speaking, New York would remain the least attractive of the Stuarts' North American colonies until after the Glorious Revolution and the reinstatement of the provincial charter in 1691.²⁴

There were six incorporations in the province of New York during the Stuart age: three municipal and three ecclesiastical corporations. The first of these, for the *Mayor, Alderman, and Commonality of the City of New York* ('New York City') would not be issued until 16 April 1686, after the Duke of York assumed the throne as James II,²⁵ but his direct claim to the region originated with the original transfer to him made by his brother Charles II. As such, the analysis begins with this, the shortest and most expansive proprietary grant in the colonies during the Stuart period. The *Grant to the Duke of York (of New York)* dated May 1664 (the 'Grant of New York') described the broad metes and bounds of the territory the English had considered New Netherland, with reference to the boundaries of bordering English possessions. It begins:

All that part of the maine Land of New England beginning at a Certaine place called or knowne by the Name of S^t Croix next adjoynning to new Scotland in America and from thence called Petuaquine or Pemaquid and so up the ~ River thereof to the furthest head of ye same as it tendeth ~ Northwards and extending from thence to the River Kinebequi and so Upwards by the Shortest Course to the River Candada Northward And also all that Island or Islands commonly called by the severall name or Names of Matowacks or Lond Island Scituate lying and being towards the West of Cape Codd and y^e narrow

²² ML Lustig, *The Imperial Executive in America: Sir Edmund Andros, 1637-1714* (n 17) 48; M Kammen (n 1) 72.

²³ R Shorto (n 14) 284.

²⁴ M Kammen (n 1) 44-48.

²⁵ City of New York, Mayor, Aldermen, and Commonalty, A Charter constituting them a body politic (27 April 1686) NYSA, Land Patents 12943-78, vol 5, roll 2 (microfiche) (the 'New York Municipal Charter Manuscript').

Higansetts abutting upon the maine Land between the two Rivers there called or knowne by the severall Names of Conecticut and Hudsons River and all the Land from the west side of Conecticut to ye East side of Delaware Bay And also all those severall Islands called or knowne by the Names of martins Vinyard and Natuckes otherwise Natuckett . . .²⁶

However, the bounds of the province of New York were uncertain. There was no acknowledgement of any claims made to the land by the WIC, the Swedes, or even the province of New England. The English recognition of a potential claim by the WIC for this land is evidenced by its status as a signatory to the Articles of Surrender signed in August of 1664 ('Articles of Surrender'):

1. The States General or West India Company shall freely enjoy all farms and houses (except those in the forts), and within six months have liberty to transport all their arms and ammunition or else be paid for them.... 3. All people shall continue free denizens, and enjoy their lands, houses, goods, &c.... 11. The Dutch shall enjoy their own customs concerning inheritances. 12 All public records shall be carefully kept by those in whose hands they now are; such as particularly concern the States General may be sent to them... 15. If there is a public engagement of debt by the town of Manhatoes, and a way agreed on for satisfying it, the same way shall go on. 16. All inferior officers and magistrates shall continue till the customary time of new election, and then new ones be chosen, who shall take the oath of allegiance to his Majesty of England. 17. All differences of contracts made before this day shall be determined according to the manner of the Dutch. 18. If it appear that the West India Company of Amsterdam owe any money to persons here, the duties payable by ships going for the Netherlands shall be continued six months longer....²⁷

The English wanted to bind the WIC to the Articles of Surrender to minimize the risk of later claims to private property rights in the province. Their rights of private property, inheritance, contracts, etc., would be respected but gradually replaced by English common law norms. It is not entirely clear, however, to what extent if at all, the Articles of Surrender would conflict with or limit the imposition of English common law.

²⁶ Grant of New York 1.

²⁷ Articles consented to by the persons hereunder subscribed, at the Governor's Bowry (27 August 1664) CSPC 5: 1661-1668 (the 'Articles of Surrender') available at <http://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol5/pp222-231> accessed (29 July 2015) 794.

Regardless of the uncertain legal bundle of rights associated with the property underlying the Grant of New York, Charles II transferred to the Duke of York his entire interest in the territory:

And all Our Estate Right Title Interest benefit Advantage Claime and Demand of in or to the said Lands and P^rmisses or any part of parcel thereof And the Revercon and Revercons Remainder & Remainders together wth the Yearly and other y^e Rents Revenues and Proffitts of all and Singular the said Premises and of every part and parcel thereof To have & to hold all and Singular the said Lands ~ . . .²⁸

These specific references to rights of reversion and remainder do not appear in the corporate charters of either the Massachusetts Bay Company or the Virginia Company, but they do appear in the later New York charters for corporate municipalities as well as grants of real property to townships.²⁹ As we have seen before, this land was to held of the royal manor in free and common soccage with a regionally appropriate annual rent due of ‘forty Beaver Skins’.³⁰

The 1664 New York Charter also devolved unfettered juridical powers to the Duke of York with no representative assembly, but, specifically reserves a right of the Crown to hear appeals.³¹ There is no provision for a representative assembly so this was the singular hope of recourse for a colonist of New York. There is nothing similar in either the Massachusetts Bay Charter or any of the charters of the Virginia Company, but a right of appeal was preserved in the Massachusetts Provincial Charter and the 1705 Act for Establishing Ports and Towns for example.³²

²⁸ Grant of New York 110-11.

²⁹ See Section C.1.

³⁰ Grant of New York 111.

³¹ Ibid 112.

³² Respectively, ‘The Charter of Massachusetts Bay: 1691’ (*The Avalon Project, Yale Law School*) <http://avalon.law.yale.edu/17th_century/mass07.asp> accessed 30 September 2014 (the ‘Massachusetts Provincial Charter’) 4; An Act for Establishing Ports and Towns 1705 (3 Henings 404) 409. See Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York:

The Grant of New York then concludes with an expansive catch-all: Notwithstanding the not reciting or [mentioning] of the Premises or any part thereof or the meets or Bounds thereof or of any former or other [letters patent] or grants heretofore made or granted of the Premises or of any Part thereof by us or of any of our Progenito^{rs} unto any other Person or Persons whatsoever Bodyes Politique or Corporate or any Act Law or other restraint uncertainty or imperfection whatsoever to the Contrary in any wise notwthstanding although express [mention] of the true yearly Value or Certainty of the p^remises or any of them or of any other [gifts] or Grants by us Progenitors or Predecesso^{rs} heretofore made to the said James Duke of Yorke in these presents is not made or any Statute Act Ordinance provision [proclamation] or restriction heretofore had made Enacted ~ Ordained or Provided or any other matter cause or thing whatsoever to the Contrary thereof in any wise Notwithstanding.³³

This provision was likely intended to address the contested boundaries of the province so broadly described at the opening of the grant. The 'Bodyes Politique or Corporate' were likely references to the claims of the Council for New England.

The Grant of New York established a dominant proprietary framework for the English colony at New York. The history of this religiously, economically, and culturally diverse colony is marked by intensely competing private interests and a colonial administration marked by factionalism as a result.³⁴ Yet, in six specific instances, the particular concerns and motivations of these private interest groups align with those of the Stuart Crown, and on such occasions, a corporate franchise is extended with certain rights and privileges beneficial to all parties.

Columbia University Press 1950) 53 (finding that the corporate charters did not generally contain rights of appeal as the 'normal locus for appeal was to the home governing body. . .');

³³ Grant of New York 115.

³⁴ See Patricia U Bonomi, *A Factious People; politics and society in colonial New York* (New York: Columbia University Press 1971) especially 54-56; ML Lustig, *Privilege and Prerogative: New York's Provincial Elite, 1710-1776* (n 18) esp 11.

III. The Colonial Corporations of New York

Remembering that the English took control of New Netherlands in 1664, it was recaptured by the Dutch in 1673, and then settled back into English control in 1674, there were in particular three Dutch entities still operating at the initial transfer and continuing their operation throughout the chaotic period of transition. They were the municipal corporations of New Amsterdam, to be renamed New York City, and Beverwyck, to be renamed Albany, and the ecclesiastical corporation of the Reformed Dutch Protestant Church.³⁵ There do not appear to be any commercial entities carrying over from the Dutch colony. Nor did James as Duke of York take interest as there is a lone record of a 1675 petition to the Governor requesting '[a]rticles of association for a joint stock company at New York, for the prosecution of the cod fishery . . .'³⁶ Any further details regarding this request, if there were any, were destroyed in the 1911 fire that devastated the New York State Archives.

Following the re-conquest of New York, most of the metropolitan government's interest in the region had actually been much further north with the incorporation of the Hudson's Bay Company in 1670. It is only in 1686, following years of conflict in the Anglo-Dutch Wars and a temporary peace with New France that a just crowned James II incorporated the City of Albany, the New York City, and in 1687, the Town of Westchester, granting each group their sought monopolistic

³⁵ New York Municipal Charter Manuscript; City of Albany, Mayor Alderman and Commonalty (22 July 1686) NYSA, Land Patents 12943 -78, vol 5, roll 2 (microfiche) (the 'Albany Charter'); Reformed Protestant Dutch Church of the City of New York, Minister, Elders and Deacons of, Deed of Confirmation of Realty and Conferring Corporate Powers (11 May 1696) NYSA, Land Patents 12943-78, vol 7, roll 3 (microfiche) (the 'Dutch Church Charter'), respectively. See also Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations* vol 1 (Cambridge, Massachusetts 1917) 40 (analyzing the former two corporations' status as 'free cities' under Dutch law).

³⁶ 8 January 1675 Petition reprinted in Edmund B. O'Callaghan (ed), *New York Calendar of Historical Manuscripts 1664-1776*, NYSA, A1894-78, 24:39-196; 25:1-66, roll 3 (microfiche) (1866).

rights to a piece of the fur trade.³⁷ These acts of incorporation served the local commercial interests as well as the interests of the metropolitan government wishing not simply for its typical financial benefits from the monopoly, but also to build up the settlement. The location of each of these municipalities were critical to the maintenance of this trade: the City of New York as the primary port supported by the Town of Westchester, and the City of Albany at the heart of the Iroquois trading network and with navigable access spanning the region. Incorporation of these three municipalities and the formation of smaller surrounding towns in quick succession was a concerted effort to build up these settlements both financially and physically before the French attacked again.

Of particular legal interest for these municipal corporate charters is their source of authority. New York City was incorporated on 22 July 1686 and the City of Albany on the same day, and both were incorporated pursuant to both a royal and prescriptive authority. They were followed by a new English municipal incorporation of the Town of Westchester in January of 1686/7. There were also several towns that were granted land and given authorization to form local government, such as the *Freehold of the Inhabitants of Flushing* on the 16 February 1685/6 ('Flushing'), the *Town of Brooklyn* 13 May 1686 ('Brooklyn'), and the *Town of Kinderhook* on the 14 March 1686/7 ('Kinderhook'), but which were not incorporated.

As for the existing ecclesiastical Dutch communities, although there was a grant to a *Deacons of New York* dated 25 February 1667, there perhaps predictably, were no ecclesiastical incorporations under either Charles II or James II.³⁸ However, in the

³⁷ An Act for the Encouragem't of Trade and Navigation w'thin this Province (27 October 1684) The Colonial Laws of New York from the Year 1664 to the Revolution (Albany: JB Lyon, state printer 1894); ML Lustig, *The Imperial Executive in America: Sir Edmund Andros, 1637-1714* (n 17) 48. See David S. Lovejoy, *The Glorious Revolution in America* (Hanover, New Hampshire: Wesleyan University Press 1972) 216-218.

³⁸ Deacons of New York (25 February 1667) NYSA, Land Patents 12943-78, vol 2, roll 1 (microfiche).

post-Glorious Revolution period the large Dutch Calvinist community in New York took their opportunity to petition the Stadtholder-King William III asking for protection of their community rights against the encroaching Anglican settlements.³⁹ The Reformed Dutch Protestant Church was incorporated by William III on 11 May 1696 (the 'Dutch Church'). It was quickly followed by the incorporation of a Church of England parish on 6 May 1697, Trinity Church. This is not particularly surprising given the post-Glorious Revolution rumblings about William III's allegiances to his home nation.⁴⁰ The latter Church of St Andrew on Staten Island incorporated on 23 November 1705 ('St Andrew Church') in the midst of Queen Anne's War where New York was once again fending off the French and their allies to the north. This St Andrew Church was a small parish, and incorporated under the staunch Protestant, Anne, but at the behest of a new missionary group, the Society for the Propagation of the Gospel in Foreign Parts, committed to spreading Protestantism in Britain's colonies.⁴¹

Each of these incorporating charters contains an Incorporating Provision, which read much like the list of Coke's essential elements from *Sutton's Hospital* and Section 3 of the 1609 Virginia Charter.⁴² Each states the authority under which the charter of incorporation is being issued, the corporate name, its members, and its

³⁹ Although William III is known for his staunch Protestantism in the post-Glorious Revolution era, recent scholarship has questioned the degree to which that might have been exaggerated for the English audience. See Jonathan I. Israel, 'William III and Toleration' in Jonathan I Israel Ole Peter Grell, Nicholas Tyacke (ed), *From Persecution to Toleration: The Glorious Revolution and Religion in England* (Oxford: Clarendon Press 1991).

⁴⁰ Wout Troost, *William III, the Stadtholder-King* (JC Grayson tr, Vermont: Ashgate Publishing Company 2005) c 10.

⁴¹ As to the first point, see generally, Edward Gregg, *Queen Anne* (London: Boston and Henley 1980) (noting throughout his biography of the Queen's strong Protestant convictions and intense distrust of Catholics). As to the second point see James Thayer Addison, *The Episcopal Church in the United States, 1789-1931* (New York: Scribner 1951) 46-37.

⁴² *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960, 29b ('Sutton's Hospital').

domicile. Each also contains a statement of the incidents of the corporate franchise: that pursuant to the charter a singular corporate body has been created and possesses perpetual succession. Their important differences come with the valuable corporate rights and privileges assigned by the metropolitan government and highly desired by local interests.

A. Municipal Corporations

i. New York City

The first corporation within the province of New York was incorporated 27 April 1686 (the ‘New York Municipal Charter’),⁴³ the same year that the unpopular Dominion of New England was imposed upon the Massachusetts Bay Colony. The city, formerly called New Amsterdam, had existed for years before the English conquest and it held significant privileges under Dutch rule. Since 1679, its merchants held an exclusive monopoly of the trade along the Hudson River.⁴⁴ It was the sole port of the province, and therefore controlled a potentially valuable provincial trade.⁴⁵

(1) The Preamble

The opening preamble of the New York Municipal Charter acknowledges the city’s privileged existence under Dutch rule. It borrows concepts from the Articles of Surrender, which had agreed, ‘[a]ll people shall continue free denizens, and enjoy their lands, houses, goods, &c.’⁴⁶ The preamble of the New York Municipal Charter reads:

Whereas the City of New Yorke is an antient City within the said Province And the Cittizens of the said City ~ have antiently been a

⁴³ New York Municipal Charter Manuscript.

⁴⁴ M Kammen (n 1) 5.

⁴⁵ Matthew Hale, *The Prerogatives of the King* (Selden Society 1976) 294-98.

⁴⁶ Articles of Surrender (n 27).

Body Politique and Corporate and the Cittizens of the said Citty have held used and Enjoyed as well within the same as else where in the said Province Diverse and Sundry Rights Libertyes Priviliges franchises free Customs ~ Preheminences Advantages Jurisdiccons Emoluments and Immunityes as well by prescripcon as by Charter Letters Pattents Grants and Confirmacons not only of Divers Governours and Commanders in Cheife in the said Province butt alsoe of ~Severall Governours Directors Generalls and Commanders in Cheife of the Neither Dutch Nation whilst the same was or has beene under their Power and Subjeccon...⁴⁷

This provision formally recognized the legal existence of a foreign organization within the newly conquered British colony. What is then particularly striking is that this charter proceeds to incorporate the municipality by authority of the Crown blended with prescription derived from the rights and privileges the municipality long held under a foreign sovereign. According to the terms of this charter, the rights, privileges, and elements of corporate existence under Dutch law are absorbed into the English common law:

Doe Give Grant Rattifie and Confirme unto the said Mayor Alderman and Commonalty of the said Citty all and every such and the same Libertyes Privilidges and franchises Rights ~ Royalties, free Customes Jurisdiccons and Immunityes which they by the Name of the Mayor Aldermen and Commonalty or otherwise have Antiently had held used or Enjoyed Provided... [they are not] inconsistent with or Repugnant to the Laws of his Majestyes Kingdome of England or any other the Laws of the General Assembly of this Province⁴⁸

The English common law, which is also being extended to the conquered North American colony by this very act of incorporation, integrated by prescription elements of Dutch corporate law, at least in form. This is a step beyond the Blackstone's observation that local laws of a conquered Christian people would remain until specifically repealed by the English common law.⁴⁹ This provision legally envelopes Dutch law and customs to the extent not conflicting with the laws of England, and

⁴⁷ New York Municipal Charter Manuscript 382.

⁴⁸ Ibid 384.

⁴⁹ W Blackstone p 104-06.

applies it to future New York corporations since each successive charter of municipal incorporation includes a broad catch-all grant of rights and powers held by any other corporation in the province.⁵⁰ For example, the later Charter of Albany provides that municipally appointed Justices of the Peace: ‘shall have the Power to heare & Determine the same Pleases and [Actions] According to the Rules of the Comon Law Acts of Genll Assembly of the [said] Province & the Course of other Corporacons in the like Nature...’⁵¹ This expansion of English common law to accommodate the laws and customs of the Dutch people, however, may have simply been a strategic move because reference to prescriptive authority does not appear in the binding Incorporating Provision discussed below.

This discussion of the interplay between Dutch and English common law in the conquered New York calls into question the first of Coke’s essential elements of incorporation from *Sutton’s Hospital*: the authority to incorporate.⁵² This charter was not issued directly from the Crown as the College of William and Mary Charter was, but rather through a delegate. The provincial Governor Thomas Dongan, acted on behalf of the Crown not the province:

Know Yee therefore that that the said Thomas Dongan by Virtue of the [Commission] and Authority under me Given and Power in me Residing at the humble Petition of the now Mayor Aldermen and Commonalty of the said City of New Yorke and for Diverse other Good Causes and Consideracons... thereunto moveing have Given Granted Rattified and Confirmed and by these Presents for and on the behalf of his most Sacred Majesty aforesaid his Heirs Successors and Assignes...⁵³

⁵⁰ See Sections C.2. and C.3.

⁵¹ Albany Municipal Charter Manuscript p 475. See R Shorto (n 14) 313 (highlighting the post of government prosecutor as a carryover from the Dutch administration).

⁵² *Sutton’s Hospital* 29b.

⁵³ New York Municipal Charter Manuscript p 384.

Here a direct royal authority to incorporate overlays or buttresses the hybrid mixture of executive Crown power and prescription that precurred the New York Municipal Charter, in effect delegating the power of control to a Governor. This 'executive legislation' prefigures the legislative action of incorporation on behalf of the Crown in Virginia's Act for Establishing Ports and Towns. It is also fitting with the thought of the period. A royal governor may incorporate through the power vested in him by the Crown.

To continue examining the issues raised by the preamble of the New York Municipal Charter, consider the listed corporate name and membership. At common law, an entity incorporated by prescription was to have the name that it was commonly known by – its ancient name.⁵⁴ However, there was also a desire to change the name of what had been the City of New Amsterdam under the Dutch. The result is a preamble acknowledgement as follows:

AND WHEREAS Divers Lands Tenements and Hereditaments Jurisdictions Libertyes Immunities and Priviledges have heretofore been Given and Granted or menconed to be Given and Granted to the Citizens and Inhabitants of the said Citty sometimes by the name of Scout Burgomasters and Schlepens of the City of New Amersterdam and sometimes by the Name of the Mayor Aldermen and Commonality of the City of New Yorke Sometimes by the name of the Mayor, Aldermen and Sheriffe of the Citty of New Yorke and by Diverse Other Names as by their Severall Letters Pattents Charters Grants Writeings Records and Immunityes amongst other things may more fully Appeare...⁵⁵

This leads to the second issue of membership. The municipality currently had a significant Dutch population. The Articles of Surrender had provided that, 'All people shall continue free denizens, and enjoy their lands, houses, goods, &c...' How then would Dutch inhabitants maintain their rights as members in an English corporation?

⁵⁴ Anonymous, *The Law of corporations : containing the laws and customs of all the corporations and inferior courts of record in England* (1 edn, London: R. and E. Atkins for I. Cleeve 1702) 14-15.

⁵⁵ New York Municipal Charter Manuscript 382-83.

Although conquered, this colony and its political leaders were still predominantly Dutch. This question of the Crown's right to issue denizenship had been confirmed in the dicta of *Calvin's Case*. The subsequent half-century of developments at common law clarified and confirmed this royal prerogative right with respect to imperial ambitions.⁵⁶ This clause in the New York Municipal Charter, however, expands this prerogative right to be a delegable power of the Crown. Certain Dutch citizens will be made members of the corporation once they are: '[n]aturalized by Act of Generall Assembly or shall have obtained Letters of Denization under the hand of the Lieutenant Governour or Commander in Chiefe for the time being and Seale of the Province...'⁵⁷ It is the provincial government, not the Crown, that is naturalizing and granting denizenship. It is a necessary development necessitated by the demographic realities of the colony.

(2) *The Incorporating Provision*

Note that each of the provisions discussed thus far are part of the preamble. The binding provisions of the New York Municipal Charter begin with the Incorporating Provision and contain far fewer conciliatory efforts. The Incorporating Provision begins:

I Doe by these Presents for and on the behalf of his Most Sacred Majesty aforesaid his Heires Successors and Assignes Declare Constitute Grant and Appointe that the Mayor Recorder Aldermen and Assistants of the said City of New Yorke for the time being and they which hereafter shall be the Mayor Recorder and Aldermen and Assistants of the said City of New Yorke for the time being and their Successors forever hereafter be and shall bee by force of these Presents one Body Corporate and Politique in Deed fact and name by the Name of the Mayor or Aldermen and Commonalty of the City of New Yorke And them by the Name of the Mayor Aldermen And Comonaltye of the City of New Yorke on Body Corporate & Pollitique in Deed fact

⁵⁶ *Calvin's Case* 7 Co Rep 1a, 77 ER 377 and accompanying text. See specifically David Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World 1664-1830* (Chapel Hill: University of North Carolina 2008) ch 2.

⁵⁷ New York Municipal Charter Manuscript 402.

and name. I Doe Really and fully Create Ordaine make constitute and Confirme by these Presents and that by the name of the Mayor Aldermen and Comonalty of the City of New Yorke they may have Perpetuall Succession and that they and their Successors for ever by the name of the Mayor Aldermen and Commonaltye of the City of New Yorke be and shall be forever hereafter Persons able and in Law Capable to have Gett Receive and Possesse Lands Tennements Rents Libertyes Jurisdiccons franchises and Hereditaments to them and their Successors in fee Simple or for terme of life lives or Years or otherwise and also Goods & Chattles and also other things of what Nature kind or Quality soever and also to Give Grant Lett sell and Assigne the same Lands Tenements Heridataments Goods and Chattles and to Doe and ~ Execute all other things about the same by the Name aforesaid...⁵⁸

The first lines contain the traditional Incorporating Provision formula: a statement of the authority to incorporate, derived solely from the Crown with no further mention of prescriptive authority; the members to be incorporated; the domicile of corporation in New York City; and the corporate name. These members are incorporated into a singular, separate entity, and such entity exists in perpetual succession in possession of the capacity to purchase, own, and sell real property.

To further illustrate the distinctiveness of this Incorporating Provision from charters for other organized localities in New York, consider the 1686 royal grant to New York City's predecessor, Flushing, whose charter reads in pertinent part:

And I do likewise hereby Confirme & Graunt unto the said Patentees and their Associates their Heires Successo^{rs} and Assignes all the Priviledges belonging to a 'Towne within this Governm^t, And that the Place of their Present Habitacon shall continue and retaine y^e name of Flushing by w^{ch} name and Stile it shall bee distinguisht and known in all Bargaines and Sales Deeds Records and Writings They the said Patentees and their Associates their heires Successo^{rs} and Assignes Rendring & Paying such Dutyes and Acknowledgem.^{ts} as now are or hereafter shall bee Constituted and Established by the Laws of this Governm^t under ye obedience of his Royall Highnesse his Heires and Successo^{rs}...⁵⁹

⁵⁸ Ibid 388-89.

⁵⁹ A Patent and Cofirmation Graunted unto the Freeholders & Inhabitatants of Flushing (15 February 1685/6), NYSA, Letters Patents, 12943-78, vol 1, roll 1 (microfiche) , 64.

This is a grant to individuals such that they may own property as co-owners. There is no creation of a separate legal entity. Furthering the point, consider the nearly contemporaneous grant on 13 May 1686 to another neighbor, Brooklyn:

Now Know Yee that I the said Thomas Dongan by Virtue of the Commission and Authority Derived unto mee and Power in mee Residing have Granted Rattified and Confirmed and by these Presents Doe Grant Rattifie and Confirme unto Theunis Gisberts... for and on the behalde of themselves and the Rest of the Present freeholders and Inhabitants of the said Towne of Breukleen their Heires and Assigns for ever all and Singular aforerecited Tract and Parcells of Land Sett forth Littited and Bounded as aforesaid together with all and Singular the Houses...to have and to hold all and Singular the said Tract or Parcells of Land and Premissess ... on behalf of themselves and the Present freeholders and Inhabitants of the Towne of Brenckleen their and every of their Heirs and Assignes forever as Tennenants in Common without any Lett Hindrance Molestation Right of Survivorshipp or otherwise to bee holden in free and Common Soccage According to the Tenure of East Greenwich in the County of Kent in his Majesties Kingdome of England Yeilding Rendring and Paying therefore Yearely and every Year on the five and twentieth Day of March forever in Liew of all Services and Demands whatsoever as a Quitt Rent to his Most Sacred Majesty aforesaid his Heires and Successors att the Citty of New Yorke twenty Bushells of Good Winter Merchantable Wheate.⁶⁰

Again, this is a grant and confirmation of rights and privileges of township and joint ownership of property. There is a recitation of a collective name and members of the town, but the key is that there is no stated intention to create a separate legal person from those members. The municipal incorporation of New York City was a different legal creature from either Flushing or Brooklyn.

(3) Corporate Property

Returning to the New York Municipal Charter, the Incorporating Provision continues to describe the property ownership rights of the corporation. The municipality was ‘in Law Capable to have Gett Receive and Posses...’ in fee simple or a lease for a term of years or lives.⁶¹ The restriction that New York City may only hold

⁶⁰ Brooklyn, Town of, Inhabitants & Freeholders, of, (May 13, 1686) NYSA, Land Patents 12943-78, vol 1, roll 1 (microfiche), 455.

⁶¹ New York Municipal Charter Manuscript 388.

property in a term of years or in fee simple was not in any of the Virginia or Massachusetts corporate charters, including the later Act for Establishing Ports and Towns. This could be an indirect acknowledgement of the cities' previous property rights to the land under Dutch law, and according to the Articles of Surrender, all claims to private property were protected by the English common law.⁶²

Continuing with reference to property ownership, the New York Municipal Charter lists all public buildings that had been constructed by the municipality prior to its incorporation as an English municipal corporation. It confirms to New York City the ownership of those public projects, a town hall, bridges, etc., that had been erected during Dutch rule. It also charges the municipality corporation with a duty to maintain, improve and expand those structures for the benefit of its inhabitants, not necessarily its corporate members. The final provision of the New York Municipal Charter contains a broad requirement that the municipal corporation use all property for the benefit of 'Religion Justice and the Publique Good' and to protect such property from misuse and disuse:

I Doe Appoint and Declare that the Incorporation to be founded by this Charter shall not att any time hereafter Doe or Suffer to be Done any thing by means whereof the Lands Tennements or Hereditaments Stock Goods or Chattles thereof or in the Hands Custody Possession of any the Cittizens of the said Citty such as have been Lett ...Given Granted or Collected to and for Pious and Charitable uses shall be wasted or Misemployed Contrary to the trust or intent of the founder or Giver thereof and that such and noe other Construction shall be made thereof then that which may tend most to Advantage Religion Justice and the Publique Good and to Suppress all Acts and Contrivances to be invented or Putt in use Contrary thereunto...⁶³

⁶² Articles of Surrender (n 27).

⁶³ New York Municipal Charter Manuscript 405.

Note that the responsibility is the citizens of the city and not simply to the corporate members, which is similar in concept to that appearing in its successor, the Act for Establishing Ports and Towns.⁶⁴

In addition to protecting corporate property, the New York Municipal Charter imposes certain property-related duties and limits on the actions of the municipal corporation. There is a duty to protect private property rights. This most clearly appears in the restricted duty to expand and maintain infrastructure, which is ‘not Extended or to be Construed to extend to the takeing away of any Person or Persons Right or Property without his her or their consent or by some knowne Law of the said Province...’⁶⁵ There is also a limit on the extent to which the municipal corporation may acquire property. It is capped under the charter at a value of £1,000 per annum:

I Doe by these Presents for and on the behalf of his most Sacred Majesty aforesaid his Heires and ~ Successors Grant to the Mayor Aldermen and Comonalty of the said Citty that they and their Successors be forever Persons able and Capable and shall have Power to ~ purchase have take and Possesse in fee Simple Lands Tennem^{ts} Rents and other Possessions wthin or without the same Citty to them and their Successors for ever soe as the same Exceed not the Yearely value of one thousand Pounds per annum the Statute of Mortmaine or any other Law to the Contrary Notwithstanding ...’⁶⁶

This municipal charter was unlike the corporate charters of the Virginia Company or the Massachusetts Bay Company, which were unlimited in their potential property value, because the geographic bounds of the New York City municipal corporation were determined. Like those municipal corporations under the Act for Establishing Ports and Towns, or the College of William and Mary, which also contained value caps, the municipal corporation under the New York Municipal Charter was encouraged to grow and expand but not to an endless extent as in the case of the Virginia Company

⁶⁴ Ibid 385.

⁶⁵ Ibid.

⁶⁶ Ibid 402-03.

and the Massachusetts Bay Company. The charter thus protects the citizens of New York City from an accumulation of real property into the 'cold dead hand' of the municipal corporation.

(4) Ancillary Corporate Rights & Corporate Governance

The New York Municipal Charter also contains the standard provisions of what Coke had described in *Sutton's Hospital* as the ancillary rights and privileges of incorporation.⁶⁷ There is the provision for a common seal, although no description; and the right to sue and be sued, implead and be impleaded.⁶⁸ With respect to the enforcement of corporate rights at law, the right extends to: 'all or any [of] the Courts of his said Majesty & other Places whatsoever...in the same and in the Like Manner and forme as other People of the said Province being Persons able and in Law Capable...'⁶⁹ The New York Municipal Charter provides equal footing for the corporation and any other colonial natural person.

This charter also goes into great detail regarding the corporate right to internal governance, which was particularly important given the decentralized nature of the diverse colony and the resulting significance of local government.⁷⁰ It may also be a reflection of the fact that James II was stalling with his signature on the colonists' Charter of Liberties and Privileges. In fact, it would never go into effect in the colony.⁷¹ The New York Municipal Charter continues stating that the traditional corporate bylaws must not just comply with the laws of England, but also with the laws of the province:

⁶⁷ *Sutton's Hospital* 29b.

⁶⁸ New York Municipal Charter Manuscript 389. *Sutton's Hospital* (holding that the description of the seal is superfluous).

⁶⁹ New York Municipal Charter Manuscript 388.

⁷⁰ M Kammen (n 1) 80.

⁷¹ See DS Lovejoy (n 37) 106-21, especially 120-21.

[I]o make laws Orders Ordinances and Constitutions in Writeing and to add Alter Diminish or Reforme them from time to time as to them shall seem Necessary and Convenient (not Repugnant to the Prerogative of his most Sacred Majesty aforesaid his Heires & Successors or to any [of] the Laws of the Kingdome of England or other . . . Laws of the General Assembly of the Province of New Yorke . . .⁷²

Also note the requirement that all laws be in writing for the benefit of royal inspection. The particulars of the governing board, the Alderman, Mayor and Town Recorder, are named and appointed in the charter by the Crown, and the corporation's governance council is instructed to act according to the majority vote.⁷³ The municipal corporation is instructed to appoint Justices of the Peace to preside over contested matters within the jurisdictional limits of the municipality and:

[E]very Tuesday shall and may have hold & keepe within the said City and Libertyes and Precincts thereof in every weeke in every Yeare forever unpon Tuesday one Court of Common Pleas for all [Actions] of Debt Tresspasse Tresspasse upon the Case Detinue Ejectment and other Personall [Actions] and the same to be held before the Mayor Recorder and Aldermen . . .⁷⁴

These corporate rights of the municipal corporation are relatively standard if adjusted for the provincial circumstances. The metropolitan government is firmly at the top of the governance hierarchy established for New York City, and the municipal corporation is ultimately answerable to him. This arrangement certainly provides a benefit in London. It is the final provisions as it thereby controls and protects economic privilege, which is the true motivation for local interests.

⁷² New York Municipal Charter Manuscript 391. For a discussion of the bounds of corporate bylaws under the common law at their respective times of publishing: William Sheppard, *OF CORPORATIONS, Fraternities, AND GUILDS, OR a Discourse, wherein THE LEARNING of the LAW touching Bodies-Politique is unfolded, shewing the USE and NECESSITY of that INVENTION, the ANTIQUITY, various Kinds, Order and Government of the same* (2nd edn, London: Printed for H. Twyford, T. Dring, and H. Place 1659) (n 14) 8; 1702 Corporate Treatise (n 14) 160-272.

⁷³ New York Municipal Charter Manuscript 390.

⁷⁴ *Ibid* 399.

(5) Prescriptive Economic Privilege

The New York Municipal Charter grants New York City several economic privileges. The first is the municipal corporate right or power to regulate trade within their bounds through the arrangement and regulation of markets.⁷⁵ The second is the inclusion of a prescriptive right to all pre-existing rights and customs enjoyed by the city. The New York Municipal Charter provides that New York City:

[S]hall have & Enjoy all the Priviledges franchises and Powers that they have and use or that any of their Predecessors at any time within the space of twenty Yeares last past had tooke or enjoyed or ought to have had by Reason or under pretence of any former Charter Grant Prescription or any other Right Custome or usage although the same have been forfeit or Lost or have been ill used or not used or Abused or Discontinued...⁷⁶

This was a limited form of prescription, in the sense that the look-back period was simply twenty years, or to 1666, two years after the English conquered the province and three years before New York City was granted its first exclusive trading right to the Hudson River.

Not to be outdone, New York City's sister city, Albany, receives a charter from James II the same year with comparably beneficial terms except that New York maintains control of the Atlantic port and the trade to and from England.

ii The City of Albany

The Charter for the Mayor, Alderman and Commonalty of the City of Albany (the 'Albany Municipal Charter') was issued just three months after the New York Municipal Charter. Albany was an outpost city on the Hudson Bay in perfect position for trade with the French and the Five Nations. In fact, by 1660 it had become the hub

⁷⁵ Ibid 403. See generally Frederic William Maitland, *Township and Borough* (Cambridge: Harvard University Press 1898).

⁷⁶ New York Municipal Charter Manuscript 405.

for such trade.⁷⁷ The Crown and the citizens of Albany had a mutual interest in protecting and expanding that trade. In pursuit of this and in a moment of calm, the former Dutch city was incorporated as an English municipal incorporation.

Like the New York City, Albany had been a city under Dutch rule and, like the New York Municipal Charter, the Albany Municipal Charter is structured as a blend between royal incorporation and a royal confirmation of an incorporation by prescription. It contains the standard incorporating provision as well as a focus on corporate property ownership, including the public duties arising from such ownership, and the internal governance mechanisms. However, the Albany Municipal Charter is not a complete copy of the New York Municipal Charter. There are points of departure and of clarification, which will each be addressed in turn.

(1) The Preamble & Incorporating Provision

The preamble to the Albany Municipal Charter begins similarly to the New York Municipal Charter in its recognition of the legal existence of the municipality under Dutch rule. The language is very similar:

Whereas the Towne of Albany is an Antient Towne within the said Province and the Inhabitants of the said Towne have held used and enjoyed as well within the same as elsewhere within the said Province Diverse and Sundry Rights ~ Libertyes Priviledges, franchises, free Customes, Preheminencyes Advantages Jurisdiccons Emolutments and Immunityes as well by prescription as by Grants Confirmacons and Proclamacons not only by Diverse Governours and Commanders in Cheife in the said Province under his said Majesty but also of Severall Governours Generalls and Commanders in Cheife of the neither Dutch Nation whilst the same was or has been under their Power and Subjeccion...⁷⁸

Furthermore, this preamble also acknowledges the previous name of the municipal entity under Dutch rule, in this case, Beverwyck. But, just as in the case of New York

⁷⁷ 'The Middle Colonies: New Opportunities for Settlement' in *Oxford History of the British Empire*, vol 1 (Oxford: Oxford University Press) 353.

⁷⁸ Albany Municipal Charter Manuscript 446-47.

City with a former name of New Amsterdam, the continuity of the municipality existence is confirmed despite the change in name.⁷⁹ It is the same entity, now under English rule.

As to the source of authority for the incorporation, there is a difference between the preambles of the Albany Municipal Charter and the New York Municipal Charter. This Albany Municipal Charter was issued by Thomas Dongan, the Governor of the province, and it was issued in reference to that position rather than in an exclusive role of delegate of the Crown as in the case of the New York Municipal Charter. Dongan's authority to incorporate was also dependent upon his position within the colony:

Know Yee therefore that I the said Thomas Dongan by Virtue of the Commission and Authority unto me Given and Power in me Resideing all the Humble Peticon of the Justices of the Peace of the said Towne of Albany and for Diverse other Good Causes and Consideracons me thereunto moveing Have Given Granted Rattified and Confirmed and by these Presents for & on behalf of his most sacred Majesty aforesaid his Heires and Successors Doe Give Grant Rattifie and Confirme unto the said Inhabitants of the said Towne herein after Agreed to be called by the Name or Names of the Mayor Aldermen and Commonalty of the Citty of Albany All and every such and the same Libertyes Privilidges, franchises, Rights Royalties free Customes, Jurisdiccons and Immunityes which they have Antiently had held and enjoyed.⁸⁰

It is a subtle expansion of the legal perception of the power to incorporate as a delegable authority outside of the example of the palatinate lords, and corporate proprietaries previously discussed, and before the Act for Establishing Ports and Towns.⁸¹ The power of incorporation was derived from the Crown, but in conjunction with his position of authority sourced from the provincial government. Now, this is simply the preamble. This language relating to his provincial position was abandoned

⁷⁹ 1702 Corporate Treatise 14-15.

⁸⁰ Albany Municipal Charter Manuscript 449.

⁸¹ M Hale (n 45) 212.

in the Incorporating Provision, which returns to the standard language of the New York Municipal Charter:

I Do by these Presents for and on the behalf of his most Sacred Majesty his Heires and Successors Ordeyne Declare Constitute Grant and Appoint that the Mayor Recorder Aldermen and Assistants of the said City of Albany for the tyme being and their Successors forever hereafter be & shall bee by force of these [presents] on body Corporate and Polotick [sic] in Deed fact and name by the Name of the Mayor Aldermen and Comonalty of the City of Albany and them by the Name o the [Mayor] Aldermen and ~ Comonalty of the City of Albany one Body Corporate and Politique in Deed fact & Name I do really and fully create Ordaine make Constitute and Confirme by these presents And that by the Name of the Mayor Aldermen & Comonalty of the City of Albany they may have Perpetuall Succession And that they and their Successors forever by the Name of the Mayor Aldermen and Comonalty of the City of Albany bee and shall bee forever hereafter Persons able & in law Capable to have gett Receive and Possess Lands, Tenements, Rents, Libertyes Jurisdiccons, franchises and Hereditaments to them and their Successors in fee Simple or for term of Life Lives or Yeares or otherwise and also Goods & Chattles...⁸²

The Incorporating Provision refers to the authority for incorporation being solely and completely sourced in the Crown. However, the preamble language should not be dismissed. It reflects some understanding or appreciation that the provincial government is a source of authority potentially capable of incorporation.

(2) Corporate Rights & Provincial Rights

In addition to the standard provisions of the *Sutton's Hospital* corporate essentials, the Albany Municipal Charter contains each of: the right or capacity to plead or be impleaded; the right to defend and to bring suit;⁸³ and the right to act and be bound under a common seal.⁸⁴ Significant attention is paid in this charter, just like the New York Municipal Charter, to issues of property ownership. In addition to the restrictions mentioned in the Incorporating Provision above, this charter also restricts

⁸² Albany Municipal Charter Manuscript 455.

⁸³ Ibid 456.

⁸⁴ Ibid 456-57.

property ownership to a fee simple, term of years or lives, and in an amount not to exceed one thousand pounds per annum:

I Doe by these [Presents] for his [said] Majesty and his Successors Grant to the said Mayor Aldermen & Comonalty of the said Citty that they & their Successors bee for ever Persons able and Capable and shall have Power to Purchase have take & Possess in fee Simple Lands Tennem^{ts} Rents & other Possessions within or without the same Citty to them & their Successors forever so as the same exceed not the Yearly Value of one thousand Pounds [per] Annum the Statute of Mortmaine or any other Law to the Contrary Notwithstanding and the Same Lands Tennem^{ts} Heriditaments & Premises or any Parte thereof to Demins Grant Lease Sett over Assigne & Dispose at [your] owne will & Pleaseure & to make Seale and Accomplish any Deed or Deeds Lease or Leases Evidences of Writeings for & Concerning the same or any Parte therof ...⁸⁵

Furthermore, as discussed in the New York Municipal Charter, the property provisions of the Albany Municipal Charter do not include a tenurial reference, *i.e.* 'held of the Manor of East Greenwich', but rather states that property be held in accordance with prior existing tenurial status but in addition with an annual quit rent of one beaver skin due to the Crown.⁸⁶

Also like the New York Municipal Charter, the Albany Municipal Charter confirms the municipal corporation's ownership of land, public buildings and structures, ferry rights, and certain tax revenue streams:

and the aforesaid Publick Buildings Accomodacons and Conveniencyes Pieces or Parcells of Ground in the said Towne (that is to say) the said Towne-hall or Stadt House with the Ground thereunto belonging [to] the said Church or Meeting Place with the Ground about the same the said Burying Place the said Watch House and Ground thereto belonging the [said] Pasture and the aforemenconed ferry with their and every of their Rights Members, and Appurtenneces together with all the Proffitts benefits and Advantages that shall or may Accrew or rise att all tymes hereafter for Anchorage or Wharfage in the Harbour Port or wharfe of the said Citty with all and Singular the Rents Issues Proffitts Gaines and Advantages which shall or may arise Grow or Accrew by the said Town Hall [lists the same structures] and also all and every the Street Lanes ~ Highways and Alleyes within the said Citty for the Publick use and

⁸⁵ Ibid 474.

⁸⁶ Ibid 453.

Service of the said Mayor Aldermen and Comonalty of the said Citty and of the Inhabitants of the Places Adjacent and Travellers there together with full Power Lycence and Authority to the said Mayor Aldermen and Commonalty and their Successors forever...⁸⁷

This proprietorship comes with a broader corporate fiduciary responsibility to maintain the municipality for the benefit of the public.⁸⁸ A further example is the collection of licenses:

each Lycense all which mony as by the said Mayo^r Shall be so Received shall be used and Applied to the Publick use of the said Mayor Aldermen and Comonalty of the said Citty of Albany without any Account thereof to be Rendred made or Don to his said Majesty his Heires Successors or Assignes or any of his Leutenants or Governo^rs of the said Province for the time being or any of their Deputyes⁸⁹

The municipal corporation owes a duty to the wider public, not simply to its corporate members.⁹⁰

(4) Corporate Boundaries & Governance

An aspect of property ownership addressed in the Albany Municipal Charter but not in the New York Municipal Charter, relates to the ill-defined boundaries of the municipality. Albany was a ‘frontier’ town that had been gradually settled over the past fifty years by Dutch, Swedes, and New Englanders.⁹¹ Therefore, there needed to be a catch-all clause as to what the geographic boundaries would be for the municipality. A metes and bounds description is included but in very broad terms and subject to the limitations put forth above. The municipal bounds extend to the Hudson River on the East, for example.⁹² Therefore, the charter includes sweeping statements such as:

⁸⁷ Ibid 449-50.

⁸⁸ Ibid 450.

⁸⁹ Ibid 464.

⁹⁰ There is also the power to levy and detain goods. Ibid 458.

⁹¹ PU Bonomi (n 34) 40-41.

⁹² Albany Municipal Charter Manuscript 453-54.

I Doe by these Presents Give and Grant unto the said Mayor Alderman and Comonalty of the said Citty of Albany all the Wast Vacant Unpattented and unappropriated Land Lyeing and being within the said Citty of Albany ...⁹³

The default was that the land in the region belonged ultimately to the Crown. The possibility of municipal eminent domain was prohibited by a special carve-out of existing Dutch manors in the region such that Albany could not encroach upon their bounded estates.⁹⁴

The other significant discussion in the charter pertains to the internal governance provisions, which were largely similar to the New York Municipal Charter. The initial corporate municipal officers are selected by the Crown and named in the Albany Municipal Charter.⁹⁵ It also created a Common Council, with an Alderman and a Mayor, just as in the New York Municipal Charter.⁹⁶ However, recall that the New York Municipal Charter required all corporate bylaws to conform to the laws of England as well as the Province.⁹⁷ The Albany Municipal Charter is far more restrictive requiring that: '[n]o Law or order or ordinance may be in effect for more than a year unless the Governor and Councill approves it...'⁹⁸

⁹³ Ibid 451.

⁹⁴ Ibid 450; see also Articles of Surrender (n 27).

⁹⁵ Ibid 455, 462-63.

⁹⁶ Ibid 458-60.

⁹⁷ New York Municipal Charter Manuscript 385.

⁹⁸ Albany Municipal Charter Manuscript 458.

(5) Prescriptive Economic Privilege

Similar to the New York Municipal Charter, the Albany Municipal Charter provides a confirmation of all customary privileges exercised by Albany over the past twenty years.⁹⁹ The provision reads:

And Further I Do for and on behalf of his said Majesty his Heires & Successors by these [presents] Grant to the said Mayor Aldermen and Comonalty of the [said] City of Albany & their Successors that the said Mayor Aldermen & Comonalty of the [said] City & their Successors shall have & Enjoye all the Priviledges franchises & Powers that they have & use or that any of their Predecessors at any time within the Space of twenty Yeares last past had tooke or Enjoyed or ought to have had by Reason or under Pretence of any further Charter Grant Prescription or any other Right Custome or Usage Altho the same have been forfeite or lost or hath been ill used or not used or absued or Discontinued albeit they bee not Particularly meconed herein...¹⁰⁰

Important for Albany though was not simply the preservation of existing rights but the creation of new economic privileges, notably the exclusive right within the province, and arguably beyond, to trade with the Five Nations.¹⁰¹ This exclusive right was not as expansive as that granted to New York City but was potentially as lucrative.

iii. Town of Westchester

The final of the three municipal incorporations in New York during this period was the Town of Westchester. It did not exist under Dutch rule, and the charter has significant points of difference with the Albany Municipal Charter and the New York Municipal Charter.¹⁰² Its legal story begins with a petition dated 6 January 1687/8 from

⁹⁹ It should be noted that the concept of exercising prescriptive rights or risk losing them was discussed at length in *The Town of Barwick* (1609) 2 Brownl 270, 123 ER 936 and accompanying text.

¹⁰⁰ Albany Municipal Charter Manuscript 476-77.

¹⁰¹ *Ibid* 471.

¹⁰² JS Davis(n 35) 41 (observing that Westchester has 'greater privileges than any other little town in America').

several of the townsmen, or freeholders of Westchester to Colonel Thomas Dugan.¹⁰³ It requested incorporation in 1687 as the first purely English municipal corporation in the province of New York. The original charter of incorporation was granted the previous year in 1686, although there does not appear to be a record of it beyond its memorialization in the preamble of the Charter of Westchester. The Charter of Westchester is a royal confirmation of the incorporation of Westchester.

(1) The Preamble

The Charter of Westchester begins:

[A]nd whereas afterwards on or about the sixth day of January in the Year of our Lord God one thousand six hundred and eighty six upon the Peticon of Severall of the Freeholders of the said Town of Winchester in behalf of themselves and the Rest of the Freeholders and Inhabitants of the said Towne directed to Coll Thomas Dongan then Captain Generall and Governour in Chief of our said Province the said Coll Thomas Dongan by Virtue of the Power and Authority to him Derived and by a Certain instrument in writeing under his hand and Seal of our said Province of New Yorke whose date is the day and year last abovesaid for the Consideration therein menconed did Give Grant Ratifye Release and Confirme unto twelve of the Freeholders and Inhabitants of the said Town of Westchester and therein and thereby made them one body Corporate and Politick and willed and Determined them to be Called and known by the name of the Trustees of the Freeholders and Comonalty of the Town of Westchester and their Successors ...¹⁰⁴

Note the difference in the organizational terminology. Neither New York City nor Albany were ever referred to as towns. They had been 'cities' since the English arrived in New Netherland. This petition for the town of Westchester is from a pre-existing township, the twelve freeholders, requesting status as a separate legal entity. There is certainly a population size difference between Westchester and its municipal corporate predecessors, but as one examines the charters, there are in fact greater differences between these government corporations.

¹⁰³ Town of Westchester (6 January 1687/8), NYSA, Land Patents 12943-78, vol 7, roll 3 (microfiche) (the 'Westchester Charter') 14.

¹⁰⁴ Ibid 14-15.

(2) Incorporating Provision

The Incorporating Provision in the Charter of Westchester is succinct, stating that the town:

may forever hereafter be a Free Burrough and Town Corporate and shall be called the Burrough & towne of Westchester and that in the said [19]Town Corporate there shall be a body Politick Consisting of a May^r Six Aldermen and Six Assistants or Comon Council of the said Burrough & Town of Westchester to Continue in Succession forever and for the more full and Perfect [erection] of the said Corporacon and body Politick to Consist Continue and be of a Mayor Six Aldermen & Six Assistants or Comon Council of the said Burrough or Towne to be called and knowne by the Name of the Mayor Aldermen & Comalty of the Burrough and Towne of Westchester ...¹⁰⁵

In quick order the corporate name is again specified, the members are identified, the domicile is provided, and the incidents of the corporate franchise are stated: perpetual succession and a separate entity status from its members. This is the provision that distinguishes the legal status of Westchester from that of Flushing or Brooklyn or the other township grants.

(3) Corporate Property Ownership

The Charter of Westchester does fit with the emerging pattern in its devotion to issues of property ownership and internal governance. First, consider the real property granted to the corporation. The preamble had discussed the gathering up the collective property for contribution to the corporation, similar to that required in the Act for Establishing Ports and Towns. The charter describes the bounds of the township both geographically and legally to include any associated rights:

[A]nd as for and Concerning all and every such Tracts and Parcels of Land Remainder of the Granted Premises not then taken up and appropriated to any Particular Person or Persons by Virtue of the before recited Deed or Patent to the use and benefite and behoofe of the then Present Freeholders & Inhabitants their Heirs Successors and Assignes forever improcon to their Severall and Respective Settlements Divisions and Allotments as Tennants in Common without any Lett

¹⁰⁵ Ibid 18-19.

hindrance or molestacon to be had upon Pretence of Joynt Tenannacy or Survivorship therein Saving to his Majesty his Heirs and Successors the Severall Rents and Quitt Rents Reserved due and Payable from Severall Persons Inhabitating within the Limits and Bounds aforesaid by Virtue of former Grants to them made and Given Alwayes Provided that all and every such Person and Persons that hold any Lands within the Limites and Bounds aforesaid by Virtue of the particular Grants or Patents are forever to be excluded from having any Right or Comonage or Particular Division of any of the Lands within the limites and bounds aforesaid that they Remaind unappropriated to be holden of us our Heires and Successors in Free and Comon Soccage According to the Mannour of East Greenwich in the County of Kent within our Realme of England...¹⁰⁶

The mention of property to be held as tenants in common and rights of survivorship are rights extinguished upon contribution to a municipal corporation with separate, perpetual existence.

Further of our Especiall Grace Certaine Knowledge and mere [motion] Wee do for us our Heirs and Successors Grant Constitute Ordaine and Appoint by this our Present Charter that all and Singular the Lands Tenements and Hereditaments herein before in this our said Royall Charter and Grant Granted and Confirmed or [mentioned] or intended to be Granted and Cofirmed shall from henceforth forever be a Free Burrough or Corporacon excepting and always Reserving out of the said Burrough or Corporacon all that Tract of Land Scitute and being upon the East side of Harlem River aforesaid and which did formerly belong to Coll Lewis Morris Deceased and which now is in the Tenure and [Occupacon] of James Graham Esq^r and to be and Remaine out of the Jurisdiccon of the said Corporatcon...¹⁰⁷

The Charter of Westchester, similar to the Albany Municipal Charter, caveats its descriptive geographic bounds to exclude existing private claims to surrounding real property. Moreover, it is, just as Albany and New York, charged with the building a public town hall and to maintain such public buildings, which are to be maintained for the benefit of the public.¹⁰⁸

¹⁰⁶ Ibid 15.

¹⁰⁷ Ibid 18.

¹⁰⁸ Ibid 22, 25.

A last point on the property ownership provisions of the Charter of Westchester is its provision that: ‘by that [corporate] name they and their Successors shall be able Persons in Law to make all manner of Gifts Grants and Purchases as any other Naturall Person or body Politick is able to make receive and take by the Laws of our Realme of England and this our Province...’¹⁰⁹ There are two things worth noting about this passage. The first is the wavering between the singular, the name, and the plural, ‘they and their Successors’. It is continued reminder that the corporation of this period frequently varied in legal perception between that of a single entity and that of an aggregate. The second is an omission. The passage does not provide a cap on the value of property that it may acquire.

(4) Corporate Governance

The Charter of Westchester includes details of the internal governance structure for the municipal corporation but in simpler detail than the provisions appearing in either the New York Municipal Charter or the Albany Municipal Charter. According to this charter, the entity shall have six alderman, and six members of a common council, to meet as they deem reasonable.¹¹⁰ They are charged with: ‘[e]stablish[ing] Ordinances and Statutes Orders or by Laws as may tend to the Good and wholesome Government of the said Borrough and Towne and to the Publick benefit . . .’¹¹¹ The charter appoints the first Mayor, the Assistants and Common Council, but provides that they shall meet as they think reasonable and shall admit to the ‘Comanly of the said Borrough and Towne such and so many Persons as the said Mayor and Aldermen . . . shall think . . .’ Moreover, a relative deferential tone is taken with the description of the internal governance process:

¹⁰⁹ Ibid.

¹¹⁰ Ibid 19, 21.

¹¹¹ Ibid 22.

[the corporation] shall from henceforth forever have franck and Free Eleccion of the said Mayor to be Chosen Yearly out of the Number of the said Aldermen and that by the Vote of the Greatest Number of the said Freeholders and Inhabitants of the said Corporacon and all other the [said] Officers and Ministers out of the rest of the Number of the said Freeholders and Inhabitants by the Greater Number of the Mayor Alderman and Comon Council...¹¹²

Much like the 1609 Virginia Charter, the Westchester Charter is careful that future members of the municipal corporation be on the same legal footing as those originally named; they are admitted with, 'Priviledges franchises and Immunityes as if the said Persons so to be admitted had been Specially and Particularly Named in this our said Royall Charter to be of the said Comonalty.'¹¹³ Presumably it was an attempt to prevent Westchester from excluding future beneficiaries of the corporate privileges granted to so few.

(5) A Point of Representative Departure

In 1683 colonial New York was given a limited representative assembly. Neither the New York Municipal Charter nor the Albany Municipal Charter made much mention of it, but the Westchester Charter provided the corporation with the right to send a delegate to this assembly:

that they and their Successors shall and may from time to time Returne and Send one Discreete Burgesse of the said Towne and Borrough into every Generall Assembly hereafter to be Summended and holden within this our Province of New Yorke which burgesse so Returned and setnt shall be Received into the House of Deputyes or Members of the said House to have and enjoy such Priviledges as any other of the said Members have or ought to have ...¹¹⁴

This is in keeping with the corporate rights memorialized in the College of William and Mary Charter and by the Act for Establishing Ports and Towns. Perhaps it was simply

¹¹² Ibid 23-24.

¹¹³ Ibid 20.

¹¹⁴ Ibid 26.

that size and import of Albany and New York City meant that their interests would be accounted for outside of the new assembly.

There are no further municipal incorporations during the Stuart age. Yet, if one considers that there were fewer than twenty incorporated cities prior to the American Revolution in 1776, and that three of those municipal corporations were created in one year and in one province; it is a quite remarkable testament to the perceived value of the corporation in New York.¹¹⁵ Next to consider are the ecclesiastical incorporations under William III and Anne I.

B. Ecclesiastical Corporations

i. The Reformed Dutch Church

Following the Charter of Westchester, the next charter of incorporation in the province of New York, and the first of the ecclesiastical entities, was issued on 11 May 1696 to the Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York, Deed of Confirmation of Realty and conferring Corporate Powers (the 'Dutch Church Charter').¹¹⁶

(1) Reason for Incorporation

As the official denomination of the States-General, the protestant 'Dutch Church' was founded during the period of New Netherland but had lost contact with Amsterdam for several years both during and after the conclusion of the Anglo-Dutch Wars.¹¹⁷ Increasingly concerned for the protection of the rights and privileges they had enjoyed under Dutch rule, the Dutch Church petitioned England's Dutch Crown,

¹¹⁵ Gerald E. Frug, 'The City as a Legal Concept' (1980) 93 Harvard Law Review 1057 1096

¹¹⁶ Dutch Church Charter Manuscript 27.

¹¹⁷ M Kammen (n 1) 149.

William III, for a charter of incorporation to both preserve and protect their rights and privileges in perpetuity from encroachment by the Church of England:¹¹⁸

[I]n their said humble Petition they have likewise Prayed our Grant and Confirmacon of all and every of the Premises and that we would be graciously Pleased to make them and their Successors forever Capable to hold and enjoy the same by Incorporating the Members of the said Dutch Protestant Congregacon in our City of New Yorke aforesaid into a body Politick and Corporate in Deed and Name by the Name and Style of the Minister Elders and Deacons of the Reformed Protestant Dutch Church of our City of New Yorke...¹¹⁹

The request makes clear that they are aware of the ‘essential elements’ for incorporation and the powers conveyed by the corporate franchise. They requested status as a separate legal entity with perpetual succession; that the membership be comprised of members of the Dutch Church; the corporate domicile be located with their church and cemetery; that they possess a corporate name.

Also interesting for this preamble is a statement of the Crown’s reason for granting the incorporation:

Now know Yee that in Consideracon therof as well as wee being Willing in Particular favour to the Pious Purposes of our said Loving Subjects and to Secure them and their Successours in the Free exercise and Enjoyment of all their Civill and Religious Rights Appertaining unto them in manner aforesaid as our Loving Subjects and to Preserve to them and their Successours that Liberty of worshipping God According to the Constitutions and Direcons of the Reformed Churches in Holland Approved and instituted by the Nationall Synod of Dort have therefore thought fit and do hereby Publish Grant Ordaine and Declare that our Royall Will and Pleasure is that noe Person in Communion of the said Reformed Protestant Dutch Church within our said City of New Yorke at any time hereafter shall be any ways molested Punished Disquieted or Called in Question for any difference in Opinion in matters of the Protestant Religion who do not Actually disturb the Civill Peace...¹²⁰

¹¹⁸ Dutch Church Charter Manuscript 27.

¹¹⁹ Ibid 28.

¹²⁰ Ibid 29.

To the extent the Dutch Church adheres to the teachings of the Synod of Dort, or the Assembly of the Reformed Church in the States-General meeting in Dort, then the Crown is willing to afford the Dutch Church in New York the protections of the corporate status. Such a grant is particularly remarkable given the religious strife in England throughout the Stuart period, and the particular persecution of minority denominations. It may have been that this incorporation was intended to fulfill obligations to protect private property made under the Articles of Surrender.¹²¹ But, the perhaps more significant point is that this charter was granted to the co-religionists of the Dutch English King, William III in the years just following the English Toleration Act of 1689. It seems undoubtedly an example of William III's steady attempts at advancing religious toleration for fellow members of the Dutch Reformed Church both within England and further afield.¹²²

(2) Corporate Purpose & Property

The Dutch Church Charter describes the precise bounds of the ecclesiastical corporation's property in connection with the statement of corporate purpose. The existing church is described and confirmed to the corporate purpose, the 'Service of God':

And that they may be in the better Capacity to hold and enjoy the Premises Wee have further thought fitt and at their aforesaid humble request wee are Graciously Pleased to ordaine and declare that the aforesaid Church Built and Erected as aforesaid and Scituate lyeing and being within the Limites aforesaid and the Ground thereunto adjoining and inclosed and intended to be used for a Coemetry or ~ Church Yard shall be the Church and Church Yard of the Minister Elders and Deacons and other Members of the Reformed Protestant Dutch Church of our City of New York and the same is hereby declared to be forever Separated and Dedicated to the Service of God and to be Applied therein only to the use and behalf of the Members of the P. Dutch Church Inhabitants from time to

¹²¹ Articles of Surrender (n 27).

¹²² See JI Israel (n 39) especially 152-66.

time Inhabiting and to Inhabite within our City of New Yorke and a Perpetuall Succession of Ministeres there...¹²³

The corporate purpose description goes a bit further with the use of the phrase ‘Separated and Dedicated,’ which suggests exclusivity. This property may be used for no other gatherings or uses. This was a protection from an encroaching Church of England population rather than a restriction on Dutch Church property use.

(3) Incorporating Provision

Against this background of corporate purpose and property, consider the Incorporating Provision of the Dutch Church Charter:

Wee have further thought fit and at the humble Peticon of the Persons aforesaid are Graciously Pleased to Create and make them a Body Politick or Corporate with the Powers and Priviledges hereafter mentioned And Accordingly our Will and Pleasure is and of our Speciall Grace Certaine knowledge and mere [mention] Wee have Ordained ~ Constituted and Declared and by these Presents for us our Heirs and Successours do Ordaine Constitute and Declare that they the said ... Present Minister Elders and Deacons and all such others as now are or hereafter shall be admitted into the Communion of the said Reformed Protestant Dutch Church in our City of New Yorke shall be from time to time and at all times forever hereafter a Body Corporate and Politick in fact and Name by Name of the Minister Elders and Deacons of the Reformed Protestant Dutch Church of the City of New Yorke and that by the same Name they and their Successours shall and may have Perpetuall Succession and shall and may be Persons Able and Capable in the Law to Sue and be Sued to Plead and be impleaded to Answer and be Answered unto to Defend and be Defended ... And alsoe to have take Possesse Acquire and Purchase Lands Tenements or Hereditaments or any Goods or Chattells and the same to Lease Grant Demise Aliene Bargaine Sell and Dispose of at their own will and Pleasure as other our leidge People or any Corporation or Body Politick within our Realme of England or this our Province may Lawfully do over and above the Rents Lands Tenements ... hereby Settled on the said Corporation and their Successours not exceeding the Yearly Value of two hundred Pounds [current] Money of our said Province...¹²⁴

¹²³ Dutch Church Charter Manuscript 30.

¹²⁴ Ibid 30.

It follows the standard format established by *Sutton's Hospital*.¹²⁵ There is a statement of the Crown's desire and statements of authority to incorporate.¹²⁶ The provision then names certain individuals as well as those who would be members by virtue of their official positions, such as the minister and church elders, which shall constitute the members of the corporation. The domicile is provided by the descriptive: the 'Reformed Protestant Dutch Church in our City of New Yorke.'¹²⁷ Its corporate name is explicitly stated to be the, 'Minister Elders and Deacons of the Reformed Protestant Dutch Church of the City of New Yorke.' The provision also recited certain incidents to the corporate franchise. The entity shall have perpetual succession, noting the members may chose their corporate member successors, and enforcement of their rights at laws. Each were valuable protections against Church of England encroachments.

(4) Corporate Property Ownership & Governance

The right of this ecclesiastical corporation to hold property is as extensive as that possessed by any corporation in the English realm, not simply the province. It is limited to a two hundred pound value cap, the same as imposed in the St. Andrew Charter below. There is, however, no limit to the type of property that the corporation may hold, sell, or purchase. Both the New York Municipal Charter and the Albany Municipal Charter required that property be held in fee simple or for a term of years or lives.¹²⁸

Finally, the Dutch Church Charter addresses the matter of internal governance. The initial four elders and four deacons to form the governing council are named in the

¹²⁵ *Sutton's Hospital* 29b.

¹²⁶ Dutch Church Charter Manuscript (n 27) 30.

¹²⁷ *Ibid.*

¹²⁸ *Ibid* 34.

charter, just as the initial officers of the New York municipal corporations were named in their respective charters. General election and meeting schedules are also provided, just as in the municipal charters.¹²⁹ However, the Dutch Church Charter acknowledges an ecclesiastical authority stating that these internal governance mechanisms must comply with both the laws of England as well as the Synod of Dort:

Annual meeting of all Church members with Elders and Deacons, they can decide who to admit as new members and appoint officers, 'to make Ordaine Constitute or Repeale such Rules Orders – and Ordinances for the Good Discipline and weal of the members of the said Church and Corporation so that these Rules Roders Ordinances be not ~ Repugnant to the Laws of our Realme of England and of this our Province nor Dissonant to the Principal of our Protestant Religion but as neere as may be agreeable to our Laws of our Kingdome of England and Consonant to the Articles of faith and Worship of God agreed upon by the aforesaid Synod of Dort...'¹³⁰

Such an acknowledgement of a foreign religious authority with respect to an English corporation is particularly significant given the time period and that New York is a recently conquered territory. It seems no surprise then that an extensive loyalty oath is required as well:

And further our will and Pleasure is and wee do for us our Heires and Successors Declare and Grant that the Patronage Advowson Donation or Presentation of and to the said Church after the Decease of the said first Minister or Next Avoidance thereof shall appertaine and belong to and be hereby Vested in the Elders and Deacons of the said Reformed Protestant Dutch Church and their Successours forever Provided always that all the Succeeding Ministers that shall be by them Presented Collated instituted & inducted into the said Church shall bear true faith and Alledgiance unto us our Heirs and Successours any thing Contained ~ herein to the Contrary hereof in any ways Notwithstanding...¹³¹

It is both a recognition of another governing body, not as a source of authority for the incorporation itself, but for the regulation and operation of an English corporation.

¹²⁹ Ibid 31-32.

¹³⁰ Ibid 34.

¹³¹ Ibid 32.

This affords another example of the expanding English common law as applied to New York corporations.

(5) Further Corporate Privileges

The Dutch Church Charter grants an extensive degree of autonomy to the Dutch Church, particularly considering the historical context. One of the most significant of these corporate privileges is the right to accept donations and even to tax its corporate membership. The Dutch Church Charter permits the minister to continue to accept funds customarily donated from members of the church:

[T]he first Minister and all the Succeeding Ministers thereof shall and may have take and Enjoy such and the like Stipends Constribucons Offerings Free and Voluntary Gifts and other Ecclesiasticall Dutyes arising or used and Accustomed to rise from the Members of the said Church . . .¹³²

These donations may be collected for both charitable uses and towards a reasonable salary for the ministers, as well the upkeep of the church's communal structures. Within those broad headings, the use of funds is left largely to the discretion of the Dutch Church:

[F]ree and lawful to Collect and Gather together the Free and Voluntary Almes of the members of the said Church Congregated as aforesaid which is to be employed by the Minister Elders and Deacons &c. unto such Pious and Charitable uses as they and their Successours at their discrecon shall – think Convenient and needful...¹³³

Continuing on the same point:

[The members] hereby Authorized ~ from time to time to make rates and Assessments upon all and every of the Members in Communion of the said Church for the Raising of Money for the Payment of the Yearly Stipends and Salleryes of the aforesaid Officers of the said Church and also for Repairing Amending and Enlargeing the said Church and Steeple Belfry Coemetry or Church Yard and other things ~ Necessary belonging to the said Church which Rates and Assessments shall be paid unto the Deacons of the said Church...¹³⁴

¹³² Ibid 32.

¹³³ Ibid 33.

¹³⁴ Ibid 34.

These freedoms granted to the Dutch Church are remarkable. They stand in clear evidence of the Crown's corporation serving a strong private interest: the protection of specific, minority religious rights.

As one might guess, the incorporation of the Dutch Church would not stand alone for long. The next corporation to be considered, that of the 'Church Wardens and Vestrymen of the Church of England as by Law Established of Trinity Church in New York' ('Trinity Church').¹³⁵

ii. Trinity Church of New York City

Almost exactly one year after the Dutch Church Charter was issued, William III granted a royal charter to incorporate Trinity Church on 6 May 1697 (the 'Trinity Church Charter'). This was William III's last charter of incorporation in New York, and as the incorporation of the state church, the Trinity Church Charter contains far more details on the ecclesiastical duties and responsibility of the corporation.

(1) Reason for Incorporation

The first difference between this request and that made by the Dutch Church, is that Trinity Church petition requested all rights of its English counterparts as well as financial maintenance. The original petition presented to Benjamin Fletcher, the Captain General and Governor of New York requested:

And Whereas our said Loving Subjects in their said humble Peticon have Likewise Prayed that We would be Graciously Pleased for the better Accomodacon and Conveninency of the Inhabitants of our said City of New Yorke that the same Church might be made Parochiall and Incorporate into one Body Politicq in fact and Name by the Name of the Rector and Inhabitants in Communion of the

¹³⁵ New York Rector and Inhabitants in Communion of the Protestant Church of England (Trinity Church), Deed of confirmation of Realty and Confirmation of Corporate Powers (6 May 1697) NYSA, Land Patents 12943-78, vol 7, roll 3 (microfiche) ('Trinity Church Charter') 82.

Protestant Church of England as now Established by our Laws and that as such they and their Successours may have hold use Occupy and Enjoy all the Rights Benefits Advantages Priviledges Immunities Mortuaries and Appurtenances as are usually held and Enjoyed by all or any of our Parochiall ~ Churches of our Church of England within our Realme of England And also that We would be further ~ Graciously Pleased to Appropriate unto our said Church the aforesaid Yearly Maintainance of one hundred Pounds Enacted by the aforesaid Act and make our further Royall Grant of a Certaine Quantity of our Land neere adjoining to the said Church unto the said Peticoners in Trust for the use of our said Church and Corporacon...¹³⁶

The request states a preference for the corporation form and asks for all those rights and privileges granted to English ecclesiastical corporations, including that of annual maintenance amount as well as a further grant of land.

The petitioners were successful, and the preamble to the Trinity Church Charter contains a clear purpose for the ecclesiastical corporation, and direct charge to the petitioners:

Now Know Yee that in Consideracion of the Great Charge that our said Trusty and welbeloved Subject Benjamin Fletcher our Captain Generall as aforesaid and the Rest of our aforesaid Loving Subjects Inhabitants within our said City & have been at in the Erecting of the said Church and Laying the foundation of a Steeple and the further Great Charge that must unavoidably ~ Accrew for the finishing the said Church and Steeple and the Providing it with Suitable Ornaments as also for the Erecting and Providing a House neere the said Church for the Habitation of a Minister to Officiate in the said Church in manner aforesaid as well as of our Pious Inclinacons to Promote Propogate and Encourage all our Loving Subjects ~ within our said Province in that Reverend and Godly Duty in Worshiping and Serving God According to the Commendable Rites and Ceremonies of our Protestant Church of England as now established by our Laws...¹³⁷

They are given explicit orders to complete the church and steeple, and to build a residence for the minister, all for the purpose of propagating the teachings of the Church of England. This is similar to the Crown's contingent donation to the College of William and Mary and its two legal phases, founded just three years before this. The

¹³⁶ Ibid 84.

¹³⁷ Ibid 84.

Trinity Church Charter then recites the same initial restriction appearing in the Dutch Church Charter: that the church and church property be used for the exclusive benefit of the Trinity Church and the broader inhabitants of the community:

Do Grant and Declare that the aforesaid Church Erected and Built as aforesaid Scituate in and neare the Street Called the Broadway within our said City of New Yorke and the Ground thereunto adjoining inclosed and used for a [cemetery] or ~ Church Yard shall be the Parish Church and Church Yard of the Parish of Trinity Church within our said City of New Yorke and the same is hereby ~ Declared to be forever Separated and Dedicated to the Service of God and to be Applied therein to the use and behalf of the Inhabitants ...¹³⁸

This provision is similar to the public dimension discussed in the previous municipal charters where the corporate property is to be maintained and used for the benefit of inhabitants, who are not necessarily the same as the corporate members included in the Incorporating Provision. The property and activity of the corporation is impressed with a broader social purpose.

(2) Incorporating Provision

The Trinity Church Charter commands that the corporation shall have, ‘a Rector to have Care of the Souls of the Inhabitants of the said Parish and a Perpetuall Succession of Rectors there . . .’¹³⁹ The charter then moves directly into the Incorporating Provision:

Do Ordaine Constitute and Declare that he the said Right Trusty and wellbeloved Right Reverend father in God Henry Lord Bishop of London and his Successors and all such of our Loving Subjects as now are or hereafter shall be admitted into the Communion of aforesaid Protestant Church of England as now Established by our Laws shall be from time to time and forever hereafter a Body Corporate and Politique in fact and Name by the Name of the Rector & Inhabitants of our said City of New Yorke in Communion of our Protestant Church of England as now Established by our Laws And that by the same Name they ~ and their Successors shall and may have Perpetuall Succession and shall and may be Persons able and Capable in the Law to Sue and be Sued to Plead and be Impleaded to

¹³⁸ Ibid 84-85.

¹³⁹ Ibid (n 27) 83.

Answer and be Answered unto to Defend and be Defended in all and Singular Suites Causes Quarrells Matters Actions and things of what kind or Nature soever and also to have Take Possess receive Acquire and Purchase Lands Tenements Hereditaments or any Goods or Chattells and the same to use Lease Grant Demise Alien Bargain Sell and Dispose of at their own Will and Pleasure as other our Liege People or any Corporacon or Body Politique within our Realme of England or this our Province may Lawfully do not exceeding the Yearly Value of five thousand Pounds the Statute of Mortmaine or any other Statute Law Custome or Usage to the Contrary hereof in any ways notwithstanding....¹⁴⁰

The opening statement of authority incorporates the membership, specifically, Henry Lord Bishop of London, and his Successors. This is specific to the ecclesiastical nature of the incorporation. At this time, all of the territory outside the realm of England was considered under the jurisdiction of the Bishop of London.¹⁴¹ Similarly, corporate membership was open to include all those ‘admitted into the Communion of aforesaid Protestant Church of England’. These members shall be ‘hereafter a Body Corporate and Politique’ and specifies its corporate name including reference to the colonial domicile of the entity: ‘Rector & Inhabitants of our said City of New Yorke in Common of our Protestant Church of England.’ The incidents of separate personality and perpetual succession are named as well as the corporate seal and ability to enforce its rights at law.¹⁴²

(3) Corporate Property

Under its charter, the Trinity Church may own property just as any other corporation in the province or elsewhere in the realm of England. Such property ownership is capped at five thousand pounds per annum; a far larger sum than the Dutch Church, but also far greater than the limits imposed on Albany and New York City. This likely because this is a Church of England parish as opposed to the Calvinist

¹⁴⁰ Ibid 86.

¹⁴¹ Robert Phillimore, *The Ecclesiastical Law of the Church of England*, vol 2 (London: H Sweet 1873) 231.

¹⁴² Trinity Church Charter Manuscript 86.

Dutch Church. It may that greater donations were anticipated for a larger community, or it may have been simply for effect. As another newly incorporated entity, the Trinity Church Charter also preserves the land conveyed under the charter to be held of a royal manor:

To have and to hold all and every of the Premisses together with all and Singular the Rights Customs Usaages benefits Members Advantages Advowsons Presentations Mortuaries ~ Oblations Offerings Fees and Perquisites Profites Royalties Hereditaments and Appurtenances whatsoever unto the said Church Church Yard and Premises belonging or in any wise Appertaining unto them the Rector and Inhabitants of our said City of New Yorke in Communion of the Protestant Church of England as now Established by our Laws and their Successors To the Sole and only use Benefite and Behoofe of them the said Rector Inhabitants &c and their Successors forever To Be Holden of us our Heirs and Successours in Free and Common Soccage as of our Mannour of East Greenwich in our County of Kent within our Realm of England ~ Yielding Rendring and Paying therefore Yearly and every Year unto us our Heirs and Successours [at a particular date] at our City of New Yorke the Yearly Rent of one Pepper Corne if the same be Lawfully Demanded in Lieu and Stead of all other Rents Dues Dutyes & Demands whatsoever for the Premises or any of them in these Presents are not named or any Statute Act Ordinance Provision Proclamacon or Resticcon heretofore had made...¹⁴³

When compared with the similar provision in the Dutch Church Charter, they are nearly the same with the primary difference being that the quitrent due the Crown from the Trinity Church is the symbolic peppercorn whereas the Dutch Church Charter requires real money due. Neither of these ecclesiastical charters contains that same limit as the Albany Municipal Charter or the New York Municipal Charter stating that property may only be held in fee simple or for a term of years or lives.

(4) The Church of England Restrictions & Privileges

There are certain provisions in the Trinity Church Charter that are unique to an ecclesiastical corporation under the authority of the Church of England. In looking

¹⁴³ Ibid 93.

first at its officers and membership, this charter contains far more detail with respect to the spiritual purpose of the entity than the Dutch Church Charter provided. The charter allows for the rules of the Church of England to influence and govern the corporate governance mechanisms granted to the corporation. Such provisions begin with the delegation of authority to govern as they see fit within the laws of England and the province:

And Wee Do of our Like Speciall Grace Certain Knowledge and mere mocon Give and Grant unto the said Rector and Inhabitants of our City of New Yorke in Communion &c full Power and Authority from time to time to Appoint Alter and Change such Days and times of meeting as they shall think fitt and to Choose Nominate and Appoint so many others of our Leige People as they shall think fitt and shall be willing to Accept the same to be Members of the said Church and Corporacon and Body Politicq and them into the same to admit and to Elect and Constitute such other Officer or Officers as they shall think fitt and Requisite for the Orderly Managing Dispatching of the Affairs of the said Church and Corporacon and their Successours and from time to time to make Ordaine and Constitute or Repeale such Rules Orders and Ordinances for the Good and welfare of the Members of the said Church and Corporacon so that those Rules Orders and Ordiannces be not Repugnant to the laws of our Realme of England and of this our Province.¹⁴⁴

This expansive provision is then narrowed by additional requirements of the Church of England. For example, the Rector was initially charged as follows:

And that the said Rector shall have the Care of the Souls of the Inhabitants within the said Parish and in the Communion of our said Protestant Church of England as now Established by our laws and have and enjoy to him and his Successors forever one Message or Tenement and Appurtenances intended to be Erected on Part of the said Church Yard or near thereunto as Conveniently as Can be Procured...¹⁴⁵

The corporation is responsible for ensuring the position of rector is filled at all times and that such rector is granted proper accommodation. Moreover, the operation of the

¹⁴⁴ Ibid 92.

¹⁴⁵ Ibid 86.

church, including the actions of the rector, must conform to the laws and rules of the London parish of St. Mary le Bow:¹⁴⁶

And that all the Succeeding Rectors of the said Parish and Parish Church (except the first Rector thereof hereby Constituted) shall be Presented Collated Instituted and Inducted as other Rectors Persons and ~ Viccars Respectively are Accustomed to be And Wee further Declare it to be our Royall Will and Pleasure that the first Rector and all the Succeeding Rectors thereof shall and may have take and enjoy such and the like Oblations Mortuaryes Easterbooks or Offerings and other Eccesiasticall Dutyes Ariseing within the said Parish of Trinity Church as the Viccar Rector or Parson of S^t. Mary Bow within our City of London in our Realme of England now Enjoyeth...¹⁴⁷

In addition to adhering to St Mary le Bow's spiritual schedule, the Trinity Church must adhere to its designation of corporate officer responsibilities and election procedures:

AND further we will and Ordaine and by these Presents Do Declare and Appoint that for the better Ordering and Managing of the Affairs and businesse of the said Corporation~ there shall be annually and once in every Year forever on the Tuesday in Easterweek two Church Wardens and twenty Vestrymen Duely Elected by the Majority of Votes of the Inhabitants of the said Parish in ~ Communion as aforesaid which Church Wardens and Vestrymen shall be from time to time Subject to [the Church of St Mary le Bow's] Laws and Statutes now in force...¹⁴⁸

There had been sweeping statements of corporations being granted powers to the extent of any other corporation in the province or realm, but this is one of the more restrictive grants as it references the operation and regulation rules of another source of authority, the Church of England, and another corporation, the Church of St Mary le Bow.

The Trinity Church is not only restricted by the rules and regulations under the Church of England, but its privileges are also greatly enhanced. The Trinity Church

¹⁴⁶ The largest of the London parishes, second only to St Paul's. See for example R Phillimore (n 141) 214-15.

¹⁴⁷ Trinity Church Charter Manuscript 86

¹⁴⁸ Ibid 86-87.

Charter allows the corporation to collect funds for a salary for the rector. The rector is provided with a salary of one hundred pounds per annum:

To have and to hold the said Yearly Maintenance of one hundred Pounds aforesaid unto him the said Rector of the Parish of Trinity Church within our said City of New Yorke and his Successors to the Sole and only Propper use benfit and behoofe of him the said Rector of the Parish of Trinity Church within our said City of New Yorke and his Successors forever...¹⁴⁹

Significantly, the Trinity Church Charter also grants the rector a cause of action within the province against the Trinity Church officials for failure to collect and pay this wage:

And wee further Declare that upon any Neglect or Refuseall of the said Church Wardens and Vestrymen (appointed by the said Act) of their Levying Assessing Collecting and Paying the said Yearly Mantainance of one hundred Pounds as aforesaid that it shall and may be Lawfull for the said Rector or Incumbent of the said Parish for the time being to Prosecute the said Church Wardens and Vestryment in an Accon of Debt in any of the Courts of Record within our said Province...¹⁵⁰

In addition to collecting funds for a rector's salary, Trinity Church was permitted to receive alms or contributions for the purpose of finishing certain listed construction projects, including the church building itself, with the remaining for other charitable works at its own discretion.¹⁵¹ But, unlike the Dutch Church Charter, the Trinity Church Charter contains an additional provision permitting it to effectively tax its membership, the 'Inhabitants of the said Parish in Communion as aforesaid' if additional funds were necessary.¹⁵² This amount is limited to five hundred pounds to be spread out over twenty-eight quarterly payments.¹⁵³ This amount is also limited to members of the parish, which would not include those members of the Dutch Church.

¹⁴⁹ Ibid 91.

¹⁵⁰ Ibid 91-92.

¹⁵¹ Ibid 92.

¹⁵² Ibid 88.

¹⁵³ Ibid 89.

With respect to the charge of completing certain building projects, the Trinity Church Charter is similar to both the Dutch Church Charter and the municipal charters for New York City and Albany. However, this charter also contains a specific directive regarding management of debts and credits incurred by these building projects:

And Wee further Declare it to be our Royall Will and Pleasure that the Church Wardens of the said Parish of Trinity Church shall Cause all the Debts Credits and Contracts made and to be made with or by the Artificers and Workmen Employed or to be Employed for any Work or Building to be made or done in or About the said Church Steeple and Premises to be Entered and Registred in one or more Book or Books to be kept for that Purpose and the said Vestrymen or any Elevelin or more of them out of the Money Collected and Paid to the said Church Wardens upon the said Quarterly Payments or by any other ways or means for the use aforesaid shall in the first Place Pay and Discharge or Cause to be Paid and Discharged all such Debts as shall become Due unto the Artificers & Workmen Impliyed or to be Employed or to be Impliyed in and about the finishing the said Church Steeple House and Premises and shall House and Pay or Cause to be Issued and Paid to the said Artificiers and Workmen as aforesaid all and every Sume and Sumes of Money now or hereafter Due and Payable unto them their Executors Administrators or Assignes Proporconably According to the Dates of the Registering of their Debts and Credits as aforesaid with moderate Interest if need shall be for their forbearance therefore...¹⁵⁴

This is a more detailed operational requirement affecting how the Trinity Church manages its finances.

But even with these restrictions, the Trinity Church Charter closes with the final sentiment:

And wee further Declare it to be our Royall Will and Pleasure ~ that nothing herein Contained nor any Clause or Article here above menconed shall be Construed or take to abridge or take away any Right ~ Priviledge benefite Liberty or Lycence that we have heretofore Granted unto any Church in Communion of our Protestant faith within our said Province of New Yorke...¹⁵⁵

¹⁵⁴ Ibid 89-90.

¹⁵⁵ Ibid 93.

The ecclesiastical corporation created under the Trinity Church Charter was to have at least as many privileges and rights as any other ecclesiastical corporation in New York: that could only mean the Dutch Church.

This was the last New York charter issued under William III. After the flurry of incorporations, there is not another incorporation until 1705 with an ecclesiastical incorporation under Anne at the behest of the new missionaries in New York.

iii. St. Andrew Church of Staten Island

The first and only New York incorporation under Anne was issued to the St Andrew Church of Staten Island on 23 November 1705 ("St. Andrew Charter"). Based on the motivation for its incorporation, missionaries rather than an existing community, it is likely that this was just a small parish church when compared even to Trinity Church. Its charter similar in most respects to the Trinity Charter, but there are a few points of divergence worthy of analysis. The preamble reveals a reason for incorporation of this small parish on Staten Island:

[T]heir petition presented unto our Trusty & welbeloved Robert [Amber] esq Captain Generale & Governour Chief of the province of New York & in behalf of themselves and all other the Inhabitants of the said Island in Communion of the Church of England as by Law Established & their Successors have set forth that by the Charitable & Voluntary Contribution of pious and well affected Christians and the blessing of Almighty God favouring their Weak endeavours there is now Erected Built & finished near the Middle part of the said Island a Decent and Convenient Stone Church for the service and Worship of God according to the Discipline of the Church of England as by Law Established and that they are [meeting] Great Disadvantages in the settling & regulating of this Church affairs by not being Incorporated thereunto praying to have our Royal [Grant] and Letters Patent a body Corporate and politick by the name of the Minister Church Wardens and Vestry of S^t. Andrew in the County of Richmond with sundry necessary & Convenient Priviledges and Liberties together with the Grant & Confirmation of their Inheritance to hold to them and their Successors for ever WE being willing to give all due Encouragement &

promotion to the pious – Institutions of our said Subjects & to grant their reasonable request ...¹⁵⁶

An established church, the 'Minister Church Wardens and Vestry of St. Andrew in the County of Richmond' ('St. Andrew Church'), has requested incorporation for the better protection and management of its property and operations. It has experienced 'Great Disadvantage in the settling & regulating of this Church affairs by not being Incorporated,' and as a result certain individuals have requested the Crown's protection of their existing rights and property by use of the corporate franchise.

(1) Incorporating Provision

The first provision of the St. Andrew Charter is a succinct Incorporating Provision:

Know Yee that of our Special grace certain knowledge and meer motion We have given Granted ratified and Confirmed and by these presents do for us and our Successours for ever give grant ratify and Confirm unto ... that the said Aeneas Mackenzie [etc.] and the rest of the Inhabitants of the said Island in Communion of the Church of England as by Law Established now are from henceforth that they and their Successors for ever and shall be one body Corporate and politick in Name and fact by the name of the Minister Churchwardens and Vestry of S^t. Andrew in the County of Richmond by which name they shall be from henceforth known & Distinguished in all bargains Sales Writings & ...¹⁵⁷

The standard elements of *Sutton's Hospital* are included in just these first lines. The authority for such an incorporation being derived from 'our Special grace'; the members are listed as Aeneas Mackenzie and the open membership of 'the Communion of the Church of England'; and the name and domicile of the corporation is listed, 'Minister Churchwardens and Vestry of St. Andrew in the County of Richmond.' This Incorporating Provision also includes mention of the incidents of the

¹⁵⁶ St Andrew, Minister, Church, Wardens and Vestry, Act of Incorporation and Grant (29 June 1713) NYSA, Land Patents 12943-78, vol 8, roll 3 (microfiche) (the 'St Andrew Charter Manuscript') 33-34.

¹⁵⁷ Ibid 34.

corporate franchise: it is 'distinguished' from its membership, and it exists in perpetual succession.

(2) Corporate Rights & Internal Governance

In addition to the standard Incorporating Provision, the St Andrew Charter provides the near formulaic corporate rights:

[T]hat they and their Successours by the name aforesaid be able and in Law Capable to Sue and be sued plead and be impleaded Answer and be Answered unto Defend & be Defended in all & Singular Suits actions quarrels Controvering and things of [that] Nature or King soever in all or any of our Courts of Law & Equity within our said province . . . ¹⁵⁸

The St Andrew Charter then leads to the description of the internal governance structure for the entity, which is far simpler than the rules imposed in the Trinity Church Charter. It begins with a list of the initial officers of the corporation, including the appointment of a minister.¹⁵⁹ Like the Trinity Church, this corporation is granted the right to levy and collect taxes in order to that the minister may be paid a salary of forty pounds.¹⁶⁰

Aeneas Mackenzie the present Minister of the said Church and his Successor Ministers of the said Church for the time being shall have and receive the sum of forty pounds yearly to be assessed Levied & Collected & paid by the Inhabitants of the said [Community]¹⁶¹

However, rather than the specific reference to a particular church, this charter created an ecclesiastical entity with enumerated powers and capacities. It provides:

Which said Body Politick & Corporate shall or may have one parochial Minister of the Church of England as by Law Established duly qualified for the Care of Souls two Churchwardens & Eight vestrymen of the Communion of the Church of England as by Law Established and the

¹⁵⁸ Ibid 35.

¹⁵⁹ Ibid 35.

¹⁶⁰ That is quite a far cry from the one hundred pounds proposed under the Trinity Church Charter, which reinforces the point that this is just a small parish in comparison.

¹⁶¹ St Andrew Charter Manuscript 36.

Churchwardens and Vestrymen hereafter to be Elected Annually and every year by the Majority of Voices of the Inhabitants of the said Island being of the Communion of the Church of England as by Law Established on every Tuesday in Easterweek at the said Church which said Churchwardens and Vestrymen shall have perpetual succession and power and authority & do act and perform all things relating to their respective offices as Church Wardens & Vestrymen in England commonly to [Act & form] in England during all that time for which that shall Be Elected to serve ...¹⁶²

The St Andrew Charter establishes a governing council of one minister, two churchwardens and eight vestrymen, to be elected at the annual meeting held on the Tuesday of Easterweek.¹⁶³ This is a much smaller parish than that of Trinity Church. Nevertheless, it is still legally curious that this corporate charter did not include by specific reference the governing bylaws of another ecclesiastical corporation. Rather, The St Andrew Charter stipulates only that the internal governance of this ecclesiastical corporation broadly conform to those of its English counterparts. It suggests a degree of uniformity at this time among the English ecclesiastical corporations.

(3) Corporate Property Ownership

The corporate property rights under the St Andrew Charter remains to be considered. Similar to the other New York ecclesiastical corporations, there is no limit on the type of property to be held, only a limit on the value:

[A]s also by the same Name to ask Demand take possesses receive hold Enjoy acquire and purchase Lands Tenements and Hereditaments goods and Chattles and them or any of them to use Lett [ut?] grant Demise bargain and sell not exceeding the yearly value of two hundred pounds clear Income over and above what we Do or shall particularly hereafter by then presents Grant ratify and Confirm unto the said minister Churchwardens & vestrymen of St. Andrew in the County of Richmond and their Successours forever And for the better regulating and ordering of the affairs of the said Church ...¹⁶⁴

¹⁶² Ibid 35.

¹⁶³ Ibid 35. There must always be at least one warden. Ibid.

¹⁶⁴ Ibid 35.

The St Andrew Charter then conveys to the corporation the communal property on which its church is built:

[G]ive grant ratify and Confirm unto the said Minister Churchwardens & Vestry of S^t. Andrew in the County of Richmond so Incorporated as is aforesaid and to their Successors for ever All That the said Stone Church called S^t. Andrew & the Tenement or [Lott of Ground] whereon it is built scituate and being on Carles Neck at the head of the
...¹⁶⁵

This conveyance is conditioned the St Andrew Church developing and maintaining the churchyards and the stone church. This is required of all the royal corporations in New York and Virginia at this time.¹⁶⁶ And with that brief corporate charter of St Andrew Church, the analysis of the Stuart corporations in colonial New York concludes.

IV. Conclusion

As with each of the corporations considered herein, the corporations of New York were truly entwined with the social, economic, and government life of the colonists. The colony itself had been a gift to the Duke of York from his brother, Charles II in 1664. Corporations only appear in New York after the Duke of York assumes the throne as James II and there is renewed interesting in shoring up certain strategic points to both improve trade and provide general protection for the colony. The corporate franchise protected and expanded the municipalities economic privileges associated with this trade for the hoped for enlargement of the colony. The value of this expansion and protection outweighed the potentially larger tax liability and oversight. Compare this with the New York ecclesiastical corporations, which appeared after the Glorious Revolution. William III had an ongoing interest in spreading Protestantism generally, and a vested interest in maintaining the financial and

¹⁶⁵ Ibid 37.

¹⁶⁶ Ibid 39.

logistical survival of the Church of England in the colonial frontier of North America, particularly in light of its non-conforming northern neighbors. The Dutch Church, Trinity Church, and St Andrew Church each sought incorporation because of the protection that legal status provided. These six corporations under the Stuarts were instrumental in the formation, expansion, and stabilization of colonial New York.

Concluding Remarks

With the end of Anne's reign, the corporation in British North America could be generally described by certain points of commonality: its Incorporating Provision. These points, this broad framework for defining a corporation might be best observed at the beginning of the period with John Cowell's 1607 definition. He described the legal entity by what it needs: an authority to incorporate, a corporate name, a corporate domicile, and members to be incorporated. He included a theoretical description of what was created, a singular and separate corporate person that might exist in perpetual succession. These elements appear in each and every corporate charter that has been considered in this dissertation. They have been encapsulated and restated at common law by *Sutton's Hospital*. They appeared with such regularity that they were easily labeled part of the 'Incorporating Provision' in this empirical study. And they bolstered the legal certainty that the corporate form with its formal corporate charter of rights and privileges could provide.

The Incorporating Provision was also always accompanied by additional rights and privileges that appeared frequently but not always with the same degree of likeness. These other rights and privileges are the provisions that Coke had also declared ancillary in 1613. In that way, it is these other provisions then, which give the seventeenth-century corporation the ability to adapt and flex according to its colonial environment. Not all corporate charters had specified membership voting allotments like that of the commercial Virginia Company; not all provided a two-tier incorporation structure to accommodate the logistical difficulties of building a college in an uncertain colony like the College of William and Mary; and not all referred to a foreign prescriptive right as well as royal authority for incorporation like that of New York City. Moreover, as the Massachusetts examples demonstrate, legal incorporation is not

always the necessary end result. There was still value in modeling the corporate form irregardless of whether it was enforceable at common law.

The discovery of this empirical study is that corporations were not prevalent in colonial Virginia, Massachusetts, or New York during the Stuart age, which was explained by any number of factors including population size and settlement patterns. However, those corporations that do appear in this colonial landscape shed a new perspective on the legal history of that colony. The corporations in Virginia depicted the struggle between the metropolitan government and local interests, most vividly with the decline of the Virginia Company and the passing of the Act for Establishing Ports and Towns. But, aligning social and educational movements were also visible through the College of William and Mary. In Massachusetts, the rebellious and independent streak of the colony reared its head with the incorporation of Harvard College and the public utility under the nose of the metropole. It was a foreboding act. In New York, the complexities of a diverse population coupled with an avid Protestant Crown, are evident in the petition for the incorporation of the Dutch Church to protect from increasing Anglican settlers, and the counter petitions seeking incorporation to build up the Church of England communities. Their economic alliance is readily seen in the municipal corporations aimed at protecting the colony's fur trade and location.

The empirical analysis of the corporations emerging in colonial Virginia, New York, and Massachusetts, and the precise examination of their corporate charters, has revealed a new perspective on the legal history of each colony and its relationship with the metropolitan government as well as the legal history of the newly established Anglo-American corporation.

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