

# The First Franchise

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## I. Introduction

Franchising has ancient roots.<sup>1</sup> In medieval times, franchises were rights granted by the sovereign.<sup>2</sup> Eventually, the term and concept came to refer to private business agreements.<sup>3</sup> In the United States, business franchising is usually considered to have begun in the late 1800s and early 1900s.<sup>4</sup> Then, in the 1950s, 1960s, and 1970s,



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1. See, e.g., *Shorter v. Smith*, 9 Ga. 517 (1851) (describing “ancient doctrine in England” that franchises were impliedly grants of exclusive rights, but, in the United States, exclusivity is not implied).

2. See, e.g., *Bank of Augusta v. Earle*, 38 U.S. 519, 585 (1839) (“Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right . . . . It is essential to the character of a franchise that it should be a grant from the sovereign. . . .”); *State v. Real Estate Bank*, 5 Ark. 595, 599 (1844) (franchises are contracts between the sovereign power and a private citizen); *People ex rel Attorney Gen. v. Utica Ins. Co.*, 15 Johns. 358, 368 (N.Y. 1818) (“A franchise is a royal privilege, or branch of the royal prerogative, subsisting in the hands of the subject, by grant from the crown.”); see also, e.g., PAUL VINOGRADOFF, *ENGLISH SOCIETY IN THE ELEVENTH CENTURY, ESSAYS IN ENGLISH MEDIAEVAL HISTORY* 108–39 (2013) (discussing franchises in medieval times and noting that “all the well-known franchises or liberties of the feudal age were chips from the block of Royal authority”); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 6, 124, 144 , 221, 454–56, 495, 518, 519, 521, 532, 577, 586 (2d ed. 1898) (discussing common law rules of medieval franchises).

3. For a case reflecting the transition between use of the term *franchise* exclusively for grants of rights from the sovereign to use of the term for private contracts, see *NLRB v. Bill Daniels, Inc.*, 202 F.2d 579, 582 (6th Cir. 1953) (noting the word “franchise” was sometimes applied to private agreements and the National Labor Relations Board referred to written agreements between Ford Motor Company and its retail dealers as “franchises,” but the court was unwilling to apply the term this way because the agreement was between private business entities and therefore lacked an “indispensable element” in that it was “not conferred by any sovereignty or state”).

4. See, e.g., Daniel J. Oates, Vanessa L. Wheeler & Katie Loberstein, *A State’s Reach Cannot Exceed Its Grasp: Territorial Limitations on State Franchise Statutes* 37 *FRANCHISE L.J.* 185 (2017) (noting that franchise businesses have existed since the early 1900s in the form of product distribution franchising or traditional franchising) (citing William L. Killion, *The History of Franchising*, in *FRANCHISING: CASES, MATERIALS, AND PROBLEMS* 3 (Alexander Moore Meiklejohn ed., 2013)); David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 *OKLA. CITY U.L. REV.* 37, 43–44 (1999) (discussing history of franchising in 1800s).

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American business franchising grew dramatically.<sup>5</sup> In the 1970s, unsavory franchisor practices led the Federal Trade Commission and state legislatures to enact protections for franchisees.<sup>6</sup>

Judicial opinions and scholarly analysis do not reflect any consideration of the possibility that business franchising may have begun earlier than even the 1800s in North America. However, evidence from historic documents suggests that elements of modern business franchising were present at the origins of British expansion to America. All the elements that, when present today in a business relationship, make that business a franchise, were present when about 100 colonists arrived in 1607 in Jamestown.<sup>7</sup>

In the ensuing years, many colonies were formed. Typical of new business ventures, many did not survive. But a few did survive, overcoming daunting challenges. Several colonies, though obviously not all,<sup>8</sup> succeeded and prospered. The survivors are integral to our nation today. Their original names are recognizable: Province of Massachusetts Bay;<sup>9</sup> Colony of Rhode Island and Providence Plantations;<sup>10</sup> Connecticut Colony;<sup>11</sup> Province of New Hampshire;<sup>12</sup>

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5. See, e.g., Oates, Wheeler & Loberstein, *supra* note 4, at 186 (noting that in the 1950s franchising became a “hallmark of the American economy”).

6. See, e.g., Statement of Basis and Purpose for Federal Trade Commission Trade Regulation Rule on Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59,614, 59,623 (Dec. 21, 1978). California enacted the first of the state franchise registration and disclosure laws in 1971. Subsequently, fourteen more states enacted legislation requiring registration, disclosure, or both. See David J. Meretta & Eric H. Karp, *Regulation FD: Roadmap to Better Relations Between Franchisors and Franchisees* 26 FRANCHISE L.J. 117, 119 (2007).

7. Finbarr McCarthy, *Participatory Government and Communal Property: Two Radical Concepts in the Virginia Charter of 1606*, 29 U. RICHMOND L. REV. 327 (1995) (noting that on April 26, 1607, about one hundred English men landed on the shore of North America near Jamestown, Virginia).

8. See Julia L. Ernst, *The Mayflower Compact: Celebrating Four Hundred Years of Influence on U.S. Democracy*, 95 N.D. L. REV. 1, 17 (2020) (noting failed English colonies in North Carolina and Maine, and that many colonies failed due to starvation, disease, exposure to elements, lack of resupplies from Europe, conflicts with people who already inhabited the land, and slaughter by rival Europeans).

9. See, e.g., *Commonwealth v. City of Roxbury*, 75 Mass. 451, 454 (1857) (referring to charter of the “Province of Massachusetts Bay”).

10. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. 657, 660 (1838) (referring to “Colony of Rhode Island and Providence Plantations”). In 2020, after 357 years, Rhode Islanders voted in a statewide ballot measure to eliminate “and Providence Plantations” from the name of the state and former colony. See, e.g., Edward Fitzpatrick, *Move over RI: Massachusetts Has the Longest Official State Name Now*, BOS. GLOBE (Nov. 10, 2020), [www.bostonglobe.com/2020/11/10/metro/move-over-ri-massachusetts-has-longest-official-state-name-now](http://www.bostonglobe.com/2020/11/10/metro/move-over-ri-massachusetts-has-longest-official-state-name-now) (“Throughout its history, the State of Rhode Island and Providence Plantations has held the distinction of being the smallest state with the longest name. But now that voters have decided to drop “and Providence Plantations” from the official name, the state with the longest name is Rhode Island’s neighbor to the north—the Commonwealth of Massachusetts”).

11. See, e.g., *Town of Middletown v. Sage*, 8 Conn. 221 (1830) (referring to “the colony of Connecticut”).

12. See, e.g., *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 522 (1819) (referring to “province of New Hampshire”).

Province of New York;<sup>13</sup> Province of New Jersey;<sup>14</sup> Province of Pennsylvania;<sup>15</sup> Delaware Colony;<sup>16</sup> Province of Maryland;<sup>17</sup> Colony and Dominion of Virginia;<sup>18</sup> Province of North Carolina;<sup>19</sup> Province of South Carolina;<sup>20</sup> and Province of Georgia.<sup>21</sup>

Over time, the colonies became dissatisfied in their franchise relationships. The grievances resembled concerns that franchisees sometimes have today: fees increased over time (in the form of higher taxes), and, worse, the increases were imposed without input (the objection being embodied in the famous phrase “taxation without representation”). Colonists, like franchisees, objected to levels of control and supervision from their franchisor in the form of British troops being quartered in the colonies. Franchisees sometimes want systemic changes and may become aggrieved when their franchisor refuses. The colonists complained that their franchisor “refused his assent to laws, the most wholesome and necessary for the public good.”<sup>22</sup> “They petitioned their franchisor, stating grievances. Their petitions were rebuffed. The colonies assembled together, twice,<sup>23</sup> and formed an association.<sup>24</sup> As an association, the colonists became the first “breakaway” franchisees.<sup>25</sup>

13. See, e.g., *Jackson ex dem Winthrop v. Ingraham*, 4 Johns. 163 (N.Y. 1809) (referring to “province of New York”).

14. See, e.g., *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842) (referring to “province of New Jersey”).

15. See, e.g., *Mather v. Kinike*, 51 Pa. 425 (1866) (referring to “province of Pennsylvania”).

16. See, e.g., *In Re Pea Patch Island*, 30 F. 1123, 1123 (1848) (referring to “Delaware Colony”).

17. See, e.g., *William H. Moore & Co., v. State*, 47 Md. 467 (1878) (referring to “Province of Maryland”).

18. See, e.g., *Boerner v. McCallister*, 89 S.E.2d 23 (1955) (referring to “Colony and Dominion of Virginia”).

19. See, e.g., *Virginia v. Tennessee*, 148 U.S. 503 (1893) (referring to “the Province of North Carolina”).

20. See, e.g., *Fletcher v. Peck*, 10 U.S. 87 (1810) (referring to “the province of South Carolina” and “the province of Georgia”).

21. See, e.g., *Warthen v. May*, 1 Ga. 602 (1846) (noting that “[t]he colony of Georgia was settled in 1732”).

22. THE DECLARATION OF INDEPENDENCE (U.S. 1776). Many more grievances were expressed in the Declaration of Independence and earlier documents such as the Petition to the King from the First Continental Congress. PETITION TO THE KING (U.S. Oct. 25, 1774), reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 115, 119.

23. The two assemblies are well known as the First Continental Congress (Phila. 1774) and Second Continental Congress (Phila. 1776).

24. The association’s name is also well known: The United States of America.

25. A franchisee who leaves the system and remains in the same business is sometimes called a breakaway franchisee. See, e.g., *Naturalawn of Am., Inc. v. West Group, LLC*, 484 F. Supp. 2d 392, 402 (D. Md. 2007) (discussing this situation); *accord* *McAlpine v. AAMCO Automatic Transmissions, Inc.*, 461 F. Supp. 1232, 1238–39 (E.D. Mich. 1978); see also David A. Beyer, *Considerations in the Development of a Franchise System*, FL BAR, FRANCHISE LAW & PRACTICE § 2.47 (1996) (discussing “breakaway franchisee syndrome”).

## II. Elements of a Franchise

Many scholarly and practical articles and some court decisions discuss the elements that, when present, may unintentionally make a business relationship a franchise.<sup>26</sup> The common warning of these analyses is that if the elements are present, the franchisor is subject to various federal and state regulations that apply to offers and sales of franchises, the ongoing franchise relationship, and restrictions on termination of the franchise relationship.

Under the Federal Trade Commission definition, a franchise is:

any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that

(1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;

(2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

(3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.<sup>27</sup>

These definitional elements lack any element of intention.<sup>28</sup> The effect of the definition is that a commercial arrangement is a franchise under the FTC Rule when the elements are present.<sup>29</sup>

26. See, e.g., Megan B. Center, *Accidental Franchises: It Takes a Community (of Interest)*, 39 FRANCHISE L.J. 545 (2020); Paul R. Fransway, *Traversing the Minefield: Recent Developments Relating to Accidental Franchises*, 37 FRANCHISE L.J. 217 (2017); Craig J. Knobbe, *Hidden Franchises*, 45 COL. LAW. 25 (2016); Lawrence G. Jameson III, *Where Did That Franchise Come from?* 28 S. CAR. LAWYER 32 (2016); Daniel J. Oates, Shannon L. McCarthy & Douglas C. Berry, *Substantial Association with a Trademark: A Trap for the Unwary*, 32 FRANCHISE L.J. 130 (2013); John Mashni, *Trademark License Agreement to Franchise: Where Is the Tipping Point* 18 TRINITY L. REV. 26 (2013); Mark Miller, *Unintentional Franchising*, 36 ST. MARY'S L.J. 319 (2005); James R. Sims III & Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against It*, 18 FRANCHISE L.J. 54 (1998); H. Brett Lowell & John F. Dienelt, *Drafting Distribution Agreements: The Unwitting Sale of Franchises and Business Opportunities* 11 DEL. J. CORP. L. 725 (1986); *Faxon Sales, Inc. v. U-Line Corp.*, Case No. 17-CV-872-JPS, 2017 WL 4990617, at \*1, \*4 (E.D. Wis. Oct. 31, 2017); *Mercy Health System of S.E. Pa. v. Metro. Partners Realty LLC*, No. 3046, 2005 WL 957722, at \*2 (Phila. Ct. Com. Pl. Mar. 6, 2005).

27. 16 C.F.R. § 436.1(h).

28. *But see*, e.g., *Jerome-Duncan, Inc. v. Auto-By-Tel, LLC*, 989 F. Supp. 838, 842 (E.D. Mich. 1997), *aff'd*, 176 F.3d 904 (6th Cir. 1999) (noting that “the word ‘franchise’ does not appear anywhere in the parties’ agreement. While not dispositive, it is clearly probative of what type of agreement was reached”).

29. See Knobbe, *supra* note 26, at 25 (“If the business relationship satisfies the elements of the federal or state definition of a franchise, it is a franchise and subject to regulation.”); Jameson, *supra* note 26, at 34 (“[I]f all three elements are present, then the relationship will be deemed a franchise.”); Lowell & Dienelt, *supra* note 26, at 737 (“If all three characteristics are present, the relationship is covered by the FTC Rule.”).

Many states have also enacted legislation defining a franchise. States typically define a franchise to include three elements: permission to use the franchisor's trademark or other identification or commercial symbol; provision by the franchisor of a marketing plan or system; and payment of a fee by the franchisee to the franchisor.<sup>30</sup> In eight states, a franchise is defined based on the existence of a "community of interest" between the franchisor and the franchisee.<sup>31</sup> Community of interest has varying definitions. Under one leading discussion, it involves a continuing financial interest between the parties coupled with shared goals and cooperative, coordinated efforts.<sup>32</sup>

Under any of these definitions, all the elements were present in the colonists' arrangements with the British Crown.

### III. Contents of a Colonial Charter—The First Virginia Charter

The colonies were in significant part business ventures conducted by the Crown and by entrepreneurs in England.<sup>33</sup> Though not everyone who came to the new world did so for business, for many this was the purpose. "Most English people who ventured abroad in the sixteenth and early seventeenth centuries did so for commercial or religious reasons. They were traders, diplomats, privateers and sailors."<sup>34</sup>

The First Virginia Charter, granted by King James in 1606, noted that several "loving and well-disposed subjects had been humble suitors" asking the King to "vouchsafe unto them our license to make habitation, plantation and to deduce a colony of sundrie" into "that part of America commonly

30. See, e.g., CAL. CORP. CODE § 31005(a); 815 ILL. COMP. STAT. 705/3(1); IND. CODE § 23-2.5-1(a); MD. CODE ANN., BUS. REG. § 14-201 (e)(1); MICH. COMP. LAWS § 445.1502(3); N.Y. GEN. BUS. LAW § 681(3); N.D. CENT. CODE § 51-19-02(5)(a); OR. REV. STAT. § 650.005(4); R.I. GEN. LAWS § 19-28.1-3(7)(i); VA. CODE ANN. § 13.1-559(A); WASH. REV. CODE § 19.100.010(6)(a); WIS. STAT. § 553.03(4)(a).

31. HAW. REV. STAT. § 482E-2; MINN. STAT. § 80C.01; MISS. CODE ANN. § 75-24-51(6); MO. REV. STAT. § 407.400(1); NEB. REV. STAT. § 87-402(1); N.J. STAT. ANN. § 56:10-3(a); S.D. CODIFIED LAWS § 37-5A-3; WIS. STAT. § 135.02.

32. Ziegler Co., Inc. v. Rexnord, Inc., 407 N.W.2d 873, 878-79 (Wis. 1987).

33. The opportunity to own "new land" was a principal inducement attracting settlers from England and elsewhere to North America. S. Colin G. Petry, *The Regulation of Common Interest Developments as It Relates to Political Expression: The Argument for Liberty and Economic Efficiency*, 59 CASE W. RES. L. REV. 491, 498 (2009). The Crown "granted charters conveying vast tracts of land to trading companies," like the Virginia Company of London, and to individual proprietors, like William Penn. "Virginia and Massachusetts, for instance, were founded by business ventures seeking a profit from colonization. The investors in the Virginia Company of London and the Massachusetts Bay Company were keenly interested in commercial gain. They anticipated revenue derived from annual rents imposed on land grants and from trade with the colonies." *Id.* at 498 n.44 (citing, JAMES W. ELY, JR. *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998); see also *Hallowich v. Range Res. Corp.*, No. 2010-3954, 2013 WL 10254260, \*11 (Pa. Ct. C.P. 2013) ("In 1682, Pennsylvania, like all American colonies, began as a business venture on behalf of the crown: i.e., as a proprietorship under Penn's absolute control, in which 'some 600 investors bought shares.'") (quoting RANDALL M. MILLER AND WILLIAM PENCAK, *PENNSYLVANIA: A HISTORY OF THE COMMONWEALTH* at 64 (2002)).

34. McCarthy, *supra* note 7, at 330. (McCarthy adds that some who traveled were pilgrims; others were fleeing religious persecution. "Few journeyed for pleasure, curiosity, or knowledge.")

called Virginia” and “other parts and territories in America,” not then possessed by another Christian sovereign or people, between 34 degrees and 45 degrees latitude or within one hundred miles of the coast.<sup>35</sup> The charter said it was granted “to that end” and for the “more speedy accomplishment of their said intended plantation and habitation there.”<sup>36</sup>

The charter noted that recipients would divide into two colonies and companies. One, called the “First Colony,” would consist of knights, gentlemen, merchants, and other adventurers from London, and others who would join them. The “Second Colony” would consist of persons described similarly, but coming from Bristol, Exeter, and Plymouth.

The charter made a territorial allocation. It noted that each colony would be centered at a plantation. It specified by latitude the geography that each colony would occupy.<sup>37</sup> Specifically, the charter provided that each colony would “have all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishing, commodities and hereditaments, whatsoever,” from the seat of their plantation, extending outward fifty miles by land and all islands within 100 miles of the seacoast.<sup>38</sup>

The charter provided a form of exclusivity to each of the colonies. It stated that “no other of our subjects shall be permitted or suffered to plant or inhabit behind or on the backside of them toward the main land, without the express license or consent of the Counsel of the Colony thereunto in writing first had or obtained.”<sup>39</sup> The charter set forth a form of noncompetition restriction between the two colonies. It stated the King’s “will and pleasure. . . that the plantation and habitation of such of the said colonies as shall last plant themselves,” would “not be made within one hundred like English miles of the other of them that first began to make their plantation there.”<sup>40</sup>

The charter granted some autonomy to the colonists, within limits. It stated that each of the colonies

shall have a council which shall govern 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 signature.<sup>41</sup>

The charter established the structure of the governing councils. Each “shall consist of thirteen persons.” They would be “ordained, made and

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35. First Virginia Charter (1606), [www.let.rug.nl/usa/documents/1600-1650/the-first-virginia-charter-1606.php](http://www.let.rug.nl/usa/documents/1600-1650/the-first-virginia-charter-1606.php). The First Virginia Charter is also summarized in Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315 (2001).

36. First Virginia Charter, *supra* note 35. (spelling of words has been modernized in all quotations in this article from the colonial charters).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (“signature” is “signe manuell” in the original).

removed from time to time according as shall be directed and comprised in" the various "instructions" mentioned above.<sup>42</sup>

The King also maintained oversight. The charter stated, "also there shall be a Council established here in England which shall in like manner consist of thirteen persons."<sup>43</sup> It would be called the Council of Virginia and its members would be appointed by the King and his heirs and successors. The Council of Virginia had "superior managing and direction . . . of 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."

The charter referenced trademarks of sorts. It stated that each of the two councils would have a seal, and each seal "shall have the King's arms engraven on the one side thereof and his portrait on the other." The charter dictated that, in the seal for each of the colonies, one side would bear the Latin words for "Seal of the King of England, France and Ireland,"<sup>44</sup> and the other side would bear the Latin words for "Council of the First Colony of Virginia" and "Council of the Second Colony of Virginia."<sup>45</sup> Likewise, the governing Council in England would have a seal, "with the like arms and portrait as aforesaid," and the inscription "engraven round about the one side," the Latin words for Seal of the King of Britain, France and Ireland, and on the other side, the Latin words for Council of His Virginia.<sup>46</sup>

The charter then turned to the business of the colonies:

And more over we do grant and agree for us, our heirs and successors, that the said several Councils of and for the said several Colonies shall and lawfully may by virtue hereof, from time to time, without interruption of us, our heirs or successors, give and take order to dig, mine and search for all manner of mines of gold, silver and copper, as well within any part of their said several Colonies as of the said main lands on the backside of the same Colonies; and to have and enjoy the gold, silver and copper to be gotten there to the use and behoove of the same Colonies and the plantations thereof.<sup>47</sup>

And the charter provided for payment of a two-tiered royalty,

yielding therefore yearly to us, our heirs and successors, the fifth part only of all the same gold and silver and the fifteenth part of all the same copper so to be gotten or had, as is aforesaid, and without any other manner of profit or account to be given or yielded to us, our heirs or successors, for or in respect of the same.<sup>48</sup>

Thus, the royalty on gold and silver was 20% (1/5th) and on copper was 6.67% (1/15th).

42. *Id.*

43. *Id.*

44. In the words of the charter: "Sigillum Regis Magne Briganie, Francie et Hibernie."

45. "Pro Consillio Prime Colonie Virginie" and "Pro Consilio Secunde Colonie Virginie."

46. "Pro Consilio Suo Virginie."

47. First Virginia Charter, *supra* note 35.

48. *Id.* This is an example of a true "royalty" of the type that reflects the origin of the word. See Taylor v. Peck, 116 N.E.2d 417, 418 (Ohio 1953) ("The term, 'royalties,' had its origin in the designation of the payments made to a monarch or sovereign by his subjects for privileges granted by the former and enjoyed by the latter.").

In another indicator that the charter concerned business, and a reflection of its attention to business activity, the charter authorized the colonists to make coins, stating that the colonies

shall or lawfully may establish and cause to be made a coin, to pass current there between the people of those several colonies for the more ease of traffic and bargaining between and amongst them and the natives there, of such metal and in such manner and form as the same several Councils there shall limit and appoint.<sup>49</sup>

The King granted the colonists a right of defense and self-help against incursions into their territorial exclusivity. He stated in the charter that

they and every of them shall and may, from time to time and at all times for ever hereafter, for their several defenses, encounter or expulse, repel and resist, as well by sea as by land, by all ways and means whatsoever, all and every such person and persons as without special license of the said several Colonies and plantations shall attempt to inhabit within the said several precincts and limits of the said several Colonies and plantations, or any of them, or that shall enterprise or attempt at any time hereafter the hurt, detriment or annoyance of the said several Colonies or plantations.<sup>50</sup>

In further vindication of the colonists' exclusivity, the King also granted them an interesting, time-limited, broad, comprehensive right to charge (and to take charge of) others who might wish to conduct business in the territory of the colony. The language is sweeping in its scope. The King permitted the colonists

to take and surprise by all ways and means whatsoever all and every person and persons with their ships, vessels, goods and other furniture, which shall be found trafficking into any harbor or harbors, creek, creeks or place within the limits or precincts of the said several Colonies and plantations, not being of the same Colony.<sup>51</sup>

The grant included power to hold the captives until, for those who were from within the British realm, they paid or agreed to pay "two-and-a-half upon any hundred of any thing so by them trafficked, bought or sold," and for those from outside the realm, paid (and not just agreed to pay) "five upon every hundred of such wares and commodities as they shall traffic, buy or sell within the precincts of the said several Colonies."<sup>52</sup>

The provision let colonists essentially hold captives hostage until they paid or (with regard to those from within the realm) agreed to pay the fee. For the first twenty-one years, the colonists could keep these payments. After twenty-one years, these payments would belong to the Crown.<sup>53</sup> The charter

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49. First Virginia Charter, *supra* note 35.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* Some franchisees today might appreciate this kind of authorized remedy for competition from franchisees in their own system and from those in competing systems.

also waived customs duties on merchandise purchased by the colonists from England for seven years.<sup>54</sup>

The charter was not all generosity. It contained a warning and penalty to the colonists. It stated the King's "gracious will and pleasure" that if any of the colonists were to transport wares, merchandise, or commodities out of the King's dominions "with a pretense" to "land, sell or otherwise dispose the same" within the colonies, but instead attempted to sell his merchandise in any other foreign country" without the King's permission, then the merchandise would "be forfeited" to the King.<sup>55</sup> It appears to be an early prohibition of transshipping "grey market goods."<sup>56</sup>

Today's franchise agreements often include indemnity clauses, wherein a franchisor agrees to provide some protections to the franchisee. King James provided a sort of indemnity and warning to others, declaring "to all Christian kings, princes and estates, that if [anyone] . . . shall at any time or times hereafter rob or spoil by sea or by land or do any act of unjust and unlawful hostility to any [of] the subjects of us," then the King would make an open proclamation, requiring the perpetrator to "make full restitution or satisfaction" for the injuries done, and, if the perpetrator failed to do so, it would become "lawful and free for all princes and others to pursue with hostility the said offenders and every of them and their and every of their procurers, aiders, abettors and comforters."<sup>57</sup> The King thus warned others and committed himself and his forces to protect the colonists.

The charter contained another indicator of its character as a business contract—a distribution agreement. It is filled with solicitous wording, deference, praise, and compliments for the King. After the usual introductory recitation of the King's many titles it refers to "loving and well disposed subjects" and "humble suitors." It notes that the King is "graciously accepting of their desires." It states the King's "gracious will and pleasure." In a way similar to how a prospective franchisee might communicate with deference as a supplicant to a franchisor who "awards" a franchise, the words of solicitude in the charter leave no doubt that its terms were preceded by seventeenth century versions of carefully written, delicately presented outlines, proposals, term sheets, and drafts prior to the King's approval of the final version.<sup>58</sup>

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54. *Id.*

55. *Id.*

56. "Grey market goods" for this purpose refers to authentic goods, produced by a manufacturer in a country, but not authorized for sale in that country. *See, e.g., Bourdeau Bros., Inc. v. Int'l Trade Comm'n.*, 444 F.3d 1317, 1320 (Fed. Cir. 2006) (noting that "grey market goods" refer to products "produced by the owner of the United States trademark or with its consent, but not authorized for sale in the United States").

57. First Virginia Charter, *supra* note 35.

58. Distinguished people were involved in promoting the venture and drafting the charter. Lord Chief Justice of the King's Bench, Sir John Popham, probably drafted a version of the first charter and revisions. His nephew and his grandson, who was a lawyer, were among those who petitioned the king for the charter. Solicitor General John Dodderidge, Attorney General Sir Edward Coke, and Lord Chancellor Thomas Egerton (Lord Ellesmere) may have aided Popham in drafting. King's counsel, Sir Francis Bacon, may have been involved. McCarthy, *supra* note 7, at 342-43.

#### IV. The Elements of a Franchise Were Present in the First Virginia Charter

*The King and Colonists Established a Continuing Commercial Relationship.* Not by accident, but by design, the elements of a business franchise were all present in the First Virginia Charter. The King and the colonists established a “continuing commercial relationship.” In the charter, the colonists were granted the right to conduct business. This expressly included mining for gold, silver, and copper. But it was not limited to these activities. The colonists were permitted to send merchandise to England duty-free.

*The Colonists Substantially Associated with Identifying Symbols of the Realm.* The colonists operated under their franchisor’s trademark. The charter provided for seals containing the King’s likeness and slogans to be used in their business. The name Virginia was itself a kind of trademark. Only the English called the area Virginia.<sup>59</sup> The name referred to Elizabeth I, the virgin Queen of England. The name “implied a perfect correspondence between England and Virginia to which proponents of colonization aspired.”<sup>60</sup>

Though not mentioned in the charter, the colonists were permitted and expressly required to use another indicia of the King’s identity: a new British flag. In 1603, the forty-five-year reign of England’s Queen Elizabeth I ended when she died early in the morning of March 24. Later that same day, James VI, King of Scotland since 1567, was proclaimed King James I of England. King James wanted an outward expression to reflect the union of England and Scotland. In the fourth year of his reign, on April 12, 1606, the King issued the following proclamation, establishing a new flag for the realm:<sup>61</sup>

henceforth all our subjects of this Isle and Kingdom of Great Britain and the Members thereof shall bear in their maintop the Red Cross, commonly called St George’s Cross, and the White Cross, commonly called St Andrew’s Cross, joined together, according to a form made by our Heralds and sent by Us to our Admiral to be published to our said Subjects. And in their foretop<sup>62</sup> Our Subjects of South Britain shall wear the Red Cross only as they were wont, and our Subjects of North Britain in their Foretop the White Cross only as they were accustomed. Wherefore We will and command all our Subjects to be conformable and obedient to this Our Order . . . as they will answer the contrary at their Peril.<sup>63</sup>

Just two days earlier, April 10, 1606, the Virginia Charter had been issued. Preparation and exchange of drafts and discussions of both documents must have taken place over the same extended time. The symbol of a unified Great Britain was on the King’s mind. The last sentence of the Proclamation,

59. McCarthy, *supra* note 7, at 336.

60. *Id.*

61. Seeking unification of what were two kingdoms, the proclamation refers to England as South Britain and Scotland as North Britain.

62. Foretop refers to a platform at the top of a ship’s foremast.

63. W.G. PERRIN, BRITISH FLAGS: THEIR EARLY HISTORY, AND THEIR DEVELOPMENT AT SEA; WITH AN ACCOUNT OF THE ORIGIN OF THE FLAG AS A NATIONAL DEVICE 55 (1922).

commanding all subjects to obey the order at their peril, would constitute good evidence today of an obligation to use the symbol of the realm.<sup>64</sup>

American colonists identified closely and publicly with their franchisor in another way. At the start of their new world venture, they named their towns after places in England. The English settlers

displayed little imagination in naming the new settlements and natural features of the land that they came to. Their almost invariable tendency, at the start, was to make use of names familiar at home, or to invent banal compounds. Plymouth Rock at the North and Jamestown at the South are examples of their poverty of fancy; they filled the narrow tract along the coast with new Bostons, Cambridges, Bristols and Londons, and often used the adjective as a prefix.<sup>65</sup>

In the permissive<sup>66</sup> or mandatory use the King's seal and flag and in the naming of towns, the colonists identified and associated with the trademarks and identification of their franchisor.

#### A. *The Colonists Were Required to Pay Substantial Franchise Fees.*

The colonists were required to pay handsome two-tiered royalties. The charter required them to pay a 20% royalty on gold and silver they mined and a 6.67% royalty on copper. The charter established that the King would exert and had authority to exert a significant degree of control over the colonists' operation and would provide significant assistance.

The charter established an organizational structure, dividing the colonies into two, directing that each would have a governing council, and establishing an overriding governing council in England. Authorization to the colonists to "expulse, repel and resist" anyone who invaded the colonies was a form of assistance. Other forms of assistance included the waiver of customs charges; authorization to hold as hostages and charge and collect fees from those who might be found to do business in the colonies without permission was another form of assistance; and the threat to pursue anyone who might "rob or spoil by sea or by land or do any act of unjust and unlawful hostility" against the colonists.

64. The Proclamation being an official act of the sovereign, it is a matter of which a court could take judicial notice. *See, e.g.,* *Hamilton v. Dillon*, 88 U.S. 73, 90 (1874) (important public act of the government may receive judicial notice of the court).

65. H.L. MENCKEN, *THE AMERICAN LANGUAGE, A PRIMARY INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* 286-87 (1919).

66. Under the FTC Rule, mere permission to use the franchisor's trademark is sufficient to satisfy the trademark element. *See* FTC Bureau Consumer Prot., *Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule (16 CFR Part 436)* 35 (2004), [www.ftc.gov/sites/default/files/documents/reports/staff-report-bureau-consumer-protection-federal-trade-commission-and-proposed-revised-trade/0408franchiserulerpt.pdf](http://www.ftc.gov/sites/default/files/documents/reports/staff-report-bureau-consumer-protection-federal-trade-commission-and-proposed-revised-trade/0408franchiserulerpt.pdf) (trademark element being satisfied if franchisor "permits the use of its trademark"); *see also* Cal. Comm'r's Release 3-F (revised), "When Does an Agreement Constitute a Franchise?" at 3 (June 22, 1994) ("[I]f the franchisee is granted the right to use the franchisor's symbol, that part of the franchise definition is satisfied even if the franchisee is not obligated to display the symbol.").

B. “Community of Interest” Existed Between the Colonists and the King.

The arrangements also readily satisfied the marketing plan and the community of interest tests under some state franchise laws. The combination of granting exclusive territories, protecting against incursions, designation of the governing structure, permitting minting and usage of coins, waiving customs charges, and authorizing colonists to charge and collect payments from other traders could readily constitute a marketing plan. The colonists’ investment of all their assets and dedication of their entire lives to traveling to and living in America, the king’s interest in receiving payments, and the coordination of governance could satisfy the community of interest test.

## V. Other Colonial Charters Were Similar in Material Ways

Not unlike some new franchise ventures,<sup>67</sup> the first attempt to colonize Virginia failed.<sup>68</sup> The charter was defective.<sup>69</sup> Not unlike many new franchise ventures, whose agreements are amended, modified or replaced, the first Virginia Charter was replaced, not once, but twice. In 1609, a second charter was issued.<sup>70</sup> Careful alterations were made to the wording. In 1612, a third Virginia charter was issued.<sup>71</sup>

Charters followed for other colonies. Some examples were the Charters of New England (1620),<sup>72</sup> Massachusetts Bay (1629),<sup>73</sup> Maryland (1632),<sup>74</sup> Connecticut (1662),<sup>75</sup> Rhode Island (1663)<sup>76</sup> and Pennsylvania (1681).<sup>77</sup> “Between 1606 (the first Virginia charter) and 1681 (Pennsylvania) some twenty-eight major territorial charters and grants were promulgated, dealing with the establishment, reestablishment, or confirmation of English (and

67. See, e.g., Jeff Haff, *Litigating Fraud Claims for Franchisees* 42 TRIAL 30, 2006 WL 1852067 (2006) (“Not all franchisors are well established. Some get into business over their heads, and the entire system eventually collapses. Others oversell their product by exaggerating its profit potential or making blatantly false claims.”).

68. James Muldoon, *Colonial Charters: Possessory or Regulatory?* 36 LAW & HIST. REV. 355, 372 (2018).

69. *Id.*

70. Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1585 (2016) (discussing changes made in the Second Virginia Charter). The Second Virginia Charter is accessible online, [www.let.rug.nl/usa/documents/1600-1650/the-second-virginia-charter-1609.php](http://www.let.rug.nl/usa/documents/1600-1650/the-second-virginia-charter-1609.php).

71. See Tomlins, *supra* note 35, at 333 n.21 (referencing and discussing first, second and third Virginia charters).

72. Charter of New England (1620), [https://avalon.law.yale.edu/17th\\_century/mass01.asp](https://avalon.law.yale.edu/17th_century/mass01.asp).

73. Charter of Massachusetts Bay (1629), [https://avalon.law.yale.edu/17th\\_century/mass03.asp](https://avalon.law.yale.edu/17th_century/mass03.asp).

74. Charter of Maryland (1632), <https://lonang.com/library/organic/1632-cm>.

75. Charter of Connecticut (1662), [www.cga.ct.gov/hco/books/Charter\\_of\\_the\\_Colony\\_of\\_CT\\_1662.pdf](http://www.cga.ct.gov/hco/books/Charter_of_the_Colony_of_CT_1662.pdf).

76. Charter of Rhode Island (1663), <https://constitution.com/rhode-island-charter-1663/>; see also, Bilder, *supra* note 70, at 1588.

77. See Julia L. Ernst, *The Mayflower Compact: Celebrating Four Hundred Years of Influence on U.S. Democracy*, 95 N.D. L. REV. 1, 80 (2020) (noting that, in 1681, King Charles II granted a charter to William Penn allowing him to establish the colony of Pennsylvania).

one Scottish) settlements on the North American mainland.”<sup>78</sup> In words that would apply aptly to emerging franchise ventures, one scholar noted that the various charters and related documents “were stages in a process whereby the British government was developing a policy for the creation and administration of colonies. The lawyers and the legal draftsmen had to develop documents that responded to the actual peoples and lands that Englishmen were encountering and that recognized deficiencies in previous texts.”<sup>79</sup>

The series of charters, each granting rights in specified geographic territories, has a look and feel akin to a chain of franchises. They had common elements and structures. For example, the Charter of New England (1620) granted rights to “search for gold and silver, engage in trade with the inhabitants, or settle there if the corporation could acquire land.”<sup>80</sup> The charter outlined the form of government that the colonists should establish. If they succeeded in establishing themselves in the region, the king would protect the colonists’ interests by granting them a monopoly of access to the region so that no Englishman could enter the region without permission. The charter announced to other European rulers that the English were not interested in entering or occupying lands already possessed by other emerging European empires, and the English expected the same consideration in return.<sup>81</sup>

The failure of some colonies, the amendments made to their charters, and the establishment of additional colonies through charters paralleled the formation, establishment, and growth of a new franchise system. England was not alone in seeking to colonize North America. Colonization efforts were also made by many other nations. As Chief Justice John Marshall stated: “On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all.”<sup>82</sup> Like in modern franchising, a vast geographic territory was available for development. There was competition to do so, and the competition was structured then as franchises are structured today.

## VI. The Rest Is History

Several of the colonies survived and prospered. During part of the 1750s and 1760s, Britain fought the Seven Years’ War, also known as the French and Indian War.<sup>83</sup> The British and French and various, often changing, Native

78. Tomlins, *supra* note 35, at 333.

79. Muldoon, *supra* note 68, at 372.

80. *Id.* at 360.

81. *Id.*

82. *Johnson v. M’Intosh*, 21 U.S. 543, 572–73 (1823).

83. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 16 (2005) (citing FRED ANDERSON, *CRUCIBLE OF WAR: THE SEVEN YEARS’ WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766*, at xv, xix (2000)).

American allies, fought over control of territory in North America.<sup>84</sup> Ironically, in one incident in the war, a young Lieutenant Colonel, returning from a mission in Ohio, mistakenly ambushed a peaceful French unit, which worsened the conflict.<sup>85</sup> That errant officer was George Washington.<sup>86</sup>

Britain sought to raise money to pay debt from the war and, in 1765, passed the Stamp Act.<sup>87</sup> The Act was in essence a tax and might be compared to a new fee or an increase in royalty fees charged to the colonists. The colonists, not unlike franchisees, objected and resisted, perceiving unilateral changes to charters, meddling with colonial legislatures, and supplanting colonial laws and governments as breaches of contract by the king.<sup>88</sup>

The Stamp Act was followed by the Townshend Acts, which also sought to raise revenue from the colonies and, like any good franchisor will do, establish the precedent that the British Parliament had the right to tax them.<sup>89</sup> The Townshend Acts met with huge resistance from the colonists, prompting additional oversight in the form of occupation of Boston by British troops in 1768.<sup>90</sup>

84. Miller, *supra* note 83, at 16 (noting France and England fought “over conflicting rights in North America and elsewhere”); see also Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1019 (2014) (noting that the areas comprising present-day upstate New York and Ohio were the most fought-over ground in eighteenth-century North America; the French and British battled to control the region for decades, and the outcome hinged on the allegiances of Native American nations).

85. RAY RAPHAEL, *FOUNDERS, THE PEOPLE WHO BROUGHT YOU A NATION* 4 (2009) (“Although the wounded French officer, the Sieur de Jumonville, tried to surrender, he was soon killed, as were several of his company. Accounts differ as to how this happened, as they often do when some men kill others, and as they always do when such actions initiate a war.”); see also, JOSEPH ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* 13–14 (2004) (quoting Lt. Colonel’s Washington’s report of the May 28, 1754, incident: “[A]fter an engagement of about 15 minutes we killed 10, wounded one and took 21 prisoners, amongst those that were killed was Monsieur De Jumonville, the Commander”; and Washington’s personal diary entry, noting “the Indians scalped the dead”) (Washington’s original language, modernized). However, apparently it was not young Lt. Colonel Washington who triggered the massacre, but the act of a Native American named Tanacharison, also known as “Half-Chief” who accompanied Washington as a guide. The guide “decided to take matters into his own hands.” He “sank his hatchet into Jumonville’s head, split his skull in half, pulled out his brain, and washed his hands in the mixture of blood and tissue. His warriors then fell upon the wounded French soldiers, scalped them all, and decapitated one and put his head on a stake. All this happened under the eyes of the shocked and hapless commanding officer, Lieutenant Colonel Washington.” ELLIS, *supra*, at 14.

86. ELLIS, *supra* note 85, at 14.

87. 5 GEO. III, ch. 12 (1775) (cited and discussed in John Phillip Reid, “*In Our Contracted Sphere*”: *The Constitutional Contract, The Stamp Act Crisis, and the Coming of the American Revolution*, 76 COLUM. L. REV. 21 (1976)).

88. Ernst, *supra* note 77, at 93.

89. David B. Kopel, *How The British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 286 n.11 (2012) (noting that the 1767 Townshend Duties “were supposed to raise some revenue,” but “their essential point was to affirm the principle that Parliament could tax the American colonies without their consent”).

90. See, e.g., Jason Mazzone, *The Security Constitution* 53 UCLA L. REV. 29, 73 (2005) (“To many observers, the British regulars who arrived in Boston in October 1768 to enforce the Townshend duties signified the danger of a military no longer under the control of the people.”) (citing LAWRENCE DELBERT CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812*, at 37 (1982)).

The Tea Act followed. On December 16, 1773, colonists boarded and destroyed three shiploads of taxed tea in Boston Harbor. These franchisees were now in open revolt.

What do dissatisfied franchisees do? In 1772, Samuel Adams created a Committee of Correspondence. The colonies opened communications among each other, exchanging grievances and information, and began to organize their opposition. In 1774, they formed their association, meeting as the first Continental Congress. At the second meeting of the association, in 1776, these franchisees decided to break away from the franchisor and form their own organization.

## **VII. Conclusion**

Britain's colonization of the new world resembled in several ways an entrepreneurial franchise venture. All the elements of modern business franchise relationships were present. The ventures prospered beyond what anyone could have envisioned. Colonial history has parallels to sometimes dysfunctional relations between franchisees and franchisors, even in a successful system. The American Revolution that followed colonization of the new world had parallels to a movement by breakaway franchisees. The new world was North America's first franchise. The colonies of the United States were the first and most successful breakaway franchisees.

