



## ARTICLE

**Why the Constitution Was Written Down**

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**Abstract.** A funny thing about the U.S. Constitution is that it's written down. Words might seem like an obvious feature of any constitution, but they're notably missing from much of the constitution of Great Britain, the country from which the United States seceded. Historians have often assumed that the quirky American practice of putting constitutions into single documents has its origins in the corporate charters of the seventeenth-century trading companies that founded more than half of the thirteen original states. But, as historian Mary Sarah Bilder has written, it is surprisingly difficult to explain the change from corporate charter to modern constitution with precision and persuasive power.

This Article attempts to do just that, telling the story of a series of lawsuits that forced the Massachusetts Bay Company to treat its charter's terms as Gospel. Relying on original research of thousands of primary sources from the United States and the United Kingdom spanning from 1607 through 1793, this Article presents an account of how a corporate charter evolved into a "Charter Constitution" in America while the British Constitution remained intangible.

This Article demonstrates that written words became a defining feature of American constitutionalism a century before the American Revolution, and that this distinction between the American and British understandings of constitutions contributed to

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American independence. The historical origins of American constitutionalism can also supply more depth to modern interpretive debates over whether text alone can provide meaningful limits on government power without reference to external traditions, modes of enforcement, or evolving practices.

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## Introduction

When American revolutionary Thomas Paine bragged to his friends in England about the U.S. Constitution, the feature he emphasized wasn't the powers it separated or the rights it protected, but rather the fact that it was written down. Written words might seem like an obvious feature of any constitution, but Paine was quick to point out that they're missing from the constitution of Great Britain, the country from which the United States seceded.<sup>1</sup> Then, as now, the British Constitution referred to the unwritten arrangement of laws and institutions that make up, or constitute, the British government.<sup>2</sup> Paine delighted in contrasting the "so much talked about" but never seen British Constitution<sup>3</sup> with the American version "to which you can refer, and quote *article by article in a visible form*."<sup>4</sup>

The American departure from the British model was no trivial change. Written words allowed anyone to read exactly what a government had the power to do. And unlike an unwritten constitution, which a legislature could theoretically change on a whim, the text of a written constitution was hard to erase.<sup>5</sup> These qualities of written constitutions so appealed to Americans that between 1776 and 1777, every state that declared independence immediately assigned some written document to serve as its constitution.<sup>6</sup>

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1. See THOMAS PAINE, DEFINITION OF A CONSTITUTION 5-6 (London, J. Debrett 1791); THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE'S ATTACK ON THE FRENCH REVOLUTION 56-57 (London, J.S. Jordan 2d ed. 1791).
  2. See, e.g., R (Miller) v. Sec'y of State for Exiting the Eur. Union [2017] UKSC 5, [40] (appeal taken from Eng. and N. Ir.) ("Unlike most countries, the United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law.").
  3. See PAINE, RIGHTS OF MAN, *supra* note 1, at 56-57.
  4. See PAINE, DEFINITION OF A CONSTITUTION, *supra* note 1, at 5-6.
  5. See *id.* at 6.
  6. See DEL. CONST. of 1776, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 562 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]; GA. CONST. of 1777, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 777; MD. CONST. of 1776, *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1686; N.H. CONST. of 1776, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2451; N.J. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2594; N.Y. CONST. of 1777, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2623; N.C. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787; PA. CONST. of 1776, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3081; S.C. CONST. of 1776, *reprinted in* 6 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3241; VA. CONST. of 1776, *reprinted in* 7 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 3812. Connecticut, Massachusetts, and Rhode Island adopted their seventeenth-century charters as their first written constitutions. See Minutes of the General Assembly of Connecticut (Oct. 10, 1776) [hereinafter General Assembly of Connecticut Minutes of  
*footnote continued on next page*

The depth of American enthusiasm for written constitutions presents something of a historical puzzle: Why did colonists, who had spent generations under an unwritten constitution, suddenly decide that their own constitutions had to be written down?

The traditional explanation is that the revolutionary United States was full of political geniuses. Fifty years ago, two celebrated historians assumed that Americans in the 1760s, “[l]ike their contemporaries in England and like their predecessors for centuries before, . . . understood by the word ‘constitution’ not, as we would have it, a written document,” but rather as something akin to the unwritten British version.<sup>7</sup> The notion of written constraints on governmental power, the story goes, was one of many discoveries of revolutionary tinkerers like James Madison. Several Justices of the U.S. Supreme Court have similarly subscribed to the view that the ideas embodied in the U.S. Constitution represent “the unique contribution of the Framers to political science and political theory.”<sup>8</sup>

This Article presents a different origin story for written constitutionalism—but one just as fittingly American: a series of lawsuits. The lawsuits began 150 years before the American Revolution, lasted for six decades, and ended with a

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Oct. 10, 1776], in 1 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 1, 3 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1894); Minutes of the Third Provincial Congress (June 20, 1775), in THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775, AND OF THE COMMITTEE OF SAFETY 358, 358-59 (William Lincoln ed., Boston, Dutton & Wentworth 1838) [hereinafter JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS]; Act of May 4, 1776, in 7 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 522, 522-23 (John Russell Bartlett ed., Providence, A. Crawford Greene 1862).

7. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 67-68 (enlarged ed. 1992); see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 259-305 (1998 ed.); see also BAILYN, *supra*, at 175-98.

8. See *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring); see also, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216-17 (2015) (Thomas, J., concurring in the judgment); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery.”); *Cramer v. United States*, 325 U.S. 1, 24 (1945). *Cramer* referred to Article III’s two-witness requirement for treason convictions as a “novel” invention of the Constitutional Convention, though the same requirement had actually appeared in several British statutes, including the Treason Act of 1695. See *Cramer*, 325 U.S. at 24; see also U.S. CONST. art. III, § 3, cl. 1 (“No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”); Treason Act 1695, 7 & 8 Wm. 3 c. 3.

The two historians, Bernard Bailyn and Gordon Wood, continue to appear often in Supreme Court opinions. In the 2015 Term alone, Justices cited Wood’s *The Creation of the American Republic* in no fewer than three opinions. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1330-31 (2016) (Roberts, C.J., dissenting); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1137-39 (2016) (Thomas, J., concurring in the judgment).

coup d'état in 1689 in which a thousand armed farmers stormed the City of Boston and demanded, of all things, a corporate charter.<sup>9</sup>

The charter at issue belonged to the Massachusetts Bay Company, a corporation that governed most of New England from 1629 to 1686.<sup>10</sup> When the company was founded, it was one of many municipal and trading corporations given a charter by the English Crown—each of which gave special permissions to govern people and territory on the Crown's behalf.<sup>11</sup> The expectation for all of these corporations was that they would administer their territories from the safety of English boardrooms and under the scrutiny of Crown oversight.<sup>12</sup> But unlike every other corporation then in existence, the founders of the Massachusetts Bay Company took their charter and corporate government out of Europe and across the Atlantic Ocean so that residents of New England could govern themselves.<sup>13</sup> The founders assumed that, as with any corporation, the Crown would leave them alone so long as they abided by their charter's terms.<sup>14</sup> But within a few years, as boatloads of religious and political dissidents filled Boston Harbor, the Crown's advisors tried to dissolve the corporation by suing it in court and arguing that the corporation's founders had taken actions inconsistent with the charter's words.<sup>15</sup>

Part I of this Article tells the story of this litigation, which spurred the company's founders to make legalistic arguments that all of their actions were permitted by the text of their charter—arguments that found their way into New England's social and political culture.<sup>16</sup> Although the Massachusetts Bay Company was far from the only corporation in Old or New England whose

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9. See *infra* Part III.D.

10. See *infra* text accompanying notes 93-94; *infra* text accompanying notes 397-400. A word on dates: During the seventeenth century, England and its colonies began the new year on March 25 and used the Julian, or "Old Style," calendar, which was roughly ten days behind the Gregorian calendar that has been in use since 1752. See *Julian Calendar*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/LC98-XDKU> (archived Apr. 14, 2019); see also Calendar (New Style) Act 1750, 24 Geo. 2 c. 23. This Article treats January 1 as the first day of the new year but uses the Julian calendar for dates before 1752.

11. See *infra* notes 59-63 and accompanying text.

12. See *infra* Parts I.B.-C.

13. See *infra* Part I.D.

14. See *infra* Part I.F.

15. See *A Quo Warranto Brought Against the Company of the Massachusetts Bay by Sir John Banks Attorney-General (1635)* [hereinafter 1635 Quo Warranto], in *A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY* 101 (Thomas Hutchinson ed., Boston, Thomas & John Fleet 1769) [hereinafter *THE HUTCHINSON PAPERS*]; *infra* Parts I.E., .G.

16. See *infra* Part I.F.

charter had been threatened by the Crown, it was unique in that its corporate government met thousands of miles away from England—meaning it was the only elected government its constituents regularly interacted with.<sup>17</sup> This remoteness led New Englanders to treat the possible dissolution of their government as a catastrophe.<sup>18</sup> And to a degree unusual for corporations of the era, the directors of the besieged Massachusetts Bay Company considered it their religious and political imperative to tie each of their governing decisions to specific text in the charter.<sup>19</sup> Whereas the officials of England-based corporations typically ignored any rules in their charters that instructed them how to govern themselves, the Massachusetts officers and residents, under threat of litigation, wielded interpretations of their charter in domestic debates over immigration, voting rights, the separation of powers, and virtually all other controversial issues.<sup>20</sup>

Part II describes what happened between 1654 and 1686, after the English Civil War temporarily ended any threat that someone from England might cross the Atlantic Ocean to dissolve the Massachusetts Bay Company's charter. Massachusetts officials responded to this benign neglect by interpreting their charter broadly: annexing neighboring colonies, establishing a mint, requiring people to take a sovereign oath of loyalty, and enforcing their criminal laws with capital punishment.<sup>21</sup> Although these decisions were controversial, the company's officials stridently defended them by pointing to specific authorizing text in the charter.<sup>22</sup> These defenses illustrate how the text of the Massachusetts Bay Company's corporate charter had become so central to the colony's political culture that colonists continued to revere it even after the threat of transatlantic legal sanction had temporarily ended. The earlier litigation was not the only reason for the text's centrality—more likely, the lawsuit merely catalyzed a homemade potion of religious norms, personal spats, ambitious bureaucrats, and an emerging demand for legal principles to guide discretionary decisionmaking. But whatever the cause, by the 1680s, constituents of English corporations were generally apathetic about the text of their charters,<sup>23</sup> while New Englanders commonly understood their charter as a consensual source of sovereign authority, a religious covenant with God that protected them from English oversight, and, most importantly, as the

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17. *See infra* Parts I.G.-I.

18. *See infra* Part I.F.

19. *See infra* Part I.I.

20. *See infra* Parts I.G.-I.

21. *See infra* Part II.A.

22. *See infra* Parts II.B.-C.

23. *See infra* text accompanying notes 354-63.

“constitution”—or framework—that guided their government.<sup>24</sup> By the time the Crown finally sent over a ship to dissolve the company’s charter, English theorists were describing England’s “constitution” as a collection of unwritten customs and traditions, while New Englanders described their “Charter Constitution” as a single, written document.<sup>25</sup>

Part III describes the five years after 1686, when the King replaced the Massachusetts Bay Company’s charter with a governor unbound by any similar document.<sup>26</sup> After six decades of interpreting their charter to justify and criticize their government’s actions, many Massachusetts colonists believed that only written limits could adequately restrain government officials from “arbitrary” rule.<sup>27</sup> It only took three years after the Crown dissolved the Massachusetts Bay Company until hundreds of armed Bostonians revolted to restore their “Ancient Constitution”: a government “according to the Rules of the Charter.”<sup>28</sup> Their agent in England, Increase Mather, explained to participants in England’s own Glorious Revolution that Massachusetts’s charter was no ordinary corporate document but the colony’s “Constitution,”<sup>29</sup> its written check on “Arbitrary Government.”<sup>30</sup> And in 1691, the newly appointed King and Queen rewarded the successful junta in Boston with a new written charter Mather thought actually improved on the company’s “original constitution.”<sup>31</sup>

Part IV explains how the colonists’ identification of the Massachusetts charter with the budding idea of a constitution only became stronger over the next century. In 1764, the Lieutenant Governor of Massachusetts, Thomas Hutchinson, published a best-selling history of the charter’s seventeenth-century evolution from its “original design . . . to constitute a corporation in England”<sup>32</sup> to the “form of . . . constitution” for a New England commonwealth.<sup>33</sup> During the

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24. See *infra* Part II.E.

25. See *infra* text accompanying note 512.

26. See *infra* Part III.A.

27. See *infra* Parts III.B-C.

28. See *infra* Parts III.D-E.

29. See INCREASE MATHER, A BRIEF RELATION OF THE STATE OF NEW ENGLAND, FROM THE BEGINNING OF THAT PLANTATION TO THIS PRESENT YEAR, 1689, at 4-7, 10 (London, Richard Baldwine 1689).

30. See INCREASE MATHER, A NARRATIVE OF THE MISERIES OF NEW-ENGLAND, BY REASON OF AN ARBITRARY GOVERNMENT ERECTED THERE, UNDER SIR EDMOND ANDROSS 1-3 (Boston, Richard Pierce 1688).

31. See 1 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 415 (Boston, Thomas & John Fleet 1764); see also INCREASE MATHER, A BRIEF ACCOUNT CONCERNING SEVERAL OF THE AGENTS OF NEW ENGLAND, THEIR NEGOTIATION AT THE COURT OF ENGLAND 15 (London, 1691); *infra* Part IV.A.

32. See 1 HUTCHINSON, *supra* note 31, at 13.

33. See *id.* at 243-44; see also *infra* Part IV.B.



political debates that followed over the next decade, colonists frequently quoted this history to explain how British policies were violating the document they referred to as “[t]he charter constitution of the Massachusetts-Bay.”<sup>34</sup> Parliament eventually nullified the charter, and Massachusetts revolutionaries went to war to protect it—just as they believed their ancestors had done a century earlier.<sup>35</sup> During the Revolutionary War, the leaders of this second coup in Boston argued that their “defective” charter and “antient Constitution” needed to be replaced,<sup>36</sup> and that “[a]ll constitutions should be contained in some written Charter.”<sup>37</sup> Between 1776 and 1780, these revolutionaries eventually adopted new constitutions—in Cambridge, Philadelphia, and across the Eastern Seaboard—that not only resembled their old charters, but were intentionally structured to function similarly to them as well.<sup>38</sup> By the time the Constitutional Convention met in 1787, each of the thirteen states already had some written document serving as its constitution.<sup>39</sup>

All in all, this Article charts how a corporate charter in New England adopted the characteristics of a modern, American-style constitution—defined by Thomas Paine as a single document that contains “the compleat organization of a civil government, and the principles on which it shall act, and by which it shall be bound.”<sup>40</sup> This point—that charters changed into constitutions—has often been assumed by scholars of constitutionalism, who

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34. See, e.g., JOHN ADAMS, *Novanglus No. VI* (1775), in 2 PAPERS OF JOHN ADAMS 288, 299 (Robert J. Taylor ed., 1977); see also, e.g., Reply of the House to Hutchinson’s First Message (Jan. 26, 1773), in 1 PAPERS OF JOHN ADAMS, *supra*, at 315; Minutes of Oct. 26, 1775, in 51-1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS 197, 197 (Mass. Historical Soc’y 1982) (1775); *infra* Parts IV.C-D.

35. See *infra* Part IV.E.

36. See The Petition Remonstrance & Address of the Town of Pittsfield to the Council and House of Representatives of the Province of the Massachusetts Bay (Dec. 26, 1775) [hereinafter Dec. 1775 Petition of Pittsfield], in REVOLUTION PETITIONS, 1775-1776, Mass. Archives Felt Collection Vol. 180, at 150, 150; The Petition & Memorial of the Inhabitants of the Town of Pittsfield to the Council and House of Representatives of the Province of the Massachusetts Bay (May 29, 1776) [hereinafter May 1776 Petition of Pittsfield], in REVOLUTION PETITIONS, 1776, Mass. Archives Felt Collection Vol. 181, at 42, 43; see also THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES; IN A LETTER FROM A GENTLEMAN TO HIS FRIEND 3 (Philadelphia, John Dunlap 1776); *infra* Part IV.F.

37. THOMAS PAINE, FOUR LETTERS ON INTERESTING SUBJECTS 15 (Philadelphia, Styner & Cist 1776).

38. See *infra* Parts IV.F-G.

39. See *supra* note 6 and accompanying text.

40. PAINE, RIGHTS OF MAN, *supra* note 1, at 56-57. As this Article will illustrate, there are many alternative definitions of a “constitution.” See MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 1-2 (2004); CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 10-12 (rev. ed. 1947).

have long noticed the similarities between the two types of documents.<sup>41</sup> But as Mary Sarah Bilder has written, “it is surprisingly difficult to explain the change with precision and persuasive power.”<sup>42</sup> Responding to the challenge, this Article explains how a corporate charter in New England evolved into a “Constitution”—while in Old England the idea of a constitution remained intangible.

Although this Article is mainly a descriptive account of why American constitutions were written down, the story has important implications for modern constitutional interpretation. Today more than ever before, judges and scholars purport to interpret the text of the U.S. Constitution with reference to its “original public meaning,”<sup>43</sup> defined as “the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted.”<sup>44</sup> But as Daniel Hulsebosch and others have written, these same judges and scholars often view the 1787 Convention that produced the Constitution as “an exceptional break with the past,”<sup>45</sup> ignoring the intuitive

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41. See, e.g., BAILYN, *supra* note 7, at 190-93; ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 25 (2018); WOOD, *supra* note 7, at 268-69; Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. (3d s.) 51, 79-80 (1993). Early twentieth-century historians of Massachusetts have noticed that its corporate charter “approximated a popular constitution more closely than any other instrument of government in actual use up to that time in America or elsewhere in modern times.” See C.H. MCILWAIN, *The Transfer of the Charter to New England and Its Significance in American Constitutional History* (1929), in *CONSTITUTIONALISM AND THE CHANGING WORLD* 231, 241 (1939); see also, e.g., ANDREW C. MCLAUGHLIN, *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 46-47 (1932); Benjamin F. Wright, Jr., *The Early History of Written Constitutions in America*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN* 344, 348-49 (Carl Wittke ed., 1936). But even they have not asked why the Massachusetts charter developed constitutional characteristics when others did not, or why the meaning of “constitution” in England and America diverged.
42. Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1550 (2016).
43. See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 687-88 (2019); *id.* at 691 (Gorsuch, J., concurring); *id.* at 692-93 (Thomas, J., concurring in the judgment); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 453 (2018).
44. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003); see also, e.g., KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 277 (2014) (defining “original meaning” as “the likely original understanding of the text at the time of its adoption by competent speakers of the English language who are aware of the context in which the text was communicated for ratification”).
45. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 4-6 (2005); see also, e.g., ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 1-5 (2010).

observation that almost all U.S. institutions “descend directly from Colonial institutions.”<sup>46</sup> As a consequence, judges and scholars regularly interpret provisions of the Constitution while missing decades of context about what “a document of this type” would have meant when it was written. But trying to interpret the historical meaning of the Constitution while ignoring the institutions from which it originated is like trying to understand why there’s a flag on the moon while ignoring the existence of NASA.

Incredibly, of the thirteen colonies that revolted in 1776, seven were founded by corporations like the Massachusetts Bay Company.<sup>47</sup> Yet only recently have legal historians and political scientists begun to take a closer look at the corporate origins of American constitutions. Bilder, for instance, has written groundbreaking histories of constitutional interpretation and judicial review as variations on the seventeenth-century practices of interpreting corporate charters and voiding corporate actions for being inconsistent with the laws of England.<sup>48</sup> She has been joined by other historians who have written similar accounts of federalism and bicameralism, locating the origins of the relationship between states and the federal government in the earlier relationship between corporate colonies and the English Parliament.<sup>49</sup>

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46. See ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 1 (1927).

47. The Virginia Company of London founded Virginia in 1607; the Massachusetts Bay Company founded its colony in 1630 and governed until 1686; Delaware and New York were both governed by the Dutch West India Company until 1674; and Connecticut was chartered as a corporation in 1662, followed by Rhode Island in 1663 and Georgia in 1732. See generally 1 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* (1934) (discussing Virginia, Massachusetts Bay, Connecticut, and Rhode Island); JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS: NUMBERS I-III* (1917) (same); JAAP JACOBS, *THE COLONY OF NEW NETHERLAND: A DUTCH SETTLEMENT IN SEVENTEENTH-CENTURY AMERICA* (2009) (discussing New York); *NEW SWEDEN IN AMERICA* (Carol E. Hoffecker et al. eds., 1995) (discussing Delaware); PAUL M. PRESSLY, *ON THE RIM OF THE CARIBBEAN: COLONIAL GEORGIA AND THE BRITISH ATLANTIC WORLD* (2013) (discussing Georgia).

48. See generally, e.g., BILDER, *supra* note 40; Bilder, *supra* note 42; Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502 (2006) [hereinafter Bilder, *Corporate Origins*]. For related works, see Barbara Aronstein Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 *U. PITT. L. REV.* 691 (1988); Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 *WASH. U. J.L. & POL’Y* 1 (2001); and Philip Hamburger, *Foreword: Law and Judicial Duty*, 72 *GEO. WASH. L. REV.* 1 (2003).

49. See, e.g., LACROIX, *supra* note 45, at 4-10; J.S. MALOY, *THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT* 114-16 (2008); David Ciepley, *Is the U.S. Government a Corporation?: The Corporate Origins of Modern Constitutionalism*, 111 *AM. POL. SCI. REV.* 418, 431-32 (2017); Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 *GEO. WASH. L. REV.* 1, 3-6 (2010). See generally LACROIX, *supra* note 45. For related histories of how seventeenth-century corporations contributed to British legal and political culture, see generally JENNIFER LEVIN, *THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660-1688, AND ITS CONSEQUENCES* (1969); and PHILIP J. STERN, *footnote continued on next page*

This Article follows Bilder in arguing that written constitutions are the product of a long American experience with similar documents. It adds new support to her argument that seventeenth-century “charter constitutionalism” involved asking not only what written words meant, but also who had the power to interpret those words—legal elites or the laity; what should be the consequence of violating those words—damnation or repentance; and, most importantly, what was the relevant context that supplied meaning to those words—ordinary meanings, unwritten traditions, legal arrangements, foundational principles, or evolving practices.<sup>50</sup> These questions remain just as relevant today as they did in the 1600s.

This Article also shows, for the first time, that people in seventeenth-century Boston were already quite familiar with constitutional governments in the modern sense. They called them corporations.

### I. The First Lawsuit, 1606-1654

The story of the litigation that produced a written constitution begins with a feud among a colorful cast. At issue were two overlapping corporate charters. One of the charters was owned by a knight named Ferdinando and a civilian whom just about everyone called “Captain.” The other was owned by a well-educated and well-connected group of religious fundamentalists known as Puritans, who procured it under suspicious circumstances and stole it away to North America. To understand how that charter evolved into a constitution, it is important to first understand the legal threat the knight and the captain posed to the Puritans.

#### A. Sir Ferdinando Gorges and Captain John Mason

Had the author of *Don Quixote* been an English journalist instead of a Spanish satirist, Sir Ferdinando Gorges could have been his main character.<sup>51</sup> Gorges was a real-life knight-errant whose dreams were as impressive as his inability to see them through. He began his career as an English military commander, earning his knighthood in combat before being captured by Spanish forces in 1588.<sup>52</sup> Friends in England paid for his ransom, but only a few

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THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011).

50. See Bilder, *supra* note 42, at 1551-52.

51. Gorges and Miguel de Cervantes, the author of *Don Quixote*, were contemporaries. See generally MIGUEL DE CERVANTES, *EL INGENIOSO HIDALGO DON QUIXOTE DE LA MANCHA* (Madrid, Juan de la Cuesta 1605).

52. See 9 *CALENDAR OF STATE PAPERS, COLONIAL SERIES 29* (W. Noel Sainsbury ed., Eyre & Spottiswoode 1893) (entry of Sept. 5, 1588); 1 *FERDINANDO GORGES AND HIS PROVINCE OF MAINE: INCLUDING THE BRIEF RELATION, THE BRIEF NARRATION, HIS DEFENCE, THE*  
*footnote continued on next page*

years later those same friends got Gorges in trouble with Queen Elizabeth, who sent him to London's Gatehouse Prison.<sup>53</sup> After the Queen died, Gorges was freed and promoted to the position he held for most of his life: the official in charge of keeping the coastal English city of Plymouth safe from any wandering Spanish armadas.<sup>54</sup> In this position, Gorges met all kinds of people. One of them was a group of financiers who were pooling their money to start a colony in North America.<sup>55</sup>

North American colonies were something of a fad in the early 1600s. One of Gorges's wartime associates, Sir Walter Raleigh, had tried and failed to plant a colony by himself on the North American coast. He'd renamed the coast "Virginia" in honor of the Virgin Queen Elizabeth who later locked both him and Gorges up.<sup>56</sup> Despite his failure there, Raleigh publicly spread word that Virginia was full of gold.<sup>57</sup> These rumors led people all over England to believe that a "company" or a "corporation" could successfully finance an expedition to prospect for it.<sup>58</sup> A *company* was basically any collection of people who partnered together for a common goal. Anyone could start a company. But if the company wanted something special from the Crown—something like permission to settle and mine Virginia, which the Crown claimed to own<sup>59</sup>—

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CHARTER GRANTED TO HIM, HIS WILL, AND HIS LETTERS 14-15 (James Phinney Baxter ed., Boston, The Prince Soc'y 1890).

53. See Ferdinando Gorges, A Breefe Answer to Certayne False, Slanderous, and Idle Objections Made Agaynst Sr Ferd. Gorges, Knighte (1601), in 2 FERDINANDO GORGES AND HIS PROVINCE OF MAINE, *supra* note 52, at 83, 87.
54. See 4 CALENDAR OF STATE PAPERS, DOMESTIC SERIES (EDWARD VI, MARY & ELIZABETH) 111 (Mary Anne Everett Green ed., London, Longmans, Green, Reader & Dyer 1869) (entry of Oct. 13, 1595); FERDINANDO GORGES, A BRIEF NARRATION OF THE ORIGINAL UNDERTAKINGS OF THE ADVANCEMENT OF PLANTATIONS INTO THE PARTS OF AMERICA: ESPECIALLY, SHEWING THE BEGINNING, PROGRESS AND CONTINUANCE OF THAT OF NEW-ENGLAND (1658) [hereinafter GORGES, A BRIEF NARRATION], in 2 FERDINANDO GORGES AND HIS PROVINCE OF MAINE, *supra* note 52, at 1, 1 (noting that Gorges was "Knight and Governour of the Fort and Island of Plymouth").
55. See GORGES, A BRIEF NARRATION, *supra* note 54, at 12-13.
56. See *id.* at 4; THOMAS HARIOT, A BRIEF AND TRUE REPORT OF THE NEW FOUND LAND OF VIRGINIA 3-4 (Franckfort, Ihon Wechel 1590); see also STEVEN W. MAY, SIR WALTER RALEIGH 12-13 (1989); Gorges, *supra* note 53, at 87. For more on Raleigh, see generally MICHAEL G. MORAN, INVENTING VIRGINIA: SIR WALTER RALEIGH AND THE RHETORIC OF COLONIZATION, 1584-1590 (2007); and WILLIAM STRACHEY, THE HISTORIE OF TRAVAIL INTO VIRGINIA BRITANNIA (R.H. Major ed., London, The Hakluyt Soc'y 1849).
57. See 1 ANDREWS, *supra* note 47, at 58-59.
58. See *id.* at 42-46.
59. Cf. Calvin's Case (1608) 77 Eng. Rep. 377, 397-98; 7 Co. Rep. 1a, 17b (discussing the Crown's ownership of land obtained by conquest).

then the company needed the Crown's written permission. Typically, this permission came in "letters patent," or a publicized charter.<sup>60</sup> A company that received such a charter was called a *corporation*.<sup>61</sup>

In 1606, Gorges's Plymouth Company petitioned King James, Queen Elizabeth's successor, for one of these charters to colonize and "Search for all manner of Mynes of Gold" in Virginia.<sup>62</sup> At the same time, a competing company from London did the same thing. King James ended up writing "Letters Patents" for both companies. He incorporated a Virginia Company of Plymouth for Gorges's group and a Virginia Company of London for Gorges's competitors.<sup>63</sup>

Unfortunately for Gorges, nothing went right for his Virginia Company of Plymouth. The company's first expedition in 1606 passed too close to a Spanish fleet, which captured the ships and sailed them off to Spain.<sup>64</sup> A second expedition in 1607 managed to land by the Kennebec River in what is now Maine, but the settlers were "strangely perplexed with the great and unseasonable cold they suffered."<sup>65</sup> They left after a year.<sup>66</sup>

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60. See Bilder, *Corporate Origins*, *supra* note 48, at 516-17. Historian Mary Sarah Bilder has emphasized that at least in the early seventeenth century, people rarely called letters patent "charters," and that when historians use a modern term to describe the past there is a danger of "impl[ying] that current categories and boundaries existed in a world where they did not." See Bilder, *supra* note 42, at 1551. With this danger in mind, I nevertheless agree with her that "[o]n balance, naming [old] concepts using modern terminology seems more useful for explanatory convenience." See *id.*

61. See 1 EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND* 250 (London, Societie of Stationers 1628). For more on early seventeenth-century corporations, see generally ROBERT BRENNER, *MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON'S OVERSEAS TRADERS, 1550-1653* (1993); K.N. CHAUDHURI, *THE ENGLISH EAST INDIA COMPANY: THE STUDY OF AN EARLY JOINT-STOCK COMPANY, 1600-1640* (1965); 2 WILLIAM ROBERT SCOTT, *THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES, TO 1720* (1910); and *SELECT CHARTERS OF TRADING COMPANIES, A.D. 1530-1707* (Cecil T. Carr ed., 1913) [hereinafter *SELECT CHARTERS OF TRADING COMPANIES*].

62. See Grant of Virginia unto Sir Thomas Gates &c. (Apr. 10, 1606), U.K. Nat'l Archives Class 5/1354, Doc. No. 2, at 7, 25-26, <https://perma.cc/AK8Q-FTY3>.

63. See *id.* at 9-11.

64. See Letter from Thomas Edmondson to Ralph Winwood, Sec'y of State (Dec. 30, 1614), in 9 *CALENDAR OF STATE PAPERS, COLONIAL SERIES*, *supra* note 52, at 52, 52-53; see also GORGES, *A BRIEF NARRATION*, *supra* note 54, at 10-11.

65. See 1 ANDREWS, *supra* note 47, at 91; GORGES, *A BRIEF NARRATION*, *supra* note 54, at 13, 16.

66. See 1 ANDREWS, *supra* note 47, at 92-95; GORGES, *A BRIEF NARRATION*, *supra* note 54, at 17-18; see also STRACHEY, *supra* note 56, at 162-80.

Even worse for Gorges, things seemed to be going well for his corporate competitors. The same year Gorges's company sailed to Maine, the Virginia Company of London founded Jamestown.<sup>67</sup> Although the Jamestown settlers also suffered from a bad winter,<sup>68</sup> they made their settlement into the first permanent English colony in North America.<sup>69</sup> A few years later, another corporate startup out of Bristol sent a thirty-year-old ship captain named John Mason to maintain a colony in Newfoundland.<sup>70</sup> Not only did Mason successfully survive six winters there, but he also wrote a well-regarded memoir, *A Briefe Discourse of the New-Found-Land*.<sup>71</sup> In contrast with the Maine settlers, Mason described Newfoundland as a warmer-than-advertised place. He wrote that it had so many fish that just thinking about it made him “readie to swallow up and drowne my senses not being able to comprehend or expresse the riches thereof.”<sup>72</sup>

Mason's memoir earned him the sobriquet “Captain Mason.” It also earned him a career as a consultant for members of the British nobility interested in starting their own colonial corporations.<sup>73</sup> While working for one of these nobles, Mason introduced himself to Gorges.<sup>74</sup> Gorges liked Mason, whom he called a “man of action.”<sup>75</sup> Gorges ended up recruiting Mason as a lifelong

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67. See 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 AN: 1584 TO THIS PRESENT 1624, at 41-43 (London, I.D. & I.H. 1624).

68. See *id.* at 21.

69. See generally *id.*

70. See 1 ANDREWS, *supra* note 47, at 304-05; CHARLES WESLEY TUTTLE, CAPT. JOHN MASON, THE FOUNDER OF NEW HAMPSHIRE: INCLUDING HIS TRACT ON NEWFOUNDLAND, 1620; THE AMERICAN LETTERS IN WHICH HE WAS A GRANTEE; WITH LETTERS AND OTHER HISTORICAL DOCUMENTS 11-14 (John Ward Dean ed., Boston, The Prince Soc'y 1887).

71. See TUTTLE, *supra* note 70, at 12-13; see also JOHN MASON, A BRIEFE DISCOURSE OF THE NEW-FOUND-LAND: WITH THE SITUATION, TEMPERATURE, AND COMMODITIES THEREOF, INCITING OUR NATION TO GOE FORWARD IN THAT HOPE-FULL PLANTATION BEGUNNE (Edinburgh, Andro Hart 1620).

72. MASON, *supra* note 71, at 4.

73. See TUTTLE, *supra* note 70, at 14-15.

74. See *id.* The noble was William Alexander, Earl of Stirling. See *id.* at 14.

75. See GORGES, A BRIEFE NARRATION, *supra* note 54, at 55; see also FERDINANDO GORGES, A BRIEFE RELATION OF THE DISCOVERY AND PLANTATION OF NEW ENGLAND (1622), in 1 FERDINANDO GORGES AND HIS PROVINCE OF MAINE, *supra* note 52, at 203, 212.

partner to help him rebrand his feckless Virginia Company of Plymouth—whose name was becoming confusing in light of the success of its renowned competitor.<sup>76</sup>

In 1620, Gorges decided to rename his corporation after “New England,” the name an English explorer had given to the northern half of the North American coast between the Delaware River and the Gulf of Saint Lawrence.<sup>77</sup> The charter he received for the new “Council for New England” gave the corporation ownership of New England’s land and a complete monopoly on fishing off its coast.<sup>78</sup> In contrast with the Virginia Company of London, which financed its own expeditions, the Council for New England decided to settle its territory on the cheap. The Council spent most of its time selling grants of land to Gorges, Mason, and its other members,<sup>79</sup> who in turn sold deeds to emigrants and fishermen who were moving to New England on their own.<sup>80</sup>

For example, in 1620, a group of religious separatists sailing the Mayflower on their way to Virginia accidentally landed by the Massachusetts Bay, near Cape Cod.<sup>81</sup> The Council sold these so-called Pilgrims a deed to settle a colony there—which the Pilgrims named New Plymouth.<sup>82</sup> In 1623, the Council

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76. See Minutes of the Council for New England (June 21, 1632), U.K. Nat’l Archives Class 1/6, Doc. No. 29, at 64a, 64b, <https://perma.cc/MU89-ZEDD>; New England Patent (1620) [hereinafter Charter of the Council for New England], U.K. Nat’l Archives Class 5/902, Doc. No. 1, at 1, 2-3, <https://perma.cc/EY4W-CAHS> (discussing the confusion).

77. See Charter of the Council for New England, *supra* note 76, at 5-6; see also JOHN SMITH, A DESCRIPTION OF NEW ENGLAND, OR, THE OBSERVATIONS, AND DISCOVERIES, OF CAPTAIN JOHN SMITH (ADMIRALL OF THAT COUNTRY) IN THE NORTH OF AMERICA, IN THE YEAR OF OUR LORD 1614: WITH THE SUCCESSE OF SIXE SHIPS, THAT WENT THE NEXT YEARE 1615; AND THE ACCIDENTS BEFELL HIM AMONG THE FRENCH MEN OF WARRES 7 (London, Humfrey Lownes 1616).

78. See Charter of the Council for New England, *supra* note 76, at 13-16. Sir Edward Coke, among other members of Parliament, considered these privileges extravagant. See GORGES, A BRIEF NARRATION, *supra* note 54, at 35-49.

79. See, e.g., A Grant of Cape Anne in New England from the President & Council of New England to John Mason Esq. (Mar. 9, 1622) [hereinafter Cape Anne Grant], U.K. Nat’l Archives Class 5/902, Doc. No. 4, at 93, <https://perma.cc/HW6N-MAMB>; Grant of the Council for New England (Dec. 30, 1622), U.K. Nat’l Archives Class 1/2, Doc. No. 14, at 108a, <https://perma.cc/YYN8-9FAT> (granting land to Gorges’s son); A Grant of the Province of Maine to Sir Ferdinando Gorges, and John Mason Esq. (Aug. 10, 1622), U.K. Nat’l Archives Class 5/902, Doc. No. 5, at 101, <https://perma.cc/2LVK-TCE2>.

80. See 1 ANDREWS, *supra* note 47, at 334-35.

81. See EDWARD WINSLOW & WILLIAM BRADFORD, A RELATION OR JOURNALL OF THE BEGINNING AND PROCEEDINGS OF THE ENGLISH PLANTATION SETTLED AT PLIMOTH IN NEW ENGLAND, BY CERTAINE ENGLISH ADVENTURERS BOTH MERCHANTS AND OTHERS 3, 7-8 (London, John Bellamie 1622).

82. See WILLIAM BRADFORD, HISTORY OF PLYMOUTH PLANTATION 96 & n.\* (Charles Deane ed., Boston, Little, Brown & Co. 1856); Minutes of the Council for New England

*footnote continued on next page*



licensed a group of merchants to set up a fishing colony north of the Massachusetts Bay, on Cape Ann.<sup>83</sup> The settlers of what would become Salem arrived a few years later.<sup>84</sup>

B. The Massachusetts Bay Company

By 1624, things finally seemed to be going well for Gorges. Later that year, however, England declared war on Spain.<sup>85</sup> With few obvious risks facing their corporation, Gorges and Mason decided to take a leave of absence from the Council to serve in the military.<sup>86</sup> They left the Council under the leadership of a board member named Robert Rich, Earl of Warwick.<sup>87</sup>

Leaving the Council in the Earl of Warwick's hands ended up being a major mistake—and the beginning of a feud that lasted the rest of Gorges's and Mason's lives. The Earl was a wealthy graduate of the University of Cambridge, one of many who was becoming increasingly dissatisfied with the organization of the Church of England at the time.<sup>88</sup> These dissidents were known as "Puritans" for their desire to purify Church of England practices they regarded as too Catholic.<sup>89</sup> After the Earl of Warwick took a leading position atop the Council for New England, he and some of his Puritan classmates saw the Council's fishing colony in Salem as the perfect place to form a religious community from which to model what reform of the Church of England could look like.<sup>90</sup> Between 1627 and 1629, under the Earl's direction, the Council for

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(Mar. 25, 1623), U.K. Nat'l Archives Class 1/2, Doc. No. 6, at 67a, <https://perma.cc/FJ5P-945S>.

83. See JOHN WHITE, *THE PLANTER'S PLEA, OR, THE GROUNDS OF PLANTATIONS EXAMINED, AND USUALL OBJECTIONS ANSWERED* 68-69, 75 (London, William Jones 1630); see also Minutes of the Council for New England (Feb. 18, 1623), U.K. Nat'l Archives Class 1/2, Doc. No. 6, at 64a, <https://perma.cc/HS6A-ZYFV>. This group, based in Dorchester, was informally known as the Dorchester Company. See, e.g., FRANCIS J. BREMER, *JOHN WINTHROP: AMERICA'S FORGOTTEN FOUNDING FATHER* 151 (2003).

84. See WHITE, *supra* note 83, at 14, 75-78.

85. See 1 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS ON LAW, AND REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS 138-40 (John Rushworth ed., London, J.A. 1682); see also ROBERT E. RUIGH, *THE PARLIAMENT OF 1624: POLITICS AND FOREIGN POLICY* 233-34 (1971).

86. See 1 ANDREWS, *supra* note 47, at 400-02.

87. See *id.*; see also Sean Kelsey, *Rich, Robert, Second Earl of Warwick*, OXFORD DICTIONARY NAT'L BIOGRAPHY (updated Jan. 3, 2008), <https://perma.cc/9TTP-BEFX>.

88. See Kelsey, *supra* note 87.

89. See BREMER, *supra* note 83, at 33.

90. See 1 ANDREWS, *supra* note 47, at 346-52; WHITE, *supra* note 83, at 75-78.

New England granted the Puritans an enormous deed to the area around Salem.<sup>91</sup> This deed clearly conflicted with earlier deeds the Council had given to Gorges and Mason.<sup>92</sup>

The Puritans must have recognized how sketchy this deed appeared. The deed was also insecure; if Gorges and Mason were to return from war and learn what the Earl of Warwick had done, they could order the Council to revoke the deed. So in 1629, on the strength of their dubiously procured deed, the Puritans petitioned King Charles for a corporate charter, and surprisingly—given the existence of the Council for New England—the King granted their request.<sup>93</sup> The charter incorporated the group as the “Company of the Massachusetts Bay in Newe England,” gave them ownership over all the land between three miles north of the Merrimack River and three miles south of the Massachusetts Bay, and, in effect, made their claim to the area as good as the Council for New England’s.<sup>94</sup>

### C. The Charter of 1629

The charter of the Massachusetts Bay Company was a beautiful document. It contained four enormous parchment pages, each measuring 34½ by 25¾ inches, and each showing the wear of a manuscript that was scrutinized by hundreds of fingers and rolled to fit inside dozens of “safe & secret” places.<sup>95</sup>

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91. See Recital of a Deed from the Council for New England (Mar. 19, 1628), U.K. Nat’l Archives Class 1/4, Doc. No. 42, at 113a, <https://perma.cc/4V67-9DB2>; see also 1 ANDREWS, *supra* note 47, at 356-59; GORGES, A BRIEF NARRATION, *supra* note 54, at 59-60; Extracts out of Severall Graunts Concerning New England (1620-1639), U.K. Nat’l Archives Class 1/1, Doc. No. 52, at 166a, <https://perma.cc/7H97-P28D>.

92. Compare Recital of a Deed from the Council for New England, *supra* note 91, with, e.g., Cape Anne Grant, *supra* note 79.

93. See Copy of a Letter to Captain John Endecott, from “the Governor and Deputy of the New-England Company for a Plantation in Massachusetts-Bay” (Apr. 17, 1629) [hereinafter Copy of a Letter to Captain John Endecott], in 1 HISTORICAL COLLECTIONS; CONSISTING OF STATE PAPERS, AND OTHER AUTHENTIC DOCUMENTS; INTENDED AS MATERIALS FOR AN HISTORY OF THE UNITED STATES OF AMERICA 256, 256 (Ebenezer Hazard ed., Philadelphia, T. Dobson 1792) [hereinafter HAZARD’S STATE PAPERS].

94. See The Charter of the Colony of the Massachusetts Bay in New England, 1628-9 (Mar. 4, 1629) [hereinafter MBC Charter], in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1, 6-10 (Nathaniel B. Shurtleff ed., Boston, William White 1853) [hereinafter MBC RECORDS].

95. See Colin Campbell, *Theft Stirs Questions on Handling of Massachusetts Archives*, N.Y. TIMES, Aug. 20, 1984, at A12; Minutes of May 18, 1664 [hereinafter MBC Minutes of May 18, 1664], in 4-II MBC RECORDS, *supra* note 94, at 99, 102 (Nathaniel B. Shurtleff ed., Boston, William White 1854).

I refer to the charter as a single document, but six copies were made and two were brought to New England: a “duplicate” in 1629 and an “original” in 1630. See Copy of a Letter to Captain John Endecott, *supra* note 93, at 256; Minutes of Aug. 29, 1629 [hereinafter MBC Minutes of Aug. 29, 1629], in 1 MBC RECORDS, *supra* note 94, footnote continued on next page

Although its pages are crammed with eight thousand words of tiny, precise calligraphy, the document is also surprisingly festive. The top of the first page is illustrated with thirty or forty flowers surrounding a lion and a unicorn that are each waving flags. Underneath, in what looks like gold leaf, is inscribed “Charles, By the grace of God,” with a picture of a robed man staring out of the “C” like the king of hearts. At the bottom, a wax seal is attached to the page by multicolored strings of braided silk.<sup>96</sup>

The charter obviously took a lot of work. But it must have been fun to decorate.

Compared with modern legal documents, the charter’s appearance is baroque in every sense of the word. Yet nothing stands out relative to the charters of other trading corporations of its time—not even the strings.<sup>97</sup> The same is true of the charter’s content. Specific words, individual sentences, and even entire paragraphs were ripped straight out of preexisting charters like that of the Virginia Company.<sup>98</sup>

The text begins with a 1,500-word recital of why it was created. In short, a group of associates received a large deed of land from the Council for New England, and they were petitioning the King to “confirme,” or formally approve, their ownership of the land.<sup>99</sup>

In the next 1,500 words, the King granted the associates’ request, giving them all the land and coastal waters between the lines of latitude three miles

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at 50, 51. The duplicate is so called because it has “dupl” written on the bottom. See Campbell, *supra*.

In 1664, soon after the restoration of King Charles II, the company decided to “keepe safe & secret” its two copies by ordering both to be hidden. See MBC Minutes of May 18, 1664, *supra*, at 102. The copies were concealed in various places for the next few decades. See Letter from John Endecott to John Winthrop (1639), in 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES 158, 159 n.† (Boston, John Wilson & Son 1865). Today, the duplicate is held at the Peabody-Essex Museum in Salem, and the original at the Massachusetts Archives in Boston. Ironically, only in these final resting places have the documents been in danger; the first page of the original was briefly stolen in 1984. See Philip Bennett, *Stolen First Page of Bay Charter Found*, BOS. GLOBE, Mar. 9, 1985, at 21.

96. See MBC Charter, *supra* note 94, at 20 (describing the seal of King Charles affixed to the charter). For an image of the charter, see *Treasures Gallery: The Massachusetts Experiment in Democracy; 1620-Today*, COMMONWEALTH MUSEUM, <https://perma.cc/L8PL-RGD2> (archived Apr. 27, 2019).

97. See, e.g., HUDSON’S BAY CO., LORDS & PROPRIETORS: A READER’S GUIDE TO THE HUDSON’S BAY COMPANY CHARTER 22-23 (2004), <https://perma.cc/G9ZE-5FCC> (detailing the multiple decorative elements of the Hudson’s Bay Company charter, which was granted in 1670).

98. See SELECT CHARTERS OF TRADING COMPANIES, *supra* note 61, at xii-xiii, xv, lxxxv-lxxxvi.

99. See MBC Charter, *supra* note 94, at 3-6.

north of “any and every parte” of the Merrimack River and three miles south of “any or every parte” of the Charles River.<sup>100</sup> Although this property was thousands of miles away from England, the charter explained that, as far as the King was concerned, his legal relationship to the associates would be identical to his relationship to the tenants who lived on his “manner of Eastgreenewich, in the County of Kent,” a Crown estate just outside of London.<sup>101</sup> This gave them the right to do almost anything they wanted to the land (hunt, mine, fish) so long as they paid the King rent in the form of one-fifth of any gold or silver they happened to find or earn for their services.<sup>102</sup>

The next few hundred words, perhaps the most important in the charter, explained how the associates were to establish “good government” on their newly confirmed property.<sup>103</sup> The charter made them shareholders of a new corporation called the Massachusetts Bay Company—or, in the boilerplate language of the time, made them “freemen” of a “body corporate and politique in fact and name, by the name of the Governor and Company of the Ma[ss]achusetts Bay in Newe England.”<sup>104</sup> Later clauses gave this corporation “perpetuall succession”<sup>105</sup> as well as “full and absolute power and authoritie to correct, punishe, pardon, governe, and rule” anyone living in New England.<sup>106</sup> To exercise this power, the corporation could pass “lawes and ordinances,” initiate and respond to legal proceedings, acquire and sell property, admit new shareholders, and even “resist by force of armes” anyone who attempted “the destruc[tio]n, invasion, detriment, or annoyaunce to the said plantation or inhabitants.”<sup>107</sup>

The charter dedicated about 2,500 words to the corporation’s organization. At its head was a board consisting of a “Governor,” or chairman; a “Deputy Governor,” or vice chairman; and eighteen “Assistants,” or directors.<sup>108</sup> This

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100. *See id.* at 7.

101. *See id.* at 4-5; *see also* Edward P. Cheyney, *The Manor of East Greenwich in the County of Kent*, 11 AM. HIST. REV. 29, 29-30 (1905) (explaining why so many colonial charters reference this manor). The manor happened to later become home to the Royal Observatory and the Prime Meridian. And the clause would later feature in debates over whether Massachusetts and other North American colonies could be governed by Parliament, whose laws indisputably applied to East Greenwich but less obviously applied overseas. *See infra* notes 224-27 and accompanying text; *infra* text accompanying notes 635-36.

102. *See* MBC Charter, *supra* note 94, at 7-9.

103. *See id.* at 9-10.

104. *Id.* at 10.

105. *Id.*

106. *Id.* at 17.

107. *See id.* at 10-12, 16, 18.

108. *See id.* at 10.

board was subject to annual election by shareholders on “the last Wednesday in Easter tearme,” which usually fell in May.<sup>109</sup> The board was also authorized to call a monthly “Courte,” or board meeting, at which it could handle “all such buysinnes and occurrents as shall, from tyme to tyme, happen.”<sup>110</sup> A quorum consisted of eight people: seven directors and the chairman or vice chairman.<sup>111</sup>

The board could also call quarterly “Generall Courts,” or general meetings, at which shareholders could participate.<sup>112</sup> With the consent of six directors plus the chairman or vice chairman, a majority of those assembled could admit new shareholders, appoint executive officers, and pass laws “for the good and welfare” of the shareholders and other inhabitants of New England.<sup>113</sup> A clause later in the charter authorized general meetings to do various other things, such as to impose “lawfull correc[tio]n” on a prisoner, impeach or set “lymytts” on an officer, or figure out how to convert “the natives” to Christianity.<sup>114</sup>

This last point about conversion was labeled “the principall ende of this planta[tio]n.”<sup>115</sup> But the charter dedicated vastly more space, over 2,000 words, to trading and customs. The King gave the corporation various tax breaks and exemptions for transporting people and goods between England and New England, while warning the company not to fraudulently export merchandise to any foreign country.<sup>116</sup>

Finally, sprinkled throughout the charter was a recurring limit on what sorts of laws and punishments the corporation could impose: none that were “contrarie or repugnant to the lawes and statut[es] of this our realme of England.”<sup>117</sup> Relatedly, all oaths had to be “warrantable” by the laws of England,<sup>118</sup> all punishments had to be “according to the course of other corpora[tio]ns in this our realme of England,”<sup>119</sup> and Britons living under the corporation’s jurisdiction were entitled to “all liberties and immunities of free

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109. *Id.* at 12; see JOHN COWELL, THE INTERPRETER, OR, BOOKE CONTAINING THE SIGNIFICATION OF WORDS, at Ttt 2, col. 1 (Cambridge, Eng., John Legate 1607) (“Easter terme . . . beginneth 18. daies after Easter and endeth the munday next after Ascension day.”).

110. MBC Charter, *supra* note 94, at 11.

111. *See id.*

112. *See id.* at 11-12.

113. *See id.*

114. *See id.* at 16-17.

115. *Id.* at 17.

116. *See id.* at 13-16.

117. *Id.* at 12; see also, e.g., *id.* at 17-18.

118. *See id.* at 16-17.

119. *Id.* at 17.

and naturall subjects . . . as [i]f they and everie of them were borne within the realme of England.”<sup>120</sup> These sorts of clauses were common in charters and were supposed to reassure potential emigrants that living overseas wouldn’t make their families’ legal status any worse than if they stayed at home.<sup>121</sup>

#### D. John Winthrop

The first shareholders of the Massachusetts Bay Company—anticipating that they might be in a race with the Council for New England to colonize North America—began looking for emigrants almost as soon as the company received its charter in March 1629.<sup>122</sup> Many of the shareholders were Puritan graduates of the University of Cambridge, and they were particularly interested in recruiting former classmates who shared their values.<sup>123</sup> That July, at Cambridge’s commencement, a couple of them began talking with a fellow alumnus named John Winthrop.<sup>124</sup> Winthrop was broke, in his forties, and had just lost his job as a tax collector—but he was a Puritan lawyer who was enthusiastic about the change of pace New England offered.<sup>125</sup>

In thinking about whether to join the Massachusetts Bay Company, Winthrop thought about the experience of the Virginia Company of London. Even though it was a monumental success that Jamestown had lasted for over two decades, the colony could best be described as sparsely populated and poorly managed—indeed, things were so bad there that the Virginia Company had recently been investigated and dissolved by the Crown.<sup>126</sup> Winthrop blamed the company’s failure in part on its mission, which he understood was “aymed cheefly at profitt and not the propagation of religion.”<sup>127</sup> More fundamentally, Winthrop also thought the Virginia Company “did not

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120. *Id.* at 16; *see also* Calvin’s Case (1608) 77 Eng. Rep. 377, 379-80, 407; 7 Co. Rep. 1a, 2a-2b, 25a (holding that a Scot born after King James’s ascension was “no alien” to England).

121. *See* Bilder, *supra* note 42, at 1577-84.

122. *See* BREMER, *supra* note 83, at 153-55.

123. *See id.* at 147-57; CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 28 (2002).

124. *See* BREMER, *supra* note 83, at 147-48; Letter from Isaac Johnson to Emmanuel Downing (July 8, 1629), in 2 WINTHROP PAPERS 102, 103 (1931).

125. *See* BREMER, *supra* note 83, at 80-135, 146. Winthrop had been an attorney for the Court of Wards and Liveries. *See id.* at 125.

126. *See* Letter from Thomas Coventry, Attorney Gen., and Robert Heath, Solicitor Gen., to James, King of Eng. (July 31, 1623) [hereinafter Letter from Thomas Coventry and Robert Heath to King James], U.K. Nat’l Archives Class 1/2, Doc. No. 43, at 183a, <https://perma.cc/BQM5-WKE7>.

127. *See* John Winthrop, General Observations for the Plantation of New England (1629) [hereinafter Winthrop, General Observations], in 2 WINTHROP PAPERS, *supra* note 124, at 111, 114.

establysh a right forme of gover[n]ment.”<sup>128</sup> Its board had attempted to sit in London and from there profitably govern a new aristocracy in Virginia—but the only emigrants willing to submit to such an arrangement were “a multitude of rude and misgoverned persons[,] the very scumme of the land.”<sup>129</sup>

After Winthrop discussed these concerns with the Massachusetts Bay Company’s shareholders, the company’s chairman invited Winthrop to speak about whether the board should “transferr the go[ver]nment of the planta[tio]n to those that shall inhabite there, and not to continue the same in subordina[tio]n to the Company heer, as now it is.”<sup>130</sup> From July through August 1629, the company debated the idea.<sup>131</sup> Winthrop came to meetings at which he and other supporters of the move offered several “weighty reasons,” chief among them being that “persons of worth & qualitie” would “transplant themselves and famylyes” to New England only if they could govern themselves as a “Com[mon]w[ealth].”<sup>132</sup> Another thing likely on the board’s collective mind was the knowledge that Sir Ferdinando Gorges and Captain John Mason might one day return to the Council for New England and challenge the Massachusetts Bay Company’s overlapping grant of land.

These arguments proved persuasive. In August, Winthrop and an influential group of board members met at Cambridge and agreed to emigrate together if the company passed an order that “legally transferred” the “whole governement together with the Patent,” or charter, to New England.<sup>133</sup> Later that month, the company passed the order.<sup>134</sup> And in December, the company finalized a plan in which the shareholders and directors going to New England would buy out any shareholders remaining in England over a period

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128. *Id.* (alteration in original).

129. *Id.*; see 1 ANDREWS, *supra* note 47, at 103-05.

130. Minutes of July 28, 1629 [hereinafter MBC Minutes of July 28, 1629], in 1 MBC RECORDS, *supra* note 94, at 47, 49; see also BREMER, *supra* note 83, at 156-57.

131. See MBC Minutes of July 28, 1629, *supra* note 130, at 48-49; Minutes of Aug. 28, 1629, in 1 MBC RECORDS, *supra* note 94, at 49, 50; MBC Minutes of Aug. 29, 1629, *supra* note 95, at 51.

132. See MBC Minutes of July 28, 1629, *supra* note 130, at 49; John Winthrop, Address to the Company of the Massachusetts Bay (Dec. 1, 1629), in 2 WINTHROP PAPERS, *supra* note 124, at 174, 175 (alterations in original); see also Winthrop, General Observations, *supra* note 127, at 114.

133. See The Agreement at Cambridge (Aug. 26, 1629), in 2 WINTHROP PAPERS, *supra* note 124, at 151, 152.

134. See MBC Minutes of Aug. 29, 1629, *supra* note 95, at 51.

of seven years.<sup>135</sup> In the future, the only people who lived in New England could become shareholders—specifically, they had to become “members of [one] of the churches” established there.<sup>136</sup>

Almost as soon as the company decided that its charter was no bar to relocation, however, the charter became something of an afterthought.<sup>137</sup> The board repeatedly disregarded the charter’s text when putting its governing structure into practice. In 1629, for example, while the company was still in England, the shareholders elected Winthrop chairman in October even though the charter required elections to be held in May.<sup>138</sup> In 1630, after the company had established its headquarters in the new town of Boston,<sup>139</sup> it restricted shareholders from electing the chairman, allowing them only to elect directors.<sup>140</sup> In 1631, the directors remained in their positions without elections and reduced the quorum for a board meeting to below the minimum specified by the charter.<sup>141</sup> And in 1632, after local residents complained that the board had levied a tax on them without first soliciting their consent, the company implicitly amended the charter by authorizing each town to send two “Deputyes,” or shareholder representatives, to vote on taxes “by proxie.”<sup>142</sup>

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135. See Minutes of Sept. 29, 1629, in 1 MBC RECORDS, *supra* note 94, at 52; Minutes of Oct. 15, 1629, in 1 MBC RECORDS, *supra* note 94, at 54; Minutes of Oct. 16, 1629, in 1 MBC RECORDS, *supra* note 94, at 56; Minutes of Oct. 19, 1629, in 1 MBC RECORDS, *supra* note 94, at 57; Minutes of Oct. 20, 1629 [hereinafter MBC Minutes of Oct. 20, 1629], in 1 MBC RECORDS, *supra* note 94, at 58; Minutes of Nov. 20, 1629, in 1 MBC RECORDS, *supra* note 94, at 60; Minutes of Nov. 25, 1629, in 1 MBC RECORDS, *supra* note 94, at 61; Minutes of Nov. 30, 1629, in 1 MBC RECORDS, *supra* note 94, at 63; Minutes of Dec. 15, 1629, in 1 MBC RECORDS, *supra* note 94, at 66.

136. See Minutes of May 18, 1631 [hereinafter MBC Minutes of May 18, 1631], in 1 MBC RECORDS, *supra* note 94, at 86, 87.

137. See 1 ANDREWS, *supra* note 47, at 431-44 (discussing examples of how the company strayed from its charter).

138. See MBC Minutes of Oct. 20, 1629, *supra* note 135, at 59; *supra* text accompanying note 109.

139. For the first meeting in Boston, see Minutes of Oct. 19, 1630 [hereinafter MBC Minutes of Oct. 19, 1630], in 1 MBC RECORDS, *supra* note 94, at 79, 79-80. Prior to the October 19, meeting, the company had met in Charlestown. See, e.g., Minutes of Sept. 28, 1630, in 1 MBC RECORDS, *supra* note 94, at 76, 76.

140. See MBC Minutes of Oct. 19, 1630, *supra* note 139, at 79-80.

141. See Minutes of Mar. 8, 1631, in 1 MBC RECORDS, *supra* note 94, at 83, 84; MBC Minutes of May 18, 1631, *supra* note 136, at 87; *supra* text accompanying note 111.

142. See THE JOURNAL OF JOHN WINTHROP, 1630-1649, at 63 (Richard S. Dunn et al. eds., 1996) [hereinafter JOURNAL OF JOHN WINTHROP] (entry of Feb. 17, 1632); *id.* at 68 (entry of May 8, 1632); *id.* at 116 (entry of May 14, 1634); Minutes of May 9, 1632, in 1 MBC RECORDS, *supra* note 94, at 95, 95. The term “proxie” first appears in 1636, when the company began authorizing shareholders to vote in elections by proxy as well. See Minutes of Mar. 3, 1636, in 1 MBC RECORDS, *supra* note 94, at 164, 166; see also Minutes of Mar. 9, 1637, in 1 MBC RECORDS, *supra* note 94, at 187, 188.



This variance from the text of the charter wasn't all that unusual. In the East India Company, the City of London, and other corporations of the era, corporate directors referenced their charters more often to verify all the goodies the Crown had given them than to seek out restrictions on their own authority.<sup>143</sup> Leaders like Winthrop certainly didn't interpret their charters with the textualist approach of a modern judge.<sup>144</sup> For example, in 1632, when someone asked Winthrop whether the charter, or "Patent," imposed any "limittes o[n] his Authoritye," he answered no, stating that "the Patent makinge him a Governor gave him whatsoever power belonged to a Governor by Common Lawe or the statutes."<sup>145</sup>

#### E. The Quo Warranto

The Massachusetts Bay Company had acted efficiently—receiving its charter in 1629 and establishing a thriving government in New England by 1632. But later that year, as the Anglo-Spanish War drew to a close, Sir Ferdinando Gorges and Captain John Mason returned to the Council for New England. They were flabbergasted to learn that their fishing colony in Salem now claimed to be a corporation that owned land they had previously granted to themselves.<sup>146</sup> From the perspective of Gorges and Mason, the Massachusetts Bay Company was a fraudulent enterprise.

To get this corporation dissolved, Gorges and Mason petitioned for help from the King's Privy Council, the group of lords and bishops who gave the King advice and executed his orders. The Privy Council agreed to "examine how the Patentes for the said Plantation, have been grannted, and

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143. See CHAUDHURI, *supra* note 61, at 28-33; PETER CLARK & PAUL SLACK, *ENGLISH TOWNS IN TRANSITION, 1500-1700*, at 126-30 (1976); 1 SIDNEY WEBB & BEATRICE WEBB, *ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE MANOR AND THE BOROUGH 271-76* (1908).

144. See 1 WEBB & WEBB, *supra* note 143, at 274-75; Bilder, *supra* note 42, at 1549, 1590-91.

145. JOURNAL OF JOHN WINTHROP, *supra* note 142, at 74 (entry of Aug. 3, 1632).

146. See GORGES, A BRIEF NARRATION, *supra* note 54, at 59-60. Gorges apparently learned what was happening when John Humphry, a shareholder of the Massachusetts Bay Company, complained that the Council for New England was violating the terms of the "Patent granted unto him" by restricting transportation to New England without a license. See Minutes of the Council for New England (June 26, 1632), U.K. Nat'l Archives Class 1/6, Doc. No. 29, at 65a, 65a, <https://perma.cc/T8KE-7VCX>; see also 1 ANDREWS, *supra* note 47, at 403-04; Minutes of the Council for New England (Nov. 6, 1632), U.K. Nat'l Archives Class 1/6, Doc. No. 29, at 66a, 66b, <https://perma.cc/5ZTM-HR2S>.

how carried.”<sup>147</sup> The Privy Council interviewed Gorges and Mason, representatives from the Massachusetts Bay Company, and witnesses from New England who reported that the Massachusetts Bay Company’s board of directors was establishing a punitive theocracy there.<sup>148</sup> One witness reported that “swarms” of migrants were leaving Old England for New England.<sup>149</sup> These migrant ships were full of Puritans and other dissidents “whom divers persons knowe to be ill affected, and discontented,” with the Church of England.<sup>150</sup> A second witness claimed that he had been whipped, mutilated, fined, and banished “for uttering mallitious & scandalous speeches against the [government] & the church of Salem.”<sup>151</sup> A third group had similar stories of being punished by a corporate government in which they had no vote because they weren’t allowed to purchase shares.<sup>152</sup>

Some of the investigating privy councilors were willing to forgive all these transgressions on the theory that it was better for New England to have a puritanical colony than no colony at all.<sup>153</sup> But most feared that the “imposterous Knaves” meeting in New England might try to take advantage of their distance from London and “wholly shake off the Royall Jurisdiction of

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147. Minutes of Dec. 19, 1632, in 1 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 183, 183 (W.L. Grant & James Munro eds., 1908) [hereinafter ACTS OF THE PRIVY COUNCIL].

148. See *id.* (appointing a committee to interview dissidents from New England); Minutes of Jan. 19, 1633, in 1 ACTS OF THE PRIVY COUNCIL, *supra* note 147, at 184, 184-85 [hereinafter Privy Council Minutes of Jan. 19, 1633] (reporting the findings of the committee).

149. Letter from Henry Dade, Comm’r of Suffolk, to the Archbishop of Canterbury (Feb. 4, 1634), in 1 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 174, 174 (W. Noel Sainsbury ed., London, Longman, Green, Longman & Roberts 1860). Technically, the Privy Council delegated its work to a committee on New England plantations. See Privy Council Minutes of Jan. 19, 1633, *supra* note 148, at 184. For simplicity’s sake, I refer to the Privy Council as a whole.

150. See Minutes of Feb. 21, 1634, in 1 ACTS OF THE PRIVY COUNCIL, *supra* note 147, at 199, 199.

151. Minutes of June 14, 1631, in 1 MBC RECORDS, *supra* note 94, at 88, 88; see also Letter from Thomas Wiggim to John Coke, Sec’y of State (Nov. 19, 1632), U.K. Nat’l Archives Class 1/6, Doc. No. 68, at 183a, <https://perma.cc/28JZ-RHCS> (defending the company’s actions).

152. See, e.g., GORGES, A BRIEF NARRATION, *supra* note 54, at 63-64; Letter from Thomas Wiggim to Emmanuel Downing (Aug. 31, 1632), U.K. Nat’l Archives Class 1/6, Doc. No. 65, at 174a, 174a, <https://perma.cc/7MMM-N6XQ> (discussing Christopher Gardiner, whom the company accused of having two wives); Petition of Edward Winslow to the Privy Council (Nov. 1632), U.K. Nat’l Archives Class 1/6, Doc. No. 69, at 185a, <https://perma.cc/9GHP-MKFS> (explaining that the company believed Thomas Morton to be a delinquent and Gardiner to be a Catholic).

153. See Privy Council Minutes of Jan. 19, 1633, *supra* note 148, at 184-85.

the Sovereign Magistrate.”<sup>154</sup> So in 1634, the councilors ordered the Massachusetts Bay Company to send its charter back to London for review—and possible dissolution.<sup>155</sup>

Gorges and Mason were delighted by this turn of events; one of their allies boasted that “the King hath taken the Matter into his owne Hands” and would soon declare the charter “to be voyd.”<sup>156</sup> But under English law at the time, voiding a corporate charter was not so simple, even for the King. As mentioned above, when a King signed a corporate charter, he was issuing a written document granting a group of people special privileges to do things they couldn’t ordinarily do without his permission.<sup>157</sup> Although a few charters stated that this grant was temporary,<sup>158</sup> most explicitly declared that the grant was “per[r]petuall” and intended to last “for ever.”<sup>159</sup> In the words of the most famous jurist of the era, Sir Edward Coke, the typical charter created a corporation that was “immortal,” an “invisible body” that couldn’t be outlawed or excommunicated like an ordinary person.<sup>160</sup> It would take more than royal displeasure to kill the Massachusetts Bay Company.

Gorges and Mason’s silver bullet was a highly technical legal procedure called “an information in the nature of quo warranto.”<sup>161</sup> (This was often shortened to “quo warranto”—as in, “the King just ‘quo warranto’d’ that corporation.”)<sup>162</sup> The procedure is easier to walk through than to define. First,

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154. See GORGES, A BRIEF NARRATION, *supra* note 54, at 60; Letter from Thomas Morton to William Jefferies (May 1, 1634), in 1 HAZARD’S STATE PAPERS, *supra* note 93, at 342, 343; see also Letter from Emanuel Downing to John Coke, Sec’y of State (Dec. 12, 1633), in 9 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 74.

155. See JOURNAL OF JOHN WINTHROP, *supra* note 142, at 120-21 (entry of July 1634); *id.* at 123 (entry of July 9, 1634).

156. Letter from Thomas Morton to William Jefferies, *supra* note 154, at 342.

157. See *supra* notes 59-61 and accompanying text.

158. See, e.g., Charter Granted by Queen Elizabeth, to the Governor and Company of Merchants of London, Trading into the East-Indies (Dec. 31, 1600), in 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 1, 7 (John Shaw ed., Madras, India, R. Hill 1887) (imposing a fifteen-year expiration date).

159. See, e.g., Charter of the Council for New England, *supra* note 76, at 5, 10; see also SELECT CHARTERS OF TRADING COMPANIES, *supra* note 61, at xviii-xix.

160. Case of Sutton’s Hosp. (1612) 77 Eng. Rep. 960, 973; 10 Co. Rep. 23a, 32b.

161. See 2 STEWARD KYD, A TREATISE ON THE LAW OF CORPORATIONS 395-410 (London, J. Butterworth 1794) (emphasis omitted); see also EDWARD COKE, A BOOKE OF ENTRIES 527-64 (London, Societie of Stationers 1614).

162. See, e.g., JOHN PALMER, AN IMPARTIAL ACCOUNT OF THE STATE OF NEW ENGLAND, OR, THE LATE GOVERNMENT THERE, VINDICATED: IN ANSWER TO THE DECLARATION WHICH THE FACTION SET FORTH, WHEN THEY OVERTURNED THAT GOVERNMENT, WITH A RELATION OF THE HORRIBLE USAGE THEY TREATED THE GOVERNOUR WITH, AND HIS

*footnote continued on next page*

the King's attorney general would bring an *information*, or criminal charge, against the shareholders of a corporation.<sup>163</sup> Then, in court, the attorney general would ask the shareholders "quo warranto," or, in modern terms, "by what warrant or authorization did you take actions that are illegal without the King's permission?"<sup>164</sup> If they could, the shareholders would reply by quoting specific terms of a charter proving that the King had given them permission to take the challenged actions.<sup>165</sup> A panel of judges would then determine whether the actions had been warranted by the charter or whether they had been *usurped*, or taken illegally.<sup>166</sup>

As so far described, this procedure had existed in one form or another since at least the thirteenth century.<sup>167</sup> It still exists in a modified form today; there is nothing odd or unusual about a civil or criminal lawsuit alleging that an official of a government or corporation exceeded his or her authority to act.<sup>168</sup>

But a few years before the Massachusetts Bay Company controversy, King James controversially modified this procedure into a deadly weapon against corporations. After receiving similar complaints of "abuses and miscarriage in the plantation and government" of the Virginia Company of London,<sup>169</sup> his attorney general began to argue in court that when a corporation takes an action unwarranted by its charter, the court should not only cancel the unauthorized action but also enter a judgment of seizure, allowing the King to take the charter back and (legally) rip it in half.<sup>170</sup> Using a quo warranto, King

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COUNCIL, AND ALL THAT HAD HIS MAJESTY'S COMMISSION 39 (London, Edward Poole 1690).

163. See 2 KYD, *supra* note 161, at 403-04; *cf. Information*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "information" as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment").

164. See 2 KYD, *supra* note 161, at 395, 403-04.

165. See *id.* at 405-06.

166. See *id.* at 406-09.

167. See Statute of Quo Warranto 1290, 18 Edw. c. 2; see also 2 KYD, *supra* note 161, at 395-403. For additional background on quo warrantos, see DONALD W. SUTHERLAND, QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I, 1278-1294 (1963).

168. See Bilder, *Corporate Origins*, *supra* note 48, at 541-44. Since the advent of the Federal Rules of Civil Procedure and its state equivalents, this sort of proceeding is rarely called a quo warranto. See, e.g., FED. R. CIV. P. 81(a)(4), (b); MASS. R. CIV. P. 81(b); see also FED. R. CIV. P. 2 (declaring the replacement of the writ system with "one form of action—the civil action").

169. Letter from Thomas Coventry and Robert Heath to King James, *supra* note 126.

170. See 4 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON 358-69 (Susan Myra Kingsbury ed., 1935) (providing a translation of the quo warranto proceeding against the Virginia Company); Minutes of the Privy Council (June 26, 1624), U.K. Nat'l Archives Class 5/1354, Doc. No. 43, at 282a, <https://perma.cc/NX6N-DRQJ> (enforcing the judgment against the Virginia Company); see also Dublin Corp. Case (1620) 81 Eng. Rep. 949, 950-51; Palmer 1, 5 (enforcing a similar judgment against the City of Dublin);  
*footnote continued on next page*

James and his son, the new King Charles, dissolved the Virginia Company and proclaimed that “the Government of the Collonie of *Virginia* shall ymediately depend uppon Our Selfe, and not be commytted to anie Companie or Corporation, to whome itt maie be proper to trust Matters of Trade and Commerce, but cannot bee fitt or safe to communicate the ordering of State Affaires.”<sup>171</sup> And in 1635, after the Massachusetts Bay Company ignored his privy councilors’ request to resign its charter,<sup>172</sup> King Charles ordered his attorney general to file a quo warranto against that company, too.<sup>173</sup>

#### F. The Effect of the Quo Warranto in New England

Information traveled slowly between England and New England: It took several months for a letter or legal document to cross the Atlantic.<sup>174</sup> Nevertheless, the news of the quo warranto eventually arrived in Boston, and Winthrop and other company leaders—most of whom were trained as lawyers—were shocked by the threat.<sup>175</sup> Taking advantage of their distance from England, they adopted a legal strategy of “avoid[ance]” and “protract[ion],” refusing to answer letters from England until they received a formal summons.<sup>176</sup> They ordered the construction of fortifications to repulse any

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2 KYD, *supra* note 161, at 409-10 (explaining that after judging that a corporation had violated its charter’s terms, a court could authorize the sheriff with jurisdiction over the corporation to “seize [its] liberties”—that is, the powers granted in its charter—“into the King’s hands”).

171. A Proclamation for Settlinge the Plantation of Virginia (1625), in 18 FÆDERA, CONVENTIONES, LITERÆ, ET CUJUSCUNQUE GENERIS ACTA PUBLICA, INTER REGES ANGLIÆ ET ALIOS QUOSVIS IMPERATORES, REGES, PONTIFICES, PRINCIPES, VEL COMMUNITATES 72, 72 (Roberto Sanderson ed., London, J. Tonson 1726); *see also* R v. Va. Co. (1624) 81 Eng. Rep. 913, 913; 2 Rolle 455, 455 (voiding the company’s charter).

172. *See* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 120-21 (entry of July 1634); *id.* at 122-23 (entry of July 9, 1634); *id.* at 129 (entry of Sept. 18, 1634).

173. *See* Minutes of the Council for New England (May 5, 1635), U.K. Nat’l Archives Class 1/6, Doc. No. 29, at 76b, 76b, <https://perma.cc/2WWD-BUUL>; 1635 Quo Warranto, *supra* note 15.

174. *See* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 120-21 (entry of July 1634) (receiving notice of an order from February to return the Massachusetts Bay Company’s charter to England). For a record of the order, *see* Minutes of Feb. 21, 1634, in 1 ACTS OF THE PRIVY COUNCIL, *supra* note 147, at 199, 199. *See also* Minutes of Feb. 28, 1634, in 1 ACTS OF THE PRIVY COUNCIL, *supra* note 147, at 200.

175. One critic of the company complained of the chairman and directors that “the best of them was but an attorney.” *See* Minutes of Mar. 4, 1632, in 1 MBC RECORDS, *supra* note 94, at 103, 103.

176. *See* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 140 (entry of Jan. 13, 1635); *see also id.* at 120-21 (entry of July 1634); *id.* at 122-23 (entry of July 9, 1634); *id.* at 129 (entry of Sept. 18, 1634).

unlawful attempts “to compell us by force, to receive a new Governor.”<sup>177</sup> And, most importantly, they began changing their laws and conduct to conform to the charter’s text so that they could win any legal battles in court.

Winthrop resisted this last strategy—at least at first. He and the board kept the charter hidden not only from the Privy Council, but also from shareholders, until April 1634, when a group of shareholders “desired a sight of the Patent.”<sup>178</sup> After the shareholders, or “freemen,” read the charter for the first time, they angrily swarmed the next general meeting, demanding annual elections, the right to participate in lawmaking, and all the other liberties the charter gave them.<sup>179</sup> Winthrop objected that “when the Patent was granted the number of freemen was supposed to be (as in like Corporations) so fewe, as they might well joine in makinge Lawes, but now they were growne to so great a bodye, as it was not possible for them to make or execute Lawes.”<sup>180</sup> But the shareholders rejected this excuse, voting to institute their reforms and also to demote Winthrop from the chairmanship he had held since 1629.<sup>181</sup>

By July 1634, however, when the company received its first order from the Privy Council demanding to see the charter,<sup>182</sup> even Winthrop could see the need to pacify the Crown and strictly comply with the charter’s terms. He began arguing that all laws passed by a majority of shareholders also required the approval of at least six directors, “as the Patent requires.”<sup>183</sup> He dragged his feet when the company appointed him to a committee to “frame a bodye of [fundamental] Lawes in resemblance to a magna Charta,”<sup>184</sup> responding that such a formal legal code “would professedly transgress the limits of our charter, which provide, we shall ma[k]e no laws repugnant to the

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177. *See id.* at 128-29 (entry of Sept. 18, 1634).

178. *See id.* at 113-14 (entry of Apr. 1, 1634).

179. *See* Minutes of May 14, 1634, in 1 MBC RECORDS, *supra* note 94, at 116, 117-21. For more context on the demand for reforms, see MALOY, *supra* note 49, at 117-23; and ROGER THOMPSON, DIVIDED WE STAND: WATERTOWN, MASSACHUSETTS, 1630-1680, at 37-50 (2001).

180. JOURNAL OF JOHN WINTHROP, *supra* note 142, at 113 (entry of Apr. 1, 1634).

181. *See id.* at 116 (entry of May 14, 1634); Letter from Israel Stoughton to John Stoughton (May 1634), U.K. Nat’l Archives Class 1/8, Doc. No. 15, at 49a, 50b, <https://perma.cc/5NJW-2Z8D> (discussing Winthrop’s demotion); *supra* text accompanying note 138.

182. *See* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 121-22 (entry of July 1634); *id.* at 122-23 (entry of July 9, 1634).

183. *See, e.g., id.* at 127 (entry of Sept. 5, 1634).

184. *Id.* at 146 (entry of May 6, 1635).

laws of England.”<sup>185</sup> And he and the board banished Roger Williams, who later founded Rhode Island, principally because Williams wrote and lectured “against the kings Patente.”<sup>186</sup>

In one sense, Winthrop’s sudden concern for the charter was pure self-interest that had nothing to do with the pending quo warranto in England. He spent every year he lived in New England as chairman or a member of the company’s board, and the charter’s terms occasionally gave him the leverage he needed to persuade the shareholders to enhance the board’s powers at their own expense—as with his demand that new laws receive the bicameral support of both the shareholders and the directors.

But the shareholders could use the charter’s terms to reduce the board’s powers, too, and Winthrop recognized as much. Between 1636 and 1639, he lost a battle over whether the company’s charter permitted his appointment to a new and powerful “standing counsell for the tearme of his life.”<sup>187</sup> His shareholder opponents voted to eliminate the council’s special powers after arguing that it represented “a new order of magistrates not warranted by our patent,” which listed only three kinds of officers (chairman, vice chairman, and director) and required each to be “chosen in the annual elections . . . established by the patent.”<sup>188</sup> Winthrop ruefully observed “how strictly the people would seem to stick to their patent, where they think it makes for their advantage, but are content to decline it, where it will not warrant such liberties as they have taken up without warrant from thence.”<sup>189</sup> For example, “only by inference” could the shareholders claim that the charter justified their post-1632 practice of sending representatives to general meetings and “voting by proxies, etc.”<sup>190</sup> Yet the shareholders didn’t subject themselves to the same strict standard to which they held Winthrop.

But in a more general sense, the reason appeals to the charter were so powerful was because no one in the company wanted to see the entire government dissolved by the quo warranto hanging over their heads like the

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185. *Id.* at 314 (entry of Dec. 1639); *see also* Minutes of May 6, 1635, in 1 MBC RECORDS, *supra* note 94, at 145, 147.

186. JOURNAL OF JOHN WINTHROP, *supra* note 142, at 137 (entry of Nov. 27, 1634); *see id.* at 107-08 (entry of Dec. 27, 1633); *id.* at 109 (entry of Jan. 24, 1634); *id.* at 163-64 (entry of Jan. 1636); Minutes of Sept. 3, 1635, in 1 MBC RECORDS, *supra* note 94, at 156, 160-61. For a biography of Williams, *see* EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE (1967).

187. *See* Minutes of May 25, 1636, in 1 MBC RECORDS, *supra* note 94, at 173, 174; *see also* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 174 (entry of Apr. 7, 1636); Minutes of Mar. 3, 1636, in 1 MBC RECORDS, *supra* note 94, at 164, 167.

188. *See* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 294-96 (entry of May 22, 1639).

189. *Id.* at 295-96.

190. *See id.*

sword of Damocles.<sup>191</sup> Because no one wanted to take a position that would lead the company to violate its charter and hurt its legal standing in the quo warranto proceeding, participants in all sorts of domestic debates explicitly cited the text of the charter to defend their positions regarding taxation, voting rights, the separation of powers, religious disagreements, and other disputes. That said, these interpretations of the charter's text were more sophisticated than mere recitals of the charter's words. Methods of interpreting the charter were as varied as methods of constitutional interpretation in the present day, when people interpret constitutional provisions with reference to their original public meaning, the general principles they reference, or how their meaning has evolved over time.<sup>192</sup>

This new mode of charter interpretation was powerfully illustrated in a debate over whether the company had the power to restrict immigration.<sup>193</sup> On the pro side, Winthrop argued that the company had to be able to defend itself from immigrants whose "misusage" of the company's privileges would "forfeit the patent."<sup>194</sup> Citing language in the charter that allowed shareholders to choose officers, Winthrop argued that the corporation was a "commonwealth" and, implicitly, therefore had the same power as all other commonwealths, including England.<sup>195</sup> Since England had the power "to keep out all such persons as might be dangerous to the commonwealth," he maintained that the Massachusetts Bay Company, a "corporation established by free consent," was no different.<sup>196</sup>

On the con side, one-time chairman Henry Vane opposed a restrictive immigration law because he believed "the kings christian subjects have right by his majesties pattent, to come over and plante" in New England.<sup>197</sup> Referencing the charter's language that gave all residents the same "liberties and

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191. See, e.g., A Passage in a Letter to Mr. Comptroller, About the Estate of Newe England (Oct. 3, 1636), U.K. Nat'l Archives Class 1/9, Doc. No. 19, at 46a, 46a, <https://perma.cc/9B77-P82B> (discussing the "great discouragement to the whole plantation" if the charter were "damned").

192. See *supra* text accompanying notes 43-44.

193. See Minutes of May 17, 1637, in 1 MBC RECORDS, *supra* note 94, at 194, 196.

194. See John Winthrop, A Reply in Further Defense of an Order of Court Made in May, 1637 (Aug. 1637), in 3 WINTHROP PAPERS, *supra* note 124, at 463, 468-69 (1943).

195. See John Winthrop, A Declaration in Defense of an Order of Court Made in May, 1637 (June 1637) [hereinafter Winthrop, Declaration in Defense of an Order], in 3 WINTHROP PAPERS, *supra* note 194, at 422, 423-25.

196. See JOURNAL OF JOHN WINTHROP, *supra* note 142, at 219 (entry of May 24, 1637); Winthrop, Declaration in Defense of an Order, *supra* note 195, at 423.

197. Henry Vane, A Briefe Answer to a Certaine Declaration, Made of the Intent and Equitie of the Order of Court, That None Should Be Received to Inhabite Within This Jurisdiction but Such as Should Be Allowed by Some of the Magistrates (1637), in THE HUTCHINSON PAPERS, *supra* note 15, at 71, 76.



immunities” as if they were in England,<sup>198</sup> Vane argued that these liberties included the right to travel within the Crown’s realms.<sup>199</sup> Vane concluded that any immigration law had to be “regulated by the worde, and sutable to our patent,” and enforced in the “manner and forme as it prescribes,” or else “we shall exceed the limitts of his majesties grante, and forfeite the priviledges, government and lands which we challenge to be our owne.”<sup>200</sup>

#### G. Enforcing the Quo Warranto from England

Back in England, Sir Ferdinando Gorges and Captain John Mason had a difficult time prosecuting the quo warranto against the Massachusetts Bay Company. Unlike the Virginia Company, whose board, shareholders, and charter were in England, the organizers of the Massachusetts Bay Company had fled overseas.<sup>201</sup> To counteract the company’s legal position that it had not violated the charter’s text, the prosecutors focused their attention on the company’s absence. The Court of the King’s Bench “outlawed” the missing shareholders and,<sup>202</sup> in 1637, entered a default judgment ordering the charter to be “Seized into the Kings hands.”<sup>203</sup> Even then, the company in New England either ignored or refused every order out of England announcing that its charter had been “called in and condemned.”<sup>204</sup> In 1638, the privy councilors even learned that the company’s government was preparing to “fortifie

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198. MBC Charter, *supra* note 94, at 16.

199. *See* Vane, *supra* note 197, at 76-77.

200. *See id.* at 72-73, 76.

201. *See supra* text accompanying notes 133-34.

202. Minutes of the Proceedings in the King’s Bench (Easter Term 1636), U.K. Nat’l Archives Class 1/9, Doc. No. 50, at 127a, 127a, <https://perma.cc/V6FF-58PB>.

203. Minutes of the Proceedings in the King’s Bench (Easter Term 1637), U.K. Nat’l Archives Class 1/9, Doc. No. 50, at 127a, 127a, <https://perma.cc/2TSC-PEMS>.

204. *See* Letter to John Winthrop (May 1637), in 3 WINTHROP PAPERS, *supra* note 194, at 397, 403. There were a few such orders. *See* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 291-92 (entry of May 6, 1639); *see also* A Copie of a Letter Sent by the Appointment of the Lords of the Council to Mr. Winthrope for the Patent of This Plantation to Be Sent to Them (Apr. 4, 1638), in 1 HAZARD’S STATE PAPERS, *supra* note 93, at 432; Order of the Privy Council (May 3, 1637), U.K. Nat’l Archives Class 1/9, Doc. No. 49, at 126a, <https://perma.cc/L57N-U2SW>. The company responded once, in 1638, claiming they “were never called to make answer” to the quo warranto, there was “no cause knowne to us” to void the charter, and that, if the councilors tried to take the charter by force, local residents might consider themselves “cast . . . off” from the King’s allegiance and “ready to confederate themselves under a new government for their necessary safety.” Massachusetts Petition to the Lords Commissioners for Foreign Plantations (1638), in 1 HAZARD’S STATE PAPERS, *supra* note 93, at 435, 435-36; *see also* JOURNAL OF JOHN WINTHROP, *supra* note 142, at 262 (entry of Sept. 7, 1638) (explaining the colonists’ fear that surrendering the charter would lead the Crown to replace their elected government with an appointed governor).

themselves” and “spend their blood” resisting any attempt to seize the charter by force—at least absent evidence that they had violated the charter’s terms.<sup>205</sup>

In the face of this shocking resistance, the councilors tasked Gorges and Mason with reclaiming New England on behalf of the King.<sup>206</sup> Gorges and Mason spent much of the decade preparing for this reclamation, distributing the Council for New England’s remaining land north of the Merrimack River, sending agents to settle that land, and asking the Crown to confirm their distributions.<sup>207</sup> (King Charles awarded Gorges the “Province of Mayne,” capital “Gorgeana,”<sup>208</sup> while Mason got the “Province of New Hampshire,” also called “Masonia”).<sup>209</sup> Gorges and Mason also agreed to resign the Council for New England’s charter, expecting the King to appoint them governor and vice admiral of New England, respectively.<sup>210</sup>

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205. See Letter from George Burdett to William Laud, Archbishop of Canterbury (Nov. 29, 1638), U.K. Nat’l Archives Class 1/9, Doc. No. 129, at 304a, 304a, <https://perma.cc/4UTF-A67V>. This was an accurate description. See, e.g., Minutes of Sept. 3, 1634, in 1 MBC RECORDS, *supra* note 94, at 123, 123-25. The company’s chief executive even declared it “lawful to resist any authority, which was to overthrow the lawful authority of the king’s grant.” JOURNAL OF JOHN WINTHROP, *supra* note 142, at 228 (entry of Aug. 3, 1637).
206. See JOURNAL OF JOHN WINTHROP, *supra* note 142, at 148 & n.11 (entry of June 16, 1635); *id.* at 177 (entry of May 31, 1636).
207. See *id.* at 42 & n.61 (entry of Dec. 14, 1630); *id.* at 224 (entry of June 26, 1637).
208. See Extracts out of Severall Graunts Concerning New England, *supra* note 91, at 166a; Grant to Sir Ferdinando Gorges of the Province of Maine (Apr. 3, 1639), U.K. Nat’l Archives Class 5/902, Doc. No. 3, at 61, <https://perma.cc/DY8L-6CV4>; Second Charter of Gorgeana, Now York (Mar. 1, 1642), in 1 HAZARD’S STATE PAPERS, *supra* note 93, at 480, 480-81.
209. See Grant of New Hampshire to Captain John Mason (Nov. 7, 1629), U.K. Nat’l Archives Class 5/902, Doc. No. 6, at 109, <https://perma.cc/73G6-TUSE>; Grant of the Province of New Hampshire from Mr. Wollaston to Mr. Mason (June 11, 1635), U.K. Nat’l Archives Class 5/902, Doc. No. 11, at 137, <https://perma.cc/2DGC-4BPP>; Grant of the Province of New Hampshire to Mr. Mason by the Name of Masonia (Apr. 22, 1635), U.K. Nat’l Archives Class 5/902, Doc. No. 9, at 127, <https://perma.cc/RJ2H-WNYN>.
210. See, e.g., A Declaration of the Council of New England for the Resignation of the Great Charter (Apr. 25, 1635), U.K. Nat’l Archives Class 1/8, Doc. No. 58, at 160a, <https://perma.cc/5YH9-KUQK>; Letter from John Mason to Robert Smith (June 22, 1635), U.K. Nat’l Archives Class 1/8, Doc. No. 68, at 186a, <https://perma.cc/7GDG-LQ6G>. King Charles accepted the resigned charter and appointed Gorges governor of New England in 1637. See Charles, King of Eng., Commission to Sir Ferdinando Gorges (July 23, 1637), U.K. Nat’l Archives Class 1/9, Doc. No. 60, at 143a, <https://perma.cc/4DGS-666K>.

#### H. The English Constitution

But as with all things in Gorges's life, these dreams were interrupted by circumstance. For one thing, Mason unexpectedly died, leaving behind a wife, two grandchildren, and a sparsely populated settlement on the New Hampshire coast.<sup>211</sup>

Even worse for Gorges, a political crisis between the English Parliament and the King prevented either from offering him much help. The crisis had many causes, but at its core was a long-simmering dispute about whether the laws and practices that "constituted" the English Kingdom—its unwritten constitution—permitted the King to collect revenue without Parliament's help.<sup>212</sup> Members of Parliament argued that under the "constitution of the policie of this kingdome," the King had no power to raise revenue without Parliament's consent.<sup>213</sup> King Charles responded that the "excellent Constitution of this Kingdom" gave him the power to take any action that neither he nor his predecessors had explicitly agreed to curb,<sup>214</sup> including his diplomatic power to impose tariffs,<sup>215</sup> his military power to require local governments to pay for ships of war,<sup>216</sup> and his sovereign power to charter

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211. See Extract from the Will of Captain John Mason (Nov. 26, 1635), in 1 HAZARD'S STATE PAPERS, *supra* note 93, at 397, 398-400; Minutes of Nov. 5, 1639, in 1 MBC RECORDS, *supra* note 94, at 276, 276 (describing dealings with Dover, a settlement established by Mason). Mason's exact date of death is unknown, but it was likely in the final months of 1635. See TUTTLE, *supra* note 70, at 42.

212. See DIANE PURKISS, THE ENGLISH CIVIL WAR: PAPISTS, GENTLEWOMEN, SOLDIERS, AND WITCHFINDERS IN THE BIRTH OF MODERN BRITAIN 93-94 (2006); THE STUART CONSTITUTION, 1603-1688: DOCUMENTS AND COMMENTARY 53-54 (J.P. Kenyon ed., 2d ed. 1986).

213. See Proceedings in Bates's Case (Case of Impositions) (1606) [hereinafter Bates's Case], in 2 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 371, 477-81 (T.B. Howell ed., London, T.C. Hansard 1816) [hereinafter HOWELL'S STATE TRIALS]. For examples of arguments against the King's power to raise revenue without Parliament's consent, see Petition of Right 1628, 3 Car. c. 1; TOUCHING THE FUNDAMENTALL LAWES, OR POLITIQUE CONSTITUTION OF THIS KINGDOME, THE KINGS NEGATIVE VOICE, AND THE POWER OF PARLIAMENTS: TO WHICH IS ANNEXED, THE PRIVILEGE AND POWER OF THE PARLIAMENT TOUCHING THE MILITIA 3-5 (London, Thomas Underhill 1643) [hereinafter TOUCHING THE FUNDAMENTALL LAWES]; and Minutes of July 2, 1610, in PARLIAMENTARY DEBATES IN 1610, at 103, 103 (Samuel Rawson Gardiner ed., Westminster, John Bowyer Nichols & Sons 1862) (statement of James Whitlocke). See also WILLIAM PRYNNE, THE TREACHERY AND DISLOYALTY OF PAPISTS TO THEIR SOVERAIGNES, IN DOCTRINE AND PRACTISE: TOGETHER WITH THE FIRST PART OF THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES 41-45 (London, Michael Sparke, Sr. 2d enlarged ed. 1643).

214. See KING CHARLES, HIS MAJESTIES ANSWER TO THE XIX PROPOSITIONS OF BOTH HOUSES OF PARLIAMENT 10-11 (London, Robert Barker 1642).

215. See Bates's Case, *supra* note 213, at 371.

216. See Proceedings in The King v. Hampden (Case of Ship-Money) (1637), in 3 HOWELL'S STATE TRIALS, *supra* note 213, at 825, 830.

corporations for a fee.<sup>217</sup> As the philosopher Thomas Hobbes later explained in his work *Leviathan*, the King was the leader of a “Common-wealth,” not the leader of a mere corporation who could take no actions “further than his Letters, or the Lawes limit.”<sup>218</sup>

Gorges could only watch as this disagreement over the “Fundamental Constitutions” of England erupted into civil war in 1642 and King Charles’s beheading in 1649.<sup>219</sup> In the meantime, Gorges appointed commissioners to establish towns in his province of Maine.<sup>220</sup> He died in 1647, however, having never set foot there.<sup>221</sup>

### I. The Charter After the Quo Warranto

Even as England broke down in a civil war between supporters of the Crown and of Parliament, New Englanders continued to fear that one day Boston would wake up to an English warship in its harbor ready to dissolve the company for failing to abide by its charter. Something of the sort even occurred in 1644, when a sea captain commissioned by Parliament seized a royalist merchant ship in Boston Harbor.<sup>222</sup> A mob, offended by Parliament’s disrespect for the company’s authority over its coastal waters, assembled on the shore and demanded that “the captain should be forced to restore the ship.”<sup>223</sup> But the company let the captain keep the ship because “deny[ing] the parliament’s power in this case” would “deny the foundation of our government by our patent.”<sup>224</sup> Under the terms of that patent, the company

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217. See *Darcy v. Allin (Case of Monopolies)* (1602) 74 Eng. Rep. 1131, 1134; Noy 173, 176.

218. See THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICAL AND CIVILL* 115-16 (London, Andrew Crooke 1651).

219. See *THE TRIAL OF CHARLES I*, at 82-85 (Roger Lockyer ed., 1959) (describing the reading of the articles of impeachment against King Charles in January 1649). Archbishop William Laud, the head of the commission overseeing the quo warranto, was removed from the House of Lords in 1640 and eventually impeached, condemned by a bill of attainder, and executed. See *The Trial of Dr. William Laud, Archbishop of Canterbury, for High Treason (1640-1644)*, in 4 HOWELL’S STATE TRIALS, *supra* note 213, at 315, 315, 599, 626; see also CHARLES M. ANDREWS, *BRITISH COMMITTEES, COMMISSIONS, AND COUNCILS OF TRADE AND PLANTATIONS, 1622-1675*, at 15-17 (1908).

220. See *Ferdinando Gorges, A True Coppy of a Commission and Ordinances Sent unto His Province of Maine* (Mar. 10, 1640), U.K. Nat’l Archives Class 1/10, Doc. No. 58, at 145a, 145a, <https://perma.cc/RT8V-PUQB>.

221. See *Social Compact to Secure Independent Government*, by Wells, Gorgeana and Piscataqua (July 1649), in 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE 265, 266 (Mary Frances Farnham ed., 1901).

222. See *JOURNAL OF JOHN WINTHROP*, *supra* note 142, at 524-25 (entry of Aug. 1644). The captain was named Thomas Stagg. See *id.* at 524.

223. See *id.* at 526.

224. *Id.*

had “consented to hold [its] land” as if it were on one of the manors the King owned near London.<sup>225</sup> In 1644, Parliament and its military generals controlled that land.<sup>226</sup> The company therefore allowed Parliament to seize ships in New England waters rather than “renounce our patent and England’s protection.”<sup>227</sup>

A more troublesome threat emerged in 1646, when a group of political dissidents in New England wrote two lengthy petitions to the company and Parliament complaining that the company had erected an “Arbitrary Government” that violated specific provisions of its “Generall Charter.”<sup>228</sup> Citing the clauses of the charter that prohibited the company from passing laws “repugnant to the Laws of *England*,” the dissidents accused the government of systematically favoring shareholders over English inhabitants who did not own shares.<sup>229</sup> Alarmingly, they complained that the company was calling itself “a Free State” rather than “a Colony or Corporation of *England*,” illegally taxing nonshareholders who had no representation in the government.<sup>230</sup> More alarmingly, they complained that when they submitted this grievance to the company’s board, it filed criminal charges against them.<sup>231</sup> Most alarmingly, they complained that these charges accused them of “perfidiously attempt[ing] the alteration and subversion of our frame of Polity or Government fundamentally,” a crime punishable by “death.”<sup>232</sup>

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225. See *id.* at 527; see also MBC Charter, *supra* note 94, at 7-9; *supra* notes 100-02 and accompanying text.

226. See An Ordinance of the Lords and Commons in Parliament, for the Safety and Defence of the Kingdom of England, and Dominion of Wales, (1642) I ACTS & ORDS. INTERREGNUM 1, 1.

227. See JOURNAL OF JOHN WINTHROP, *supra* note 142, at 526-28 (entry of Aug. 1644). This was a wise move. Parliament included many Puritans who had a considerably more favorable attitude toward New England than King Charles did. In 1643, a year earlier, it even immunized New England from all taxation, calling it a “Kingdom” of its own. See 10 Mar. 1643, 2 HC Jour. 998.

228. See Robert Child et al., Remonstrance and Humble Petition (May 19, 1646), in JOHN CHILD, NEW-ENGLANDS JONAS CAST UP AT LONDON 6, 8-9 (London, T.R. & E.M. 1647); see also JOURNAL OF JOHN WINTHROP, *supra* note 142, at 624-25 (entry of May 6, 1646) (explaining that the petition to the company—the one published by John Child in 1647—was a “much enlarged” version of the petition to Parliament). This was one of a few petitions to England at the time. For another, see, for example, SAMUEL GORTON, SIMPLICITIES DEFENCE AGAINST SEVEN-HEADED POLICY, OR, INNOCENCY VINDICATED, BEING UNJUSTLY ACCUSED, AND SORELY CENSURED, BY THAT SEVEN-HEADED CHURCH-GOVERNMENT UNITED IN NEW-ENGLAND (London, John Macock 1646).

229. See Child et al., *supra* note 228, at 8-10.

230. See *id.* at 9-11.

231. See A Relation of the Effects This Petition Produced, in CHILD, NEW-ENGLANDS JONAS CAST UP AT LONDON, *supra* note 228, at 14.

232. By the Court: In the Yeares 1641, 1642; Capital Lawes Established Within the Jurisdiction of Massachusetts, in CHILD, NEW-ENGLANDS JONAS CAST UP AT LONDON, *supra* note 228, at 9, ¶ 15; see EDWARD WINSLOW, An Answer to the Second Head, *footnote continued on next page*

Worried that this petition might convince Parliament to revive the quo warranto or otherwise undermine its charter, the company responded with petitions of its own, explaining that it had “frame[d] our go[vern]ment & administra[tio]ns to [th]e fundamentall rules” of the charter.<sup>233</sup> As evidence, the company even drafted a chart of all the “lawes and customes as are in force and use in this jurisdiction, shewing withall (where occasion serves) how they are warranted by our charter.”<sup>234</sup> For example, the laws taxing nonshareholders and punishing traitors were both warranted by the clause in the charter that gave the company “full and absolute power and authoritie to correct, punishe, pardon, governe, and rule” anyone living in New England.<sup>235</sup> The company argued that this clause necessarily applied to people who had “no vote in election of the members of the [government].”<sup>236</sup>

The parliamentary commission that evaluated these petitions was led by none other than Robert Rich, Earl of Warwick—the same man who, as a board member of the Council for New England in 1627, had granted the land around Salem to the Puritan organizers of the Massachusetts Bay Company.<sup>237</sup> The Warwick Commission was so satisfied by the company’s explanation that it wrote back that it would not “incourage any Appeales from your Justice: nor to restraine the boundes of your Jurisdiction, to a narrower Composse, then is helde forthe by your Lettres Patentes.”<sup>238</sup> With this friendly letter, sent in 1647, the commission essentially told the company that it had nothing further to worry about from England so long as Parliament was in charge there.

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Namely the Petition of Doctor Robert Childe, &c., in *NEW-ENGLANDS SALAMANDER, DISCOVERED BY AN IRRELIGIOUS AND SCORNEFULL PAMPHLET, CALLED NEW-ENGLANDS JONAS CAST UP AT LONDON, &c.* 6, 8-9 (London, Ric. Cotes 1647); see also Nathaniel Ward, *A Coppie of the Liberties of the Massachusets Collonie in New England* (1641) [hereinafter *Body of Liberties*], in 8 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES* 216, 233 (Boston, Charles C. Little & James Brown 1843).

233. Minutes of Nov. 4, 1646, in 3 *MBC RECORDS*, *supra* note 94, at 79, 95-99 (Nathaniel B. Shurtleff ed., Boston, William White 1854) (reproducing the “[p]etition and remonstrance to Earl Warwick & commissioners”); see also *JOURNAL OF JOHN WINTHROP*, *supra* note 142, at 647-80 (entries from November 1646 to December 1646).

234. See *A Declaration of the General Court Holden at Boston, Concerning a Remonstrance and Petition Exhibited at Last Session of This Court by Doctor Child, Thomas Fowle, Samuel Maverick, Thomas Burton, John Smith, David Yale, and John Dand* (Nov. 4, 1646) [hereinafter *Declaration of the General Court*], in *THE HUTCHINSON PAPERS*, *supra* note 15, at 196, 199-200.

235. *MBC Charter*, *supra* note 94, at 17.

236. See *Declaration of the General Court*, *supra* note 234, at 205.

237. See *supra* text accompanying note 91; see also *Ordinance for the Government of the Plantations in the West Indies*, (1643) *I ACTS & ORDS. INTERREGNUM* 331, 331-32.

238. See *JOURNAL OF JOHN WINTHROP*, *supra* note 142, at 702-04 (entry of May 25, 1647) (reporting a letter from the Warwick Commission).

But two decades of paying close attention to the charter had already done their work solidifying a principle in New England that government without written limits was “an Arbitrary Government,” one in which the leadership could “doe what they pleased without Controll.”<sup>239</sup> Shareholders continued to demand “transcript[s]” of records, the power to instruct their representatives “in writeing,” and “written” laws to limit the board’s exercise of discretion.<sup>240</sup> In 1641, the company published what has become known as the *Body of Liberties*, a written compendium of laws that protected, among other things, inhabitants’ right to a trial by jury, right to counsel, freedom from excessive bail, and freedom from cruel and inhumane punishment.<sup>241</sup> Meanwhile, John Winthrop and other board members continued to defend their decisions by attempting to “prove by the words of the Patent” that their exercises of authority were tied to some fundamental, written text.<sup>242</sup>

Even New England’s religious ministers got in on the need for a charter to organize and limit the powers of their institutions. When Reverend Richard Mather wanted to explain New England’s unique form of church government to his English contemporaries—particularly the churches’ use of “covenants,” or “solemne and publick promise[s]” that new congregations agreed upon when forming themselves<sup>243</sup>—he analogized the covenants to corporate charters. Mather explained that just as a charter is what joins a group of people into “a body politick or incorporate,” “joyning in Covenant is that which makes a man, a member of a Church.”<sup>244</sup> A covenant is “the Constituting forme of a

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239. See *id.* at 589 (entry of July 3, 1645).

240. See *Body of Liberties*, *supra* note 232, at 224, 228 (codifying requirements that instructions and rules be in writing); see also Minutes of Dec. 10, 1641, in 1 MBC RECORDS, *supra* note 94, at 343, 344-46 (discussing transcripts and approving the *Body of Liberties*). For background on shareholder demands for written methods of accountability, see MALOY, *supra* note 49, at 132-35.

241. See *Body of Liberties*, *supra* note 232, at 219-21, 224.

242. See John Winthrop, A Replye to the Answer Made to the Discourse About the Negative Vote (June 1643), in 4 WINTHROP PAPERS, *supra* note 124, at 380, 382 (1944).

243. See RICHARD MATHER, AN APOLOGIE OF THE CHURCHES IN NEW-ENGLAND FOR CHURCH-COVENANT 3 (London, T.P. & M.S. 1643). Mather had been a resident of New England since 1635, see JOURNAL OF RICHARD MATHER, 1635: HIS LIFE AND DEATH, 1670, at 30 (Boston, David Clapp 1850), was the pastor of the church in Dorchester by 1637, see JOURNAL OF JOHN WINTHROP, *supra* note 142, at 173 (entry of Apr. 1, 1636), and was an “Elder[]” by 1646, see *id.* at 632 (entry of July 1646).

244. RICHARD MATHER, CHURCH-GOVERNMENT AND CHURCH-COVENANT DISCUSSED, IN AN ANSWER OF THE ELDERS OF THE SEVERALL CHURCHES IN NEW-ENGLAND TO TWO AND THIRTY QUESTIONS, SENT OVER TO THEM BY DIVERS MINISTERS IN ENGLAND, TO DECLARE THEIR JUDGMENTS THEREIN 20-22 (London, R.O. & G.D. 1643); see also JOHN COTTON, THE WAY OF CONGREGATIONAL CHURCHES CLEARED: IN TWO TREATISES pt. 2, at 14 (London, Matthew Simmons 1648) (comparing covenants to “the Corporations of England”); THOMAS HOOKER, A SURVEY OF THE SUMME OF CHURCH-DISCIPLINE 50 (London, A.M. 1648) (comparing churches to corporations).

Church,” he wrote.<sup>245</sup> And while a covenant did not have to be written down, Mather and other ministers agreed that “the more express & plain it is, the more fully it puts us in mind of our mutuall duty, & stirreth us up to it, & leaveth lesse room for the questioning” of the church’s beliefs, its organization, or its membership.<sup>246</sup>

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The Massachusetts Bay Company thus survived Sir Ferdinando Gorges, Captain John Mason, and even King Charles—none of whom were able to enforce the quo warranto levied against the company in 1637. By 1647, shareholders, board members, and ministers alike “All Agreed that our Charter was the fondation of our Government.”<sup>247</sup> While parliamentarians and royalists in England assumed that the “constitution of th[at] Kingdome” did not need to be written down,<sup>248</sup> New Englanders like John Winthrop maintained that “[t]he words of Constitution of this bodye politike” are “sett downe [in] the verve words of the Patent.”<sup>249</sup> The charter not only constituted the government by giving it its “Forme, and beinge,” but also “regulate[d] [its] power and motions, as might best conduce to the preservation, and good of the wholl bodye.”<sup>250</sup> In the words of Mather and the other “Reverend Elders,” the Massachusetts Bay Company was a “co[mm]on wealth now constituted by [th]e patent,” whose leaders could take any action “so farr as . . . is by [th]e patent . . . reserved to [the]m & seated in them.”<sup>251</sup>

## II. The Second Lawsuit, 1654-1686

As 1654 dawned, the Massachusetts Bay Company looked like proof positive of Sir Edward Coke’s words that corporations were “immortal.”<sup>252</sup>

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245. MATHER, *supra* note 243, at 5.

246. RICHARD MATHER, A PLATFORM OF CHURCH DISCIPLINE: GATHERED OUT OF THE WORD OF GOD AND AGREED UPON BY THE ELDERS AND MESSENGERS OF THE CHURCHES ASSEMBLED IN THE SYNOD AT CAMBRIDGE IN NEW ENGLAND ch. IV, at 5-6 (Cambridge, Mass., S.G. 1649); *see also* PERRY MILLER, *The Cambridge Platform in 1648*, in *THE RESPONSIBILITY OF MIND IN A CIVILIZATION OF MACHINES* 45, 45 (1979).

247. JOURNAL OF JOHN WINTHROP, *supra* note 142, at 648 (entry of Nov. 1646).

248. *See* TOUCHING THE FUNDAMENTALL LAWES, *supra* note 213, at 3-5.

249. John Winthrop, *Arbitrary Government Described and the Common Mistakes About the Same (Both in the True Nature Thereof, and in the Representation of the Government of the Massachusetts, Under Such a Notion) Fully Cleared (July 1644)* [hereinafter *Winthrop, Arbitrary Government Described*], in 4 WINTHROP PAPERS, *supra* note 242, at 468, 469.

250. *Id.* at 468.

251. Minutes of Nov. 13, 1644, in 2 MBC RECORDS, *supra* note 94, at 81, 90-95 (reporting the “Answers of the Reverend Elders to certeine Questions propounded to them”).

252. *See* Case of Sutton’s Hosp. (1612) 77 Eng. Rep. 960, 973; 10 Co. Rep. 23a, 32b.



The company had not only survived a quo warranto attempt on its life, but it had also outlived King Charles, Sir Ferdinando Gorges, Captain John Mason, and all its other would-be assassins. But later that year, the company made a fatal decision that, ironically, followed the words of its charter to the letter. The decision rekindled the enmity of the King, the knight, and the captain from beyond the grave. When news of a second quo warranto reached New England, residents were ready to defend the charter they regarded as a biblical covenant and the genesis of their independent political identity.

A. The Annexation of Maine and New Hampshire

To understand what finally undid the Massachusetts Bay Company, you have to know a little bit about the shape of the Merrimack River. Specifically, from above, it looks like a capital “L.” The river begins by Lake Winnepesaukee, in the middle of what is now inland New Hampshire. It flows due south for about seventy miles until it reaches what is now Lowell, Massachusetts, where it abruptly turns east. From there, it flows for another forty miles until it reaches its mouth at the Atlantic Ocean.<sup>253</sup>

In the early 1620s, when European fishermen sailed up and down the New England coastline, they knew only of this east-flowing part of the Merrimack River. Mason and others mapped the river as a straight line perpendicular to the coast.<sup>254</sup> When Mason received his deed to what he called the Province of New Hampshire and Gorges received the Province of Maine to its north, the two men treated this straight-lined river as New Hampshire’s southern boundary.<sup>255</sup> Toward the end of their lives, as Puritans settled on the south side of the river’s mouth, Mason’s and Gorges’s agents founded a handful of small towns on its north side.<sup>256</sup>

You can imagine the confusion when, in 1654, the Massachusetts Bay Company finally completed a survey of its northern boundary, which its charter defined as the line of latitude three miles north of “any and every parte” of the Merrimack River.<sup>257</sup> The surveyors followed the river west from its mouth and north all the way up to Lake Winnepesaukee where they declared—

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253. For a modern representation, see *Merrimack River Basin*, NAT’L WEATHER SERV., <https://perma.cc/5UBQ-T2GV> (archived June 23, 2019).

254. See WILLIAM ALEXANDER, AN ENCOURAGEMENT TO COLONIES, at vi-vii (London, William Stansby 1624) (providing a contemporary map of New England). Sir William Alexander was Mason’s first client after Mason returned from Newfoundland. See TUTTLE, *supra* note 70, at 14-15; *supra* note 74 and accompanying text.

255. New Hampshire extended from the Merrimack River to the Kennebec River and Maine extended north of the Kennebec River. See sources cited *supra* notes 208-09.

256. See *supra* text accompanying notes 206-07.

257. See MBC Charter, *supra* note 94, at 6-9.

quite reasonably—that “the true interp[re]tati[on] of the termes of the lymitts northward graunted in the patent” was a “streyght line east & west” at the top of the “L.”<sup>258</sup> Extended to the coast, this boundary line incorporated everything south of what is now Portland, Maine—including the towns Mason and Gorges had commissioned. So the company annexed each of these towns, declaring that, “by the extent of the line, (according to o[ur] patent[ ]),”<sup>259</sup> the company had a “just right and interest to, and jurisdic[tio]n over, the tract of land where [it] inhabit[ed], requiring their subjection thereunto.”<sup>260</sup>

Not everyone was pleased with this hostile takeover. Although Gorges’s grandson (also named Ferdinando) had “taken no order for [the] Regement” of his family’s towns in Maine,<sup>261</sup> his agent there initially refused to acknowledge himself “subject to the government of the Massachusetts.”<sup>262</sup> But with few allies in sight, the agent eventually “expresse[d] his consent” and used the company’s own court system to complain.<sup>263</sup>

The same thing happened in New Hampshire. Mason’s will left the province to his grandson, Robert Tufton, on the petty condition that Robert “alter his sirname” to Mason as an adult.<sup>264</sup> But in 1654, Robert was still a teenager, and his attorney in New Hampshire had previously “acknowledge[d]” that “the lands in question” were part of the company’s “jurisdic[tio]n.”<sup>265</sup>

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258. See Minutes of May 31, 1652, in 3 MBC RECORDS, *supra* note 233, at 274, 274; see also Minutes of Oct. 19, 1652 [hereinafter MBC Minutes of Oct. 19, 1652], in 3 MBC RECORDS, *supra* note 233, at 279, 288. This was later elevated to 43 degrees, 43 minutes, and 20 seconds. See Minutes of Oct. 18, 1654, in 3 MBC RECORDS, *supra* note 233, at 361, 361-62 (reporting “The returne of Mr. Jonas Clarke & Mr. Samuel Andrews concerning the runinge of the northernmost lyne of our patent on the seasid[e], according to [the] order of the Generall Court”).

259. Minutes of Oct. 7, 1641, in 1 MBC RECORDS, *supra* note 94, at 336, 342-43; see Minutes of June 2, 1641, in 1 MBC RECORDS, *supra* note 94, at 323, 324; Minutes of June 14, 1641, in 1 MBC RECORDS, *supra* note 94, at 324, 332.

260. Minutes of May 18, 1653 [hereinafter MBC Minutes of May 18, 1653], in 4-I MBC RECORDS, *supra* note 94, at 119, 128 (Nathaniel B. Shurtleff ed., Boston, William White 1854); see *id.* at 124-29; Minutes of Sept. 7, 1653, in 4-I MBC RECORDS, *supra*, at 157, 157-65; see also Minutes of Oct. 19, 1658, in 4-I MBC RECORDS, *supra*, at 345, 357-59.

261. Petition to Parliament, by the General Court of the Province of Maine (Dec. 5, 1651), in 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE, *supra* note 221, at 267, 268. This was the impetus for the survey of the northern border of Massachusetts completed in 1654. See Minutes of Oct. 14, 1651, in 3 MBC RECORDS, *supra* note 233, at 239, 250-51.

262. See MBC Minutes of May 18, 1653, *supra* note 260, at 128-29.

263. See *id.*; Minutes of Oct. 18, 1654, in 4-I MBC RECORDS, *supra* note 260, at 200, 208 [hereinafter MBC Minutes of Oct. 18, 1654].

264. See TUTTLE, *supra* note 70, at 398-99, 403 (reproducing Mason’s will).

265. Minutes of May 31, 1652, in 4-I MBC RECORDS, *supra* note 260, at 93, 94; see Minutes of Aug. 30, 1653, in 4-I MBC RECORDS, *supra* note 260, at 150, 156; see also Letter from John Endecott to Ann Mason (July 19, 1652), U.K. Nat’l Archives Class 1/11, Doc. No. 62, at 178a, <https://perma.cc/D6VG-4MM7>; Mr. Mason’s Protest Against the Proceedings

*footnote continued on next page*

This concession by Gorges's and Mason's grandchildren probably had less to do with their reading of the company's charter than with their reading of the political situation in England. In 1654, King Charles was dead.<sup>266</sup> Oliver Cromwell was Lord Protector of the "Commonwealth and Free-State" of England.<sup>267</sup> And Cromwell was a big supporter of the Massachusetts Bay Company.<sup>268</sup> Cromwell liked it so much that he and Parliament even invited the company to replace its royal charter with a parliamentary charter and relocate from New England to Ireland, closer to home.<sup>269</sup> But the company declined his invitation to relocate, writing that its charter in New England was doing just fine as "the frame of our government," which let its people live under leaders "of our owne chusing, and under laws of our owne making."<sup>270</sup>

Ferdinando and Robert could also see that now that England was King-free, the company was assuming for itself sovereign powers the King had once wielded. In 1650, the company issued a corporate charter to Harvard College<sup>271</sup>—even though English law books declared that "incorporation

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of Mr. Leader (July 4, 1651), U.K. Nat'l Archives Class 1/11, Doc. No. 35, at 87a, <https://perma.cc/Y4W7-H3H2>; Petition of Joseph Mason to the Generall Court at Boston (May 6, 1653), U.K. Nat'l Archives Class 1/12, Doc. No. 3, at 9a, <https://perma.cc/UMC6-2TJC>.

266. See An Act Prohibiting the Proclaiming Any Person to Be King of England or Ireland, or the Dominions Thereof, (1649) I ACTS & ORDS. INTERREGNUM 1263, 1263.
267. See An Act Declaring and Constituting the People of England to Be a Commonwealth and Free-State, (1649) II ACTS & ORDS. INTERREGNUM 122, 122; see also The Government of the Commonwealth of England, Scotland and Ireland, and the Dominions Thereunto Belonging, (1653) II ACTS & ORDS. INTERREGNUM 813, 813.
268. See, e.g., Copy of a Letter from Lord General Oliver Cromwell to Mr. John Cotton (Oct. 2, 1651), in THE HUTCHINSON PAPERS, *supra* note 15, at 236.
269. See Copy of a Letter to Oliver Cromwell from the General Court of the Massachusetts (1651), in THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY, FROM THE FIRST SETTLEMENT THEREOF IN 1628, UNTIL ITS INCORPORATION WITH THE COLONY OF PLIMOUTH, PROVINCE OF MAIN, & C. BY THE CHARTER OF KING WILLIAM AND QUEEN MARY, IN 1691 app. at 520, 520-22 (Boston, Thomas & John Fleet 1764); Copy of a Petition to the Parliament (1651), in HUTCHINSON, *supra*, app. at 516, 516; Minutes of Oct. 23, 1652, in 4-I MBC RECORDS, *supra* note 260, at 109, 110 (reporting on "Letters to [th]e Parliament & Lord Genn[eral] Cromwell").
270. See Copy of a Petition to the Parliament, *supra* note 269, app. at 517-18. When the company complied with another request from Cromwell, it explained that it was not obligated to do so but that it "freely consent[ed]." See Minutes of June 9, 1654, in 4-I MBC RECORDS, *supra* note 260, at 195, 195.
271. See A Copy of the Charter for Harvard College (May 31, 1650), U.K. Nat'l Archives Class 1/11, Doc. No. 16, at 30b, <https://perma.cc/PQ3Y-FEB4>. Harvard had been an unincorporated college, funded by the company, since 1636. See Minutes of Oct. 28, 1636, in 1 MBC RECORDS, *supra* note 94, at 182, 183. It was named for John Harvard after he died and left the college books and an estate worth "about £800." See JOURNAL OF JOHN WINTHROP, *supra* note 142, app. B at 743; Minutes of Mar. 13, 1639, in 1 MBC RECORDS, *supra* note 94, at 250, 253.

cannot be created without the King.”<sup>272</sup> In 1652, the company established a mint and began coining its own currency<sup>273</sup>—even though earlier lawyers would have considered this “treason” because only the King could “make or coin Money within his dominions.”<sup>274</sup> The company required new visitors, residents, and members of its armed forces to take oaths declaring their allegiance to the “common wealth” of Massachusetts—an oath with no mention of the King or of England.<sup>275</sup> And when a new religious sect of Quakers not only refused to take such oaths but also refused to leave the commonwealth when banished, the company began executing Quakers on Boston Common “for their rebell[i]on, sedition, & presumptuous obtruding themselves upon us, notwithstanding their being sentenced to banishment on pain of death.”<sup>276</sup>

Quaker pamphleteers later asked the company to “Look [at] your Patent, and see if the King hath granted you that Liberty” to “Hang or Burn his Subjects.”<sup>277</sup> But in the 1650s, few people were willing to challenge the company’s broad interpretation of the clause in its charter that gave it “absolute power and authoritie” over all inhabitants within its jurisdiction.<sup>278</sup> The company therefore had little reason to care what Gorges, Mason, or anyone else thought of its decisions. In 1659, it even banned Christmas, promising to fine anyone found celebrating the “superstitious[.]” holiday.<sup>279</sup>

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272. Case of Sutton’s Hosp. (1612) 77 Eng. Rep. 960, 964-65; 10 Co. Rep. 23a, 26b.

273. See Minutes of May 27, 1652 [hereinafter MBC Minutes of May 27, 1652], in 3 MBC RECORDS, *supra* note 233, at 258, 261-62; MBC Minutes of Oct. 19, 1652, *supra* note 258, at 283.

274. The Case of Mixed Money in Ireland (1605), in 2 HOWELL’S STATE TRIALS, *supra* note 213, at 113, 116. See generally CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 266-94 (2014).

275. See, e.g., MBC Minutes of May 27, 1652, *supra* note 273, at 263-64; *id.* at 269-70.

276. See MBC Minutes of Oct. 18, 1654, *supra* note 263, at 383; see also Minutes of Oct. 14, 1656, in 4-I MBC RECORDS, *supra* note 260, at 277, 278; MBC Minutes of Oct. 18, 1654, *supra* note 263, at 383-89; Minutes of May 30, 1660, in 4-I MBC RECORDS, *supra* note 260, at 416, at 419.

277. GEORGE FOX, SOMETHING IN ANSWER TO A LETTER (WHICH I HAVE SEEN) OF JOHN LEVERAT GOVERNOUR OF BOSTON, TO WILLIAM CODDINGTON GOVERNOUR OF RODE-ISLAND, DATED, 1677, at 6 (n.p., 1678); see also GEORGE BISHOPE, NEW-ENGLAND JUDGED, NOT BY MAN’S, BUT THE SPIRIT OF THE LORD: AND THE SUMME SEALED UP OF NEW-ENGLAND’S PERSECUTIONS 30-31 (London, Robert Wilson 1661) (comparing the Quaker dissidents in New England to earlier Puritan dissidents in England).

278. MBC Charter, *supra* note 94, at 17.

279. See Minutes of May 11, 1659, in 4-I MBC RECORDS, *supra* note 260, at 364, 366. Increase Mather later explained the company’s aversion to Christmas: First, it wasn’t celebrated until the third century or later, so it was superstitious; second, it had the Catholic word “mass” in it; and third, it was probably celebrated on the incorrect date, as the Bible never specified Jesus’s birthday. See INCREASE MATHER, A TESTIMONY AGAINST SEVERAL PROPHANE AND SUPERSTITIOUS CUSTOMS, NOW PRACTICED BY SOME IN NEW-ENGLAND, THE EVIL WHEREOF IS EVINCED FROM THE HOLY SCRIPTURES, AND FROM THE WRITINGS

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B. The Restoration of Charles II

This situation didn't appear to change much in 1660, when the late King Charles's son ended his exile and peacefully returned to claim the English throne. On his arrival, King Charles II issued a "Free and Generall Pardon" for prior offenses committed by individuals or "Bodies corporate,"<sup>280</sup> and he assented to a law declaring that "no Charter of any Corporation" would be "[voided]" for something the corporation did before his restoration.<sup>281</sup> The Massachusetts Bay Company, unsure of whether the King even knew about the 1637 quo warranto against it, immediately petitioned the King and Parliament "to rattify & confirme" the charter granted to it by the King's "royall [f]ather."<sup>282</sup> The King responded affirmatively, asking in return only that the company stop hanging Quakers.<sup>283</sup>

But the Gorges and Mason grandchildren soon bombarded the King with petitions detailing the company's actions over the past twenty years and asking him to exempt the company from his amnesty.<sup>284</sup> The petitions accused the company of violating two clauses in its charter: one that limited the company's geographic bounds, and another that prohibited the company from passing laws repugnant to those of England.<sup>285</sup> Gorges and Mason said the company had violated the first clause when it sent "armed forces" to Maine and New Hampshire and "compelled them to submitt to their usurped

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BOTH OF ANCIENT AND MODERN DIVINES 18-19 (London, 1687). For a modern reflection on this early "war on Christmas," see Rachel N. Schnepper, Opinion, *Yuletide's Outlaws*, N.Y. TIMES (Dec. 14, 2012), <https://perma.cc/6D8R-KE6Y>.

280. See 12 Car. 2 c. 11, § 5 (1660); 1 May 1660, 11 HL Jour. 7-8 (statement of Charles II, King of Eng.).

281. See 13 Car. 2 c. 1, § 2 (1661).

282. Minutes of Dec. 19, 1660, in 4-I MBC RECORDS, *supra* note 260, at 448, 450-56.

283. See A Breife Narrative of the Late Negotiation Betweene His Majesties Colony of the Massachuset & the Honorable Colonell Richard Nicolls, Sir Robert Carr, Knight, George Cartwright, & Samuell Maverick, Esquires, His Majesties Commissioners (May 1665) [hereinafter Narrative of Negotiation Between the MBC and King Charles II's Commissioners], in 4-II MBC RECORDS, *supra* note 95, at 157, 164-65 (reporting a June 28, 1662 letter from King Charles II); Letter from Charles II, King of Eng., to John Endecott, Governor, Mass. Bay Co., et al. (Sept. 9, 1661), U.K. Nat'l Archives Class 1/15, Doc. No. 85, at 169a, <https://perma.cc/H6Y2-JTH7>; Letter from Charles II, King of Eng., to the Mass. Bay Co. (Feb. 15, 1661), U.K. Nat'l Archives Class 5/903, Doc. No. 2, at 18, <https://perma.cc/LB6S-87N8>.

284. See, e.g., Petition of Edward Godfrey et al. to Parliament of Eng. (1659), U.K. Nat'l Archives Class 1/13, Doc. No. 79, at 189b, 190a, <https://perma.cc/SR6D-PGRZ>; Report of Robert Mason et al. to Charles II, King of Eng. (Feb. 15, 1662) [hereinafter Report of Robert Mason et al. to King Charles II], U.K. Nat'l Archives Class 1/16, Doc. No. 18, at 37a, 37a, <https://perma.cc/UEM4-4PKA>.

285. See Report of Robert Mason et al. to King Charles II, *supra* note 284, at 37a; *supra* text accompanying note 117.

& arbitrary Government.”<sup>286</sup> And they said the company had violated the second when it “endeavoured to model & contrive themselves into a free state or common wealth without any relation to the Crown of England”—denying appeals, erecting a mint, and imposing oaths in “the name & State of a common wealth.”<sup>287</sup>

In light of these petitions, King Charles II and his privy councilors agreed that he should probably remind the company that it was, still, an “English Collonie.”<sup>288</sup> In further letters to the company, he hardened his tone, warning its leaders that “they may have swarved from the rules prescribed, & even from the governm[en]t that was instituted by the charter.”<sup>289</sup> He demanded that the company repeal all laws “derogatory to our authority & government,” institute the oath of allegiance in his name, and allow anyone with “competent estates” to become a voting shareholder.<sup>290</sup> And, in 1664, he dispatched four commissioners to New England to enforce his demands.<sup>291</sup> The King hoped the commissioners would “suppresse & utterly extinguish” any idea that the company was “independent [from] us & our lawes” by examining its legal code and hearing “all Complaints and appeals” against the company.<sup>292</sup>

Simon Bradstreet, one of the members of the Massachusetts Bay Company’s board, was so afraid of these commissioners that he voted to hide the company’s

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286. Report of Robert Mason et al. to King Charles II, *supra* note 284, at 37a.

287. *Id.* at 37b.

288. See Council for Foreign Plantations, Report to the King (Apr. 1661), U.K. Nat’l Archives Class 1/15, Doc. No. 47, at 100a, 100a, <https://perma.cc/RV78-J4BB>.

289. See Narrative of Negotiation Between the MBC and King Charles II’s Commissioners, *supra* note 283, at 164-65.

290. See *id.* at 165-66.

291. See Charles II, King of Eng., Commission to Richard Nicolls et al. (Apr. 23, 1664) [hereinafter Original Commission from King Charles II to Richard Nicolls et al.], U.K. Nat’l Archives Class 1/18, Doc. No. 48, at 98a, <https://perma.cc/A4LU-XYGM>; Charles II, King of Eng., Commission to Richard Nicolls et al. (Apr. 23, 1664), U.K. Nat’l Archives Class 1/18, Doc. No. 49, at 100a, <https://perma.cc/MRC6-QLM4>; Charles II, King of Eng., Instructions to Richard Nicolls et al. (Apr. 23, 1664), U.K. Nat’l Archives Class 1/18, Doc. No. 51, at 103a, <https://perma.cc/RZ37-8FF6>; Charles II, King of Eng., Instructions to Richard Nicolls et al. (Apr. 23, 1664) [hereinafter Secret Instructions from King Charles II to Richard Nicolls et al.], U.K. Nat’l Archives Class 1/18, Doc. No. 52, at 107a, <https://perma.cc/UJ3W-ECEN>. The commissioners were also instructed to capture New Amsterdam, which they did; they renamed it the City of New York. See Secret Instructions from King Charles II to Richard Nicolls et al., *supra*, at 108b-109b.

292. See Original Commission from King Charles II to Richard Nicolls et al., *supra* note 291, at 98b-99a; Secret Instructions from King Charles II to Richard Nicolls et al., *supra* note 291, at 107b-108b; see also Narrative of Negotiation Between the MBC and King Charles II’s Commissioners, *supra* note 283, at 158; Letter from Charles II, King of Eng., to the Inhabitants of Mayne (June 11, 1664), U.K. Nat’l Archives Class 1/18, Doc. No. 72, at 161a, <https://perma.cc/J3CU-8M2N>.

charter in a “safe & secret” place before the commissioners arrived.<sup>293</sup> Bradstreet, who was in his sixties, had been a member of the board since 1630, and he was therefore all too familiar with the threat of a quo warranto.<sup>294</sup> That said, he and the rest of the board had already resolved “to adhere to their patten[t],”<sup>295</sup> which they “conceive[d] . . . (under God) to be the first & maine founda[tio]n of our civil politye here.”<sup>296</sup>

Nevertheless, Bradstreet and the commissioners didn’t get along. Their interactions started off tense when the commissioners read through the company’s laws and demanded that it remove all uses of the word “commonwealth” and repeal its ban on Christmas.<sup>297</sup> The tension escalated to “violen[t]” opposition when the commissioners resolved to hear a complaint against the company from a man named John Porter, whom the company had recently banished.<sup>298</sup> Porter was a charming young man. With his parents’ consent, a jury had convicted him of a number of crimes, including “threat[ening] to burne his fathers house” and drunkenly calling his mother “G[randma] Shithouse” and the “rankest sow in the to[w]nne.”<sup>299</sup> When the commissioners invited him back to Boston so they could decide for themselves whether the company had treated him fairly, Bradstreet called the invitation an infringement of the privileges “granted to us by his majesties royall charter.”<sup>300</sup> He and other company representatives argued that the charter gave the company “full & absolute power & authority” to punish whomever a jury convicted, and that there could be no complaint against or appeal from “the highest authority heere established by our constitution, according to his majesties royall charter.”<sup>301</sup>

Bradstreet was not alone. For two decades, shareholders and board members had defined “their present constitution, granted to this colony by his

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293. See *supra* note 95 and accompanying text.

294. See Minutes of Mar. 18, 1630, in 1 MBC RECORDS, *supra* note 94, at 69, 69; see also Francis J. Bremer, *Bradstreet, Simon*, OXFORD DICTIONARY NAT’L BIOGRAPHY (Sept. 23, 2004), <https://perma.cc/TR8Y-KAQ3>.

295. See Minutes of Aug. 3, 1664, in 4-II MBC RECORDS, *supra* note 95, at 116, 118.

296. See Minutes of June 10, 1661, in 4-II MBC RECORDS, *supra* note 95, at 24, 25.

297. See Narrative of Negotiation Between the MBC and King Charles II’s Commissioners, *supra* note 283, at 211-13 (reporting a May 24, 1665 letter from the commissioners).

298. See Letter from Joseph Mason to Robert Mason (July 16, 1665), U.K. Nat’l Archives Class 1/19, Doc. No. 80, at 186a, 186a, <https://perma.cc/HZ8W-7JUP>.

299. See Narrative of Negotiation Between the MBC and King Charles II’s Commissioners, *supra* note 283, at 216-17; see also Minutes of Oct. 19, 1664 [hereinafter MBC Minutes of Oct. 19, 1664], in 4-II MBC RECORDS, *supra* note 95, at 129, 137.

300. Narrative of Negotiation Between the MBC and King Charles II’s Commissioners, *supra* note 283, at 177; see *id.* at 207-09.

301. *Id.* at 196.

majesties royal charter,” as one that required judges and legislators to make decisions on the basis of some written text.<sup>302</sup> Now, the commissioners were proposing to hear an appeal based not on the charter but on their own discretion. Accordingly, shareholders in Boston instructed their representatives to defend “o[u]r just privileges according to Patent,”<sup>303</sup> and the entire company protested that, “instead of being governd by rulers of our oune choosing, (which is the fundamentall priviledge of our patent,) & by lawes of our owne,” the appeal would subject them “to the arbitrary power of strangers, proceeding not by any established lawe, but by their oune discretions!”<sup>304</sup>

The commissioners were amazed by this “obstruction,” and they warned the company “that the Charter, which you so much idolize, may be forfeited.”<sup>305</sup> But while they accused the company of acting “contrary to their allegiance & derogatory to his Majestys Sovereignty,”<sup>306</sup> they had trouble pointing to a clause in the charter that the company was definitively violating.<sup>307</sup> When the King recalled the commissioners in 1666, all he could say was that it was “very evident” the company believed that the commissioners’ action represented “an apparent violation of their Charter & tending to the dissolution of it.”<sup>308</sup> The King requested that the company send agents

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302. See *id.* at 168. For explanations of the bases in the charter for the company’s decisions, see *id.* at 209-14, 231-32, 236; Minutes of Aug. 1, 1665 [hereinafter MBC Minutes of Aug. 1, 1665], in 4-II MBC RECORDS, *supra* note 95, at 273, 276-78; and A Copy of the Letter Sent from the Governour & Council of the Massachuset to the Kings Commissioners and the Kings Commissioners Reply (July 1665) [hereinafter Letter from the Governour & Council with Reply], U.K. Nat’l Archives Class 1/19, Doc. No. 79, at 182a, <https://perma.cc/976V-JGF9>. For examples of decisions rooted in the charter’s text, see text accompanying notes 182-200 above; text accompanying notes 233-36 above; and text accompanying notes 257-60 above.

303. See Minutes of Mar. 4, 1665, in 7 A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 26, 26 (Boston, Rockwell & Churchill 1881) [hereinafter BOSTON RECORDS].

304. See MBC Minutes of Oct. 19, 1664, *supra* note 299, at 129-33 (reporting a letter addressed to the King); see also MBC Minutes of Aug. 1, 1665, *supra* note 302, at 274-75 (same).

305. See Letter from the Governour & Council with Reply, *supra* note 302, at 182b; Letter from George Cartwright to Richard Nicolls (Feb. 4, 1665), U.K. Nat’l Archives Class 1/19, Doc. No. 20, at 28a, 28a, <https://perma.cc/5YXM-7VWN>; see also Robert Carr et al., By the Kings Commissioners for Settling the Affayres of New England (June 23, 1665), U.K. Nat’l Archives Class 1/19, Doc. No. 75, at 164a, <https://perma.cc/EXU4-FTDN>; Minutes of Jan. 1913 Meeting, 46 PROC. MASS. HIST. SOC’Y 253, 285-301 (reproducing the Massachusetts patent).

306. Carr et al., *supra* note 305, at 164a.

307. See Letter from Richard Nicolls to Lord Arlington (Apr. 9, 1666), U.K. Nat’l Archives Class 1/20, Doc. No. 42, at 81a, 81a-83a, <https://perma.cc/68ZK-LB2U>; Report of His Majestie’s Commissioners Concerning the Masschusetts (Dec. 14, 1665), U.K. Nat’l Archives Class 1/19, Doc. No. 143, at 338a, 338a, <https://perma.cc/WZ3E-AXCH>.

308. Letter from Charles II, King of Eng., to the Colonies of New Eng. (Apr. 10, 1666), U.K. Nat’l Archives Class 1/20, Doc. No. 44, at 88a, 88a, <https://perma.cc/5CCM-RAUP>.



to London to see “how far hee is from the least thought of invading or infringing in the least degree the Royall Charter granted to the said Colony.”<sup>309</sup>

To company leaders like Bradstreet, the King’s letter and the commissioners’ withdrawal proved the wisdom of their decades-long strategy of fiercely respecting the charter’s words as if it were Gospel. Indeed, ministers in New England who had once compared their church “covenants” to corporate charters now equated the 1629 charter to God’s covenant with Abraham—the promise that Abraham’s descendants would have a “shield” to protect them so long as they continued to respect the word of the Lord.<sup>310</sup> Ministers called the charter “that wall of Government,” a “Hedge” or “Venice-glasse” that protected the “vineyard” of New England from all threats, including the King.<sup>311</sup> God would keep that wall standing so long as the “civil constitution respecting both the form and administration of civil government” was “founded in and upon our charter by which wee are incorporated into a body politique.”<sup>312</sup> Accordingly, members of Bradstreet’s generation who remembered the 1637 quo warranto warned the rising generation of shareholders not to be “prodigal of those liberties you never knew the getting of,” because as long as the company abided by the charter’s material terms, the King would never “ceaseth” it for “circumstantial failer.”<sup>313</sup>

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309. *Id.* at 88b.

310. *See* Genesis 15:1 (King James); *see also, e.g.*, JAMES ALLEN, NEW-ENGLANDS CHOICEST BLESSING AND THE MERCY MOST TO BE DESIRED BY ALL THAT WISH WELL TO THIS PEOPLE 7 (Boston, John Foster 1679); JOHN DAVENPORT, A SERMON PREACH’D AT THE ELECTION OF THE GOVERNOUR, AT BOSTON IN NEW-ENGLAND, MAY 19TH 1669, at 15-16 (n.p., 1670); WILLIAM STOUGHTON, NEW-ENGLANDS TRUE INTEREST: NOT TO LIE, OR, A TREATISE DECLARING FROM THE WORD OF TRUTH THE TERMS ON WHICH WE STAND, AND THE TENURE BY WHICH WE HOLD OUR HITHERTO-CONTINUED PRECIOUS AND PLEASANT THINGS 33-34 (Cambridge, Mass., S.G. & M.J. 1670); SAMUEL WILLARD, A SERMON PREACHED UPON EZEK. 22.30, 31: OCCASIONED BY THE DEATH OF THE MUCH HONOURED JOHN LEVERET ESQ., GOVERNOUR OF THE COLONY OF THE MATTACHUSETTS, N-E 3 (Boston, John Foster 1679).

311. *See* INCREASE MATHER, A SERMON WHEREIN IS SHEWED THAT THE CHURCH OF GOD IS SOMETIMES A SUBJECT OF GREAT PERSECUTION, PREACHED ON A PUBLICK FAST 18-19 (Boston, Samuel Sewall 1682); Letter from Samuel Nadhorth to William Morice, Sec’y of State (Oct. 26, 1666), U.K. Nat’l Archives Class 1/20, Doc. No. 155, at 278a, 278a, <https://perma.cc/2PVE-UPNG>.

312. Copy of the Elders Advice to the General Court (May 15, 1672), in THE HUTCHINSON PAPERS, *supra* note 15, at 436, 436-37.

313. JOHN OXENBRIDGE, NEW-ENGLAND FREEMEN WARNED AND WARMED, TO BE FREE INDEED, HAVING AN EYE TO GOD IN THEIR ELECTIONS 28-29 (n.p., 1673); *see also* SAMUEL TORREY, AN EXHORTATION UNTO REFORMATION, AMPLIFIED, BY A DISCOURSE CONCERNING THE PARTS AND PROGRESS OF THAT WORK, ACCORDING TO THE WORD OF GOD 23 (Cambridge, Mass., Marmaduke Johnson 1674) (warning that violating New England’s “Covenant” would provoke God’s “revenge”).

Shareholders responded complementarily, instructing their representatives to “assume noe arbitrarie powre” but “have respect to [the] Charter or Patent & . . . make noe lawe or ord[e]r repugnant thereto.”<sup>314</sup>

### C. Edward Randolph

Back in England, however, the grandsons of Sir Ferdinando Gorges and Captain John Mason remained dissatisfied. They again petitioned the King, complaining that the “free State” of Massachusetts continued to “violently and by force of Armes” impose an arbitrary and dangerous government on their land.<sup>315</sup> For eight years, Gorges’s and Mason’s petitions slid through the cracks of a disorganized committee of privy councilors encumbered by war with the Netherlands, rapid turnover in membership, and recordkeeping practices so full of holes that one meeting “thought it remarkable” to learn of the existence of the 1637 *quo warranto*.<sup>316</sup> It took until 1676 for Mason’s and Gorges’s petitions finally to stir the King to “do something effectual for the better regulation of [Massachusetts], or else all hopes of it may be hereafter lost.”<sup>317</sup>

The King decided to send someone to Boston to deliver a copy of Gorges’s and Mason’s petitions and demand that the company send agents to respond to them. The deliveryman the King selected was Mason’s distant brother-in-law, a man named Edward Randolph.<sup>318</sup> As will soon become clear, this selection

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314. Minutes of May 19, 1677, in 7 BOSTON RECORDS, *supra* note 303, at 110, 110.

315. Petition of Robert Mason to King’s Council for Foreign Plantations (July 24, 1671), U.K. Nat’l Archives Class 1/27, Doc. No. 12, at 23a, 23a, <https://perma.cc/E9EA-97SG>; *see, e.g.*, The Humble Proposals of William Earl of Sterling, Ferdinando Gorges Esq. and Robert Mason (Mar. 20, 1674), U.K. Nat’l Archives Class 1/31, Doc. No. 22, at 72a, <https://perma.cc/X5QS-FX6Z>; Petition of Ferdinando Gorges to the King and the Privy Council (Jan. 13, 1675), U.K. Nat’l Archives Class 1/34, Doc. No. 2, at 3a, <https://perma.cc/RD98-TJEF>.

316. *See* Journal of the Lords of Trade and Plantations (Feb. 4, 1676), in 9 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 350, 350; *see also* New England Affairs Before the Council of Plantations (1671-1672), U.K. Nat’l Archives Class 1/26, Doc. No. 55, at 147a, <https://perma.cc/XCS5-JA9W>; Robert Mason’s Title to the Province of New Hampshire (Mar. 1676), U.K. Nat’l Archives Class 1/34, Doc. No. 46, at 103a, <https://perma.cc/R67X-XCA7>. Beginning soon after the Restoration in 1660, the committee of privy councilors responsible for New England underwent a series of reorganizations until 1675, when King Charles II commissioned the Committee for Matters Relating to Trade and Foreign Plantations, commonly known as the Lords of Trade. *See generally* ANDREWS, *supra* note 219, at 61-114.

317. *See* Journal of the Lords of Trade and Plantations (Mar. 20, 1676), in 9 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 361, 361-62.

318. *See* Robert Noxon Toppan, *Memoir of Edward Randolph*, in 1 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, at 1, 1-6 (Robert Noxon Toppan ed., Boston, John Wilson & Son 1898) [hereinafter *footnote continued on next page*]

had a profound effect on the rest of this story, because Randolph did not like the company one bit. Randolph was a Cambridge-educated lawyer and a former civil servant for the navy who had as little tact as he had money.<sup>319</sup> He got this job, which paid reasonably well, soon after fleeing from his “home & a wife very big w[i]th child” to escape creditors “whome [his] delays ha[d] made deaffe to all entreaties of forbearance.”<sup>320</sup>

As a man familiar with delay tactics, Randolph was not amused when he arrived in Boston in June 1676 and was told by the company chairman that its “Constitution By patent” didn’t permit the company to respond to the King’s letter until after its next general meeting.<sup>321</sup> Randolph concluded that the company was merely applying “their usuall methods of discountenancing all Affairs that come to them from his Ma[jes]ty.”<sup>322</sup>

In addition, as a man familiar with the navy, Randolph was incredulous when he looked around and saw the company flaunt laws of Parliament known as the Navigation Acts, which essentially prohibited any English merchants from shipping goods to English colonies or foreign countries without first going through England.<sup>323</sup> When Randolph asked the company chairman about the Navigation Acts, the chairman responded point blank that the Acts didn’t apply to New Englanders because “a Charter granted to them by King James” immunized them from any act of Parliament that “retrench[ed] their Liberties.”<sup>324</sup> This answer stunned Randolph. He immediately reported to the privy council that “3 frigates of 40 Guns with 3 Ketches well manned lying a League or two below Boston with his Ma[jesty’s] express orders to seize all

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RANDOLPH PAPERS]; Letter from Charles II, King of Eng., to Edward Randolph (Mar. 20, 1676), U.K. Nat’l Archives Class 5/903, Doc. No. 37, at 99, <https://perma.cc/5N2L-W3UF>.

319. See MICHAEL GARIBALDI HALL, EDWARD RANDOLPH AND THE AMERICAN COLONIES, 1676-1703, at 1-4 (1960).

320. Letter from Edward Randolph to Navy Comm’rs (Feb. 2, 1666), in 2 RANDOLPH PAPERS, *supra* note 318, at 188, 188-89.

321. See Letter from John Leverett, Governor, Mass. Bay Co., to Charles II, King of Eng. (June 13, 1676), U.K. Nat’l Archives Class 1/37, Doc. No. 3, at 13a, 13a, <https://perma.cc/WV5Q-37KS>.

322. Letter from Edward Randolph to Henry Coventry, Sec’y of State (June 17, 1676), U.K. Nat’l Archives Class 1/37, Doc. No. 7, at 18a, 18a, <https://perma.cc/9V2D-WCWY>.

323. See *id.* For the Navigation Acts, see, for example, 15 Car. 2 c. 7 (1663); and 12 Car. 2 c. 18 (1660).

324. Letter from Edward Randolph to Henry Coventry, *supra* note 322, at 18a. Whatever the merits of the chairman’s argument, the charter had actually been granted by King James’s son Charles.

Shipping & perform other Acts of hostility ag[ain]st these Revolters” would do “more in one Weeks time than all the Ord[ers] of King and Council to them in Seven years.”<sup>325</sup>

No one sent any frigates. But Randolph’s overall mission was nevertheless successful. In December 1676, the company sent agents to London ready to argue that the “express termes” of its charter gave the company jurisdiction over New Hampshire and Maine.<sup>326</sup> After a brief hearing, the King’s privy councilors rejected the agents’ reading of the charter as based on “imaginary Lynes.”<sup>327</sup> They ultimately confirmed Mason’s title to New Hampshire and Gorges’s title to Maine.<sup>328</sup>

At this point, Mason and Gorges were basically satisfied. Mason surrendered his title to New Hampshire for King Charles II to govern with the King’s own appointed council.<sup>329</sup> And Gorges sold Maine back to the Massachusetts Bay Company for £1,250.<sup>330</sup> (To put that in perspective, John Harvard left the

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325. *Id.*

326. See Minutes of Aug. 9, 1676, in 5 MBC RECORDS, *supra* note 94, at 98, 99-100 (Nathaniel B. Shurtleff ed., Boston, William White 1854); Minutes of Sept. 6, 1676, in 5 MBC RECORDS, *supra*, at 103, 106-08, 110; see also Petition of the Mass. Bay Co. to Charles II, King of Eng. (Dec. 13, 1676), U.K. Nat’l Archives Class 1/38, Doc. No. 93, at 249a, 249a, <https://perma.cc/8VRQ-FQ4T>.

327. See Journal of Lords of Trade and Plantations (July 19, 1677), in 10 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 122, 122-23 (W. Noel Sainsbury & J.W. Fortescue eds., London, Eyre & Spottiswoode 1896); Journal of Lords of Trade and Plantations (Aug. 2, 1677), in 10 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra*, at 141, 141-42; Report of Richard Raynsford and Francis North, Lord Chief Justices, to the Lords of Trade & Plantations (July 17, 1677), U.K. Nat’l Archives Class 1/41, Doc. No. 22, at 52a, 53a, <https://perma.cc/3QPZ-W5FN>; see also Order in Council of King Charles II (Feb. 7, 1677), U.K. Nat’l Archives Class 1/39, Doc. No. 27, at 58a, 58a, <https://perma.cc/9R7D-984Q>; Order of the Council of King Charles II upon the Answer of the Agents of Boston (July 20, 1677), U.K. Nat’l Archives Class 5/903, Doc. No. 69, at 226, 226, <https://perma.cc/5Z8X-WPQZ>.

328. See Report of William Jones, Attorney Gen., and Francis Winnington, Solicitor Gen., to the Lords of Trade (May 24, 1675), U.K. Nat’l Archives Class 1/34, Doc. No. 77, at 163a, 163a, 164a, <https://perma.cc/D56G-A9DY>; Report of William Jones, Attorney Gen., and Francis Winnington, Solicitor Gen., to the Lords of Trade (May 14, 1675), U.K. Nat’l Archives Class 1/34, Doc. No. 76, at 162a, 162a, <https://perma.cc/X3GR-Y95L>.

329. See Order & Report Concerning the Government of New Hampshire (July 10, 1679), U.K. Nat’l Archives Class 5/903, Doc. No. 109, at 360, 360, <https://perma.cc/B96X-4WNG>.

330. See Deed of the Province of Maine from Ferdinando Gorges to John Usher (Mar. 13, 1678), in 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE, *supra* note 221, at 343, 343; Deed of the Province of Maine from John Usher to the Governor and Company of the Massachusetts Bay (Mar. 15, 1678), in 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE, *supra* note 221, at 350; see also Minutes of Feb. 4, 1680, in 5 MBC RECORDS, *supra* note 326, at 260, 263.

college that bears his name a gift worth “about £800.”<sup>331</sup> But Randolph remained offended by what he had seen in Boston. He pleaded with the King to send someone to New England to enforce the Navigation Acts<sup>332</sup>—preferably someone who had recently been there and could use the £175 salary plus commissions.<sup>333</sup>

The King acceded, and between December 1679 and March 1683, Randolph primarily lived in Boston as Collector of His Majesty’s Customs in New England.<sup>334</sup> He made enemies with virtually everyone he met. Randolph reported that biased harbor masters refused to arrest ships he suspected were violating the Navigation Acts.<sup>335</sup> Biased judges made Randolph repay “the charges of [the] Court” every time he tried to prosecute a suspected violator.<sup>336</sup> Biased juries acquitted the people he prosecuted.<sup>337</sup> And biased legislators erected a naval office of their own to conduct their own prosecutions and collect fines due to the King.<sup>338</sup> After a few months of what was supposed to be a gold mine, Randolph reported that he was broke.<sup>339</sup>

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331. See JOURNAL OF JOHN WINTHROP, *supra* note 142, app. B at 743.

332. See Report from Edward Randolph Concerning the Massachusetts Government (Apr. 18, 1678), U.K. Nat’l Archives, Class 1/42, Doc. No. 58, at 116a, 116a, 117a, <https://perma.cc/ZZF6-TYC6>.

333. See Edward Randolph, Representation of the Affairs of New England (May 6, 1677), U.K. Nat’l Archives, Class 1/40, Doc. No. 67, at 132a, 132a-132b, <https://perma.cc/43ZF-TGW9>; see also Journal of Lords of Trade and Plantations (June 19, 1679), in 10 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 327, at 377.

334. See Instructions from the Commissioners for Manageing, Leavying, and Causeing to Be Collected His Majesties Customes, Subsidies, and Other Duties in England, to Edward Randolph (July 9, 1678), in 3 RANDOLPH PAPERS, *supra* note 318, at 19 (Robert Noxon Toppa ed., Boston, John Wilson & Son 1899); Letter from the Lords of the Privy Council to the Lord Treasurer (May 16, 1678), in 10 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 327, at 253, 253.

335. See Letter from Edward Randolph to the Comm’rs of Customs (June 7, 1680), U.K. Nat’l Archives Class 1/45, Doc. No. 4, at 114a, 114a-114b, <https://perma.cc/9Y46-NB8E>.

336. Order of the Court of Assistants at Boston (Oct. 1, 1680), U.K. Nat’l Archives Class 1/46, Doc. No. 15, at 45a, 45a, <https://perma.cc/WR33-9ZND>; see Protest of Edward Randolph Against the Proceedings of the General Court of the Colony of the Massachusetts Bay in New England (Apr. 3, 1682), U.K. Nat’l Archives Class 1/48, Doc. No. 52, at 132a, 132a, <https://perma.cc/4BFD-A2PE>.

337. See Edward Randolph, Articles of High Crimes and Misdemeanors Exhibited Against the Governor and Company of the Massachusetts Bay in New England (June 12, 1683), U.K. Nat’l Archives Class 1/52, Doc. No. 14, at 22a, 22b, <https://perma.cc/23C9-DWWP>.

338. See Edward Randolph, Articles of High Misdemeanors Exhibited Against a Faction in the Governor’s Court Sitting in Boston (May 28, 1682), U.K. Nat’l Archives Class 1/48, Doc. No. 83, at 265a, 265a, <https://perma.cc/FEN8-3WJV>.

339. See Letter from Edward Randolph to the Comm’rs of the Customs (June 9, 1680), U.K. Nat’l Archives Class 1/45, Doc. No. 10, at 124a, 124b, <https://perma.cc/7XQ3-U6HR>.

For his part, company chairman Simon Bradstreet wrote a letter saying that the company was, in fact, cooperating with Randolph. But he reported that no one—and certainly no juror—liked a person who “beares noo good will to the Country but sought the ruin of it.”<sup>340</sup>

Bradstreet’s letter spoke to Randolph’s barely concealed secondary agenda in New England, which was to collect evidence the King’s attorney general might be able to use in a quo warranto against the company.<sup>341</sup> There wasn’t much—the company repealed its ban on Christmas and most of the other laws objected to by the 1664 commissioners<sup>342</sup>—but Randolph resurrected complaints that had been made against the company since 1629. He alleged that the company illegally taxed nonshareholders “like slaves in Algiers.”<sup>343</sup> It illegally coined money while “humbly beg[ging] his maj[es]ties pardon.”<sup>344</sup> It illegally denied the right of dissidents to appeal to the Privy Council in England.<sup>345</sup> It illegally interfered with his attempts to enforce the Navigation Acts.<sup>346</sup> And it illegally “assume[d] other Powers not warranted by [its] Charter.”<sup>347</sup>

Randolph also claimed that nothing short of a quo warranto could “save my life and reform this Governm[ent].”<sup>348</sup> He wrote that when company officials found out that he was pushing for a quo warranto, they threatened to charge him with treason for “endeavouring, openly, the alteration of their constitution.”<sup>349</sup>

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340. Letter from Simon Bradstreet, Governor, Mass. Bay Co., to the Lords of His Majesties Councill (May 18, 1680), U.K. Nat’l Archives Class 1/44, Doc. No. 61, at 407a, 407a, <https://perma.cc/TUE8-H87Q>.

341. See Letter from William Jones, Attorney Gen., and Francis Winnington, Solicitor Gen., to the Lords of the Comm. of Trade & Plantations (Apr. 8, 1678), U.K. Nat’l Archives Class 5/903, Doc. No. 84, at 265, <https://perma.cc/597G-J5CC>.

342. See Minutes of Mar. 17, 1682, in 5 MBC RECORDS, *supra* note 326, at 338, 339; Journal of Lords of Trade and Plantations (Feb. 24, 1679), in 10 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 327, at 332, 332-33.

343. See Abstract of Letters Received by the Lords of Trade from Edward Randolph (Feb. 25, 1680), U.K. Nat’l Archives Class 1/44, Doc. No. 31, at 75a, 76b, <https://perma.cc/H2M5-EERK> (noting that residents in Maine complained of being taxed and compared it to being “bartered & Sold”).

344. Minutes of Mar. 23, 1682, in 5 MBC RECORDS, *supra* note 326, at 346, 347; see Randolph, *supra* note 337, at 22a.

345. See Randolph, *supra* note 337, at 22b.

346. See *id.* at 22a.

347. *Id.*

348. Letter from Edward Randolph to Leoline Jenkins, Sec’y of State (Apr. 11, 1682), U.K. Nat’l Archives Class 1/48, Doc. No. 58, at 202a, 202b, <https://perma.cc/KW4A-4AXF>.

349. Letter from Edward Randolph to the Earl of Clarendon (June 14, 1682), in THE HUTCHINSON PAPERS, *supra* note 15, at 534, 536; see also Letter from Edward Randolph to the Comm’rs of Customs, *supra* note 335; Letter from Edward Randolph

*footnote continued on next page*

D. The City of London Case

King Charles II eventually agreed to pursue this quo warranto in 1681, authorizing his attorney general, a “dull hot man” named Sir Robert Sawyer,<sup>350</sup> to begin the paperwork.<sup>351</sup> But this prosecution was interrupted when another corporation, the City of London, threatened the King’s ability to use a quo warranto to seize a corporate charter.

Like the Massachusetts Bay Company, the City of London was a corporation, and the two had nearly identical structures. Its chairman was called the “mayor” and its shareholders “citizens.”<sup>352</sup> Indeed, most cities and universities in England were corporations.<sup>353</sup>

The one major difference between these corporations and the Massachusetts Bay Company was that constituents of English corporations hadn’t developed any tradition of using their charters to restrict the power of their corporations’ officers. That is, where the New England corporation’s charter was acquiring the attributes of a modern written constitution, English corporate charters were far less important safeguards against abuses of power by corporate governments. One explanation for this divergence is geographic. Residents of London, the University of Oxford, and other English corporations lived in the immediate shadow of a much more powerful government: the Crown and Parliament. Crown and parliamentary officials were, on the whole, eager to enforce their own legislation over incompatible corporate bylaws<sup>354</sup>—a far easier task in their own neighborhoods than across the Atlantic. So when residents of municipal corporations challenged the legality of an English corporation’s actions, they typically argued that the action was “repugnant” or “contrary” to the “general laws of the kingdom”—not that the action was repugnant or contrary to the charter itself.<sup>355</sup>

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to Leoline Jenkins, Sec’y of State (May 29, 1682), U.K. Nat’l Archives Class 1/48, Doc. No. 84, at 267a, <https://perma.cc/9E76-2Y47>; Letter from Edward Randolph to Leoline Jenkins, Sec’y of State (June 14, 1682), U.K. Nat’l Archives Class 1/48, Doc. No. 104, at 333a, <https://perma.cc/WVS9-5E4J>.

350. See 1 GILBERT BURNET, BISHOP BURNET’S HISTORY OF HIS OWN TIME 532 (London, Thomas Ward 1724).

351. See Journal of Lords of Trade and Plantations (June 21, 1681), in 11 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 77, 77 (J.W. Fortescue ed., London, Eyre & Spottiswoode 1898); Order of the Privy Council of King Charles II (Oct. 21, 1681), U.K. Nat’l Archives Class 1/47, Doc. No. 77, at 181a, <https://perma.cc/F58E-76FR>.

352. See First Charter of King Charles I (Oct. 18, 1638), in THE HISTORICAL CHARTERS AND CONSTITUTIONAL DOCUMENTS OF THE CITY OF LONDON 159, 163-64 (Walter de Gray Birch ed., London, Whiting & Co. rev. ed. 1887).

353. See CLARK & SLACK, *supra* note 143, at 126-28, 133; 1 WEBB & WEBB, *supra* note 143, at 271-76.

354. See Bilder, *Corporate Origins*, *supra* note 48, at 520-22.

355. See *id.* at 514-15, 515 nn.48-50 (quoting 2 KYD, *supra* note 161, at 109).

A second explanation is cultural. As historians Peter Clark and Paul Slack have written, English charters typically defined “the shape of the civic élite and its powers over the citizenry.”<sup>356</sup> Charters “were the treaties of alliance between a Crown which wished to see power in the hands of a group small and rich enough to be answerable to it, and urban élites determined to perpetuate their local status.”<sup>357</sup> Indeed, this is how John Winthrop originally interpreted the Massachusetts Bay Company’s charter.<sup>358</sup> But whereas in New England, the enumerated powers granted to corporate officials had become implied restrictions on powers not granted, in England “urban rulers spent much of their time trying to obtain new charters or confirm controversial clauses in old ones.”<sup>359</sup> And “[f]or its part, the central government quickly appreciated the political possibilities inherent in its freedom to refuse or accede to these local demands.”<sup>360</sup>

At the time, one of the privileges English charters often gave corporations was to elect members of Parliament.<sup>361</sup> And in the 1660s, when King Charles II wanted to influence which members of Parliament these corporations were electing, he began accusing corporations of violating their charters in minor ways, hoping the fear of a quo warranto would compel them to surrender their charters and allow the King to regulate them.<sup>362</sup> These violations were generally pretextual and easy to prove. As just discussed, few corporate officials in England understood the text of their charters as limits on their authority.<sup>363</sup>

In 1681, when the King demanded the City of London’s charter on the pretextual ground that the city was operating a market in violation of the charter’s terms, the City’s urban elite decided to defend themselves.<sup>364</sup> One witness called the resulting case “the greatest concern to the nation ever contested in any court of Westminster Hall.”<sup>365</sup> The City’s lawyers, “some of

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356. CLARK & SLACK, *supra* note 143, at 126.

357. *Id.* at 128.

358. *See supra* text accompanying notes 144-45.

359. CLARK & SLACK, *supra* note 143, at 126.

360. *Id.*

361. *See* LEVIN, *supra* note 49, at 5.

362. *See* 13 Car. 2 c. 1 (authorizing the practice); *see also* 1 BURNET, *supra* note 350, at 527-35 (criticizing the practice); ROGER NORTH, EXAMEN, OR, AN ENQUIRY INTO THE CREDIT AND VERACITY OF A PRETENDED COMPLETE HISTORY; SHEWING THE PERVERSE AND WICKED DESIGN OF IT, AND THE MANY FALSITIES AND ABUSES OF TRUTH CONTAINED IN IT 624-45 (London, Fletcher Gyles 1740) (defending the practice).

363. *See* LEVIN, *supra* note 49, at 13-15.

364. *See* Proceedings in *The King v. City of London (1681-1683)*, in 8 HOWELL’S STATE TRIALS, *supra* note 213, at 1039, 1039.

365. *Id.* at 1357.



the greatest men that ever appeared at the bar,"<sup>366</sup> each gave oral arguments for "about three hours apiece."<sup>367</sup> Their best argument was also the most sensible one: If the City lacked authorization to operate a market, then the solution was to close the market—not to dissolve the entire municipal government.<sup>368</sup>

This argument was so attractive that it looked like the Court of the King's Bench might side with the City. So after the first round of arguments, the King replaced several of its judges with political allies—including one of his lawyers who had argued the case at the pleading stage.<sup>369</sup> The new judges were receptive when Attorney General Sawyer responded with a five-hour-long argument of his own that clearly had the Massachusetts Bay Company in mind.<sup>370</sup> If the King lacked the power to dissolve a corporation for exceeding the "limits and extents" of its charter, Sawyer argued, then every corporation would be "an independant commonwealth within a kingdom, and unaccountable to the king."<sup>371</sup> Although dissolution was a harsh penalty, he maintained that it was the only one that made the leaders of a corporation pay attention to their charter's terms. Corporations were supposed to be "subordinate governments," he added, mere "inferior jurisdictions" delegated from the Crown.<sup>372</sup> If the King had the authority to fire one of his officers for insubordination, surely he had at least the same authority to dissolve a group of officers who considered "themselves independent o[f] the Crown and in defiance to it."<sup>373</sup>

Observers called the Attorney General's performance "beyond the expectation of all mankind,"<sup>374</sup> and the King was "very well pleased."<sup>375</sup> The court's unanimous opinion, issued a month later, agreed with the Attorney

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366. Proceedings in *East-India Co. v. Sandys* (Great Case of Monopolies) (1683-1685), in 10 HOWELL'S STATE TRIALS, *supra* note 213, at 371, 373.

367. See 1 BURNET, *supra* note 350, at 533.

368. See Proceedings in *R v. City of London*, *supra* note 364, at 1099, 1114 (argument of Sir George Treby); *id.* at 1240-41 (argument of Henry Pollexfen); see also 1 BURNET, *supra* note 350, at 533-34.

369. See Proceedings in *R v. City of London*, *supra* note 364, at 1086 n.\*; 1 BURNET, *supra* note 350, at 535.

370. See Letter from Francis Gwyn to the Earl of Conway (May 1, 1683), in 24 CALENDAR OF STATE PAPERS, DOMESTIC SERIES (CHARLES II), at 222, 222 (F.H. Blackburne Daniell ed., 1933).

371. See Proceedings in *R v. City of London*, *supra* note 364, at 1155-59 (argument of Attorney General Robert Sawyer).

372. See *id.* at 1178.

373. See Letter from Francis Gwyn to the Earl of Conway, *supra* note 370, at 223.

374. *Id.* at 222.

375. Letter from the Earl of Sunderland to Leoline Jenkins, Sec'y of State (May 2, 1683), in 24 CALENDAR OF STATE PAPERS, DOMESTIC SERIES (CHARLES II), *supra* note 370, at 227, 227.

General that quo warrantos were necessary to prevent “so many independent republicks, as there are now corporations in [England].”<sup>376</sup>

E. The Second Quo Warranto

On June 12, 1683, the day the City of London opinion came down, the King ordered his attorney general to file a quo warranto against the self-described commonwealth in New England—the second since the one in 1637.<sup>377</sup> He also sent Edward Randolph to serve the quo warranto on the Massachusetts Bay Company along with two hundred copies of the opinion.<sup>378</sup> But if the King hoped Randolph could convince the company to surrender its charter voluntarily, he didn’t understand the connection the New Englanders had made between their charter and the Abrahamic covenant. “Do not sin in giving away the inheritance of your fathers,” an anonymous pamphleteer wrote in Boston, citing the examples of 1637 and 1664 when the company’s leaders were “firm and faithful in asserting and standing by their civil and religious liberties.”<sup>379</sup> Increase Mather, perhaps the most famous minister in New England at the time, similarly reminded a group of Boston shareholders of the biblical story of Naboth, a man who refused to sell his inherited vineyard to a king where such a sale would violate the law of Moses.<sup>380</sup> The charter was as much a covenant with God as Mosaic law, Mather explained. So long as “we keep ourselves still in the hands of God, and Trust ourselves with his providence and who knoweth what God may do for us?”<sup>381</sup>

After weeks of contentious shareholder meetings about the charter at which Mather and other ministers “excited them to take Arms to defend it,”<sup>382</sup>

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376. See *R v. Mayor of London* (1683) 89 Eng. Rep. 930, 938-39; 2 Show. 263, 278-79.

377. See Order & Report for a Quo Warranto Against the Massachusetts Colony (June 12, 1683), U.K. Nat’l Archives Class 5/904, Doc. No. 60, at 178, <https://perma.cc/2ZXX-9BD6>; Writ of Quo Warranto Against the Massachusetts (June 12, 1683), U.K. Nat’l Archives Class 5/904, Doc. No. 61, at 179, <https://perma.cc/LM8P-R6RD>.

378. See Order for a Declaration (July 20, 1683), U.K. Nat’l Archives Class 5/904, Doc. No. 69, at 186, 187, <https://perma.cc/4VLB-TNSM>.

379. See Arguments Against Relinquishing the Charter (Nov. 1683), in 1 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES, *supra* note 232, at 74, 76-79 (Boston, Charles C. Little & James Brown 1846). The pamphleteer dated the first quo warranto to 1638. See *id.* at 76.

380. See M.G. Hall, *The Autobiography of Increase Mather*, 71 PROC. AM. ANTIQUARIAN SOC’Y 271, 308 (1961) [hereinafter *Mather Autobiography*]; see also *Leviticus* 25:23 (King James); 1 *Kings* 21:1-29 (King James).

381. *Mather Autobiography*, *supra* note 380, at 308; see also Minutes of Jan. 21, 1684, in 7 BOSTON RECORDS, *supra* note 303, at 164.

382. See Letter from Edward Cranfield, Governor, Province of N.H., to the Lords of Trade (May 14, 1684), U.K. Nat’l Archives Class 5/940, Doc. No. 35, at 111, 112-13, <https://perma.cc/N3EE-6V38>.

the company voted to “spinn out the case to the uttermost.”<sup>383</sup> It hired a lawyer “to prevent a judgment against us” and petitioned the King to keep “the security of the charter granted by your royall father.”<sup>384</sup>

Unfortunately for the company, it never got to see its day in court. Under the formalities of English law at the time, a quo warranto had to be timely served, and Randolph was unable to make the four-month trip from London to Boston and back before it expired.<sup>385</sup> Accordingly, in May 1684, Attorney General Sawyer had to try a different tack. He petitioned the Court of Chancery for an alternative writ of scire facias, an equitable order that didn’t require anyone to leave the country.<sup>386</sup> Instead, the writ put the onus on the company to show up and “shew cause unto the Court” why its charter shouldn’t be vacated.<sup>387</sup>

This wouldn’t have been a big deal if the company were still in England, but it was devastating to a company 3,000 miles away. In June 1684, the Court of Chancery ordered that the Massachusetts Bay Company’s charter would be vacated unless the company “shall appear by the first day of Next Term & plead so as to go to trial.”<sup>388</sup> When that day arrived four months later with no company in sight, the Court of Chancery vacated the charter.<sup>389</sup>

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When the directors of the Massachusetts Bay Company heard rumors that their charter had been vacated before they could defend themselves, they were “ama[z]ed” by what was happening.<sup>390</sup> “[W]ee are . . . a litle surprised to

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383. Minutes of May 7, 1684, in 5 MBC RECORDS, *supra* note 326, at 436, 439; see Minutes of Nov. 7, 1683, in 5 MBC RECORDS, *supra* note 326, at 420, 421-23; Minutes of Dec. 5, 1683, in 5 MBC RECORDS, *supra* note 326, at 423, 423-25; Minutes of May 17, 1684 [hereinafter MBC Minutes of May 17, 1684], in 5 MBC RECORDS, *supra* note 326, at 439, 439-40.

384. See MBC Minutes of May 17, 1684, *supra* note 383, at 440-41.

385. See Opinion of Robert Sawyer, Attorney Gen., Touching the Quo Warranto for New England (May 3, 1684), U.K. Nat’l Archives Class 1/54, Doc. No. 86, at 228a, 228a, <https://perma.cc/4XKK-HR6Z>.

386. See Letter from Robert Sawyer, Attorney Gen., to Owen Wynne (May 13, 1684), U.K. Nat’l Archives Class 1/54, Doc. No. 95, at 260a, 260a, <https://perma.cc/2GRA-4KAD>.

387. See COWELL, *supra* note 109, at Nnn 3, cols. 2-3; see also 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 88 (London, M. Flesher 1644).

388. Rule in Chancery for Judgment Against the Boston Charter (June 18, 1684), U.K. Nat’l Archives Class 1/54, Doc. No. 131, at 360a, 360a, <https://perma.cc/P6QQ-2V7N>.

389. See Rule in Chancery Against the Massachusetts Charter (Oct. 23, 1684), U.K. Nat’l Archives Class 1/55, Doc. No. 55, at 237a, <https://perma.cc/Y5BR-RFF7>.

390. See Minutes of Sept. 12, 1684, in 5 MBC RECORDS, *supra* note 326, at 451, 451 (reporting a “Letter to Mr Robert Humphryes” from Edward Rawson, secretary of the Massachusetts Bay Company).

understand the procedure against us,” they wrote.<sup>391</sup> Nevertheless, life went on much as it had after the first quo warranto in 1637.<sup>392</sup> In August 1685, a victorious Edward Randolph complained that “[m]ore than 9 months are pasd since Judgm[ent] was entred up for his Late Maj[esty] ag[ains]t the charter of Boston; . . . yet to this day, some disaffected persons, under colour of their vacated charter, pretend to exercise a Govern[ment] there.”<sup>393</sup> Indeed, as the company waited for someone from London to show up with instructions on how to proceed without a charter, it continued to abide by the charter’s terms. It held elections every May, it passed new laws, and it continued to debate whether those new laws “might be construed contrary to the Charter.”<sup>394</sup>

This was in sharp contrast with a corporation like the City of London, which was also the victim of a quo warranto. Unlike in Massachusetts, there developed in London no expectation that the city and its elected government would cease to exist just because it lacked a charter; rather, the only expectation was that the Crown would simply play a less restrained role in managing the city’s affairs.<sup>395</sup> This cultural divergence was likely caused by the same two explanations discussed earlier. In English corporations, charters were more useful for detailing all the powers granted by the Crown than for protecting constituents from abuses of power by corporate officers.<sup>396</sup> And in England, unlike in Massachusetts, the source of authority for the most powerful government in the area—the Crown and Parliament—was also unwritten.

But in New England, where the corporation was the most powerful government in any New Englander’s daily life, it became clear that without the charter, the government in Boston had begun “palpably to dye.”<sup>397</sup> And on May 14, 1686, Edward Randolph arrived in Boston Harbor on a frigate—ten years after Randolph had asked for three such frigates to crush

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391. Minutes of Oct. 15, 1684, in 5 MBC RECORDS, *supra* note 326, at 453, 458 (reporting the “Courts letter to Mr Robert Humfreys”).

392. See Minutes of Jan. 28, 1685, in 5 MBC RECORDS, *supra* note 326, at 465, 468-69 (expressing uncertainty about the company’s legal status in light of rumors from England but continuing to meet as usual).

393. Letter from Edward Randolph to the Lords of Trade (Aug. 18, 1685), U.K. Nat’l Archives Class 1/58, Doc. No. 33, at 71a, 71a, <https://perma.cc/2XGV-46AG>.

394. 1 THE DIARY OF SAMUEL SEWALL, 1674-1729, at 67 (M. Halsey Thomas ed., 1973) [hereinafter SEWALL’S DIARY] (entry of June 20, 1685); see Minutes of May 27, 1685, in 5 MBC RECORDS, *supra* note 326, at 475, 476-77; Minutes of May 12, 1686, in 5 MBC RECORDS, *supra* note 326, at 513, 513-14.

395. See LEVIN, *supra* note 49, at 50-59.

396. See *supra* text accompanying note 143.

397. See 1 SEWALL’S DIARY, *supra* note 394, at 86 (entry of Dec. 4, 1685).

“these Revolvers.”<sup>398</sup> In his hand, Randolph held an exemplification of the scire facias, a commission for a new royal government, and paperwork appointing him as the new government’s official secretary and register.<sup>399</sup> Members of the new government addressed Simon Bradstreet and the outgoing directors “not as a Go[ver]nor & Company, but [as . . . some of the principall gentlemen and chiefe of the inhabitants of the severall townes of the Massachusetts.”<sup>400</sup> In other words, the company was no more.

### III. The Coup, 1686-1691

Edward Randolph’s new government didn’t last very long. Only three years later, in April 1689, over a thousand gun-toting men marched into Boston, imprisoned members of Randolph’s “Arbitrary Government” at gunpoint, and replaced them with a government “agreeable unto our Charter Constitution.”<sup>401</sup> These events followed a similar coup in England, where in December 1688, a prince from the Netherlands marched into London, evicted the King and members of his “Arbitrary Government” at gunpoint, and replaced them with a government “according to the constitution of the English government.”<sup>402</sup>

Although these two revolutions looked pretty similar, the two constitutions that guided them couldn’t have been more different. In England, the “constitution” was an intangible idea tied to unwritten tradition, while in New

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398. See *Whitehall, July 25*, LONDON GAZETTE, July 26-29, 1686, at 2, 2 (mistakenly reporting the ship as having arrived in June rather than May); *supra* notes 321-25 and accompanying text; see also 1 SEWALL’S DIARY, *supra* note 394, at 112 (entry of May 14, 1686) (noting that the frigate arrived on May 14).

399. See *Whitehall, July 25*, *supra* note 398, at 2; see also Edward Randolph’s First Commission as Secretary and Register of the Territory and Dominion of New England (Sept. 21, 1685), in 2 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 311 (1913); James II, King of Eng., Exemplification of the Judgment for Vacating the Charter of the Massachusetts Bay in New England (Oct. 13, 1685), in 2 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES, *supra* note 95, at 246 (Boston, Crosby, Nichols & Co. 1854); Joseph Dudley’s Commission as President of the Council for New England (Oct. 8, 1685), in 2 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS, *supra*, at 37.

400. Minutes of May 20, 1686 [hereinafter MBC Minutes of May 20, 1686], in 5 MBC RECORDS, *supra* note 326, at 515, 516.

401. See Simon Bradstreet, Governor, Mass. Bay Co., Address of the Governor’s Council and Convention of the Massachusetts Bay (June 6, 1689), U.K. Nat’l Archives Class 5/855, Doc. No. 12, at 25, 25, <https://perma.cc/ZTY2-5YEC>; see also A Narrative of the Proceedings att Boston in New England, upon the Inhabitants Seizeing the Government There (n.d.), U.K. Nat’l Archives Class 5/855, Doc. No. 20, at 7a, <https://perma.cc/T8E2-4KNX>.

402. See The Prince of Orange’s First Declaration, 30 Sept. 1688, 5 Parl. Hist. Eng. cols. 8-9 [hereinafter First Declaration of Prince William]; see also *infra* Part III.C.

England, the “Constitution” was identified with a single, written document. Already by the 1680s, Bostonians’ history with their corporate charter as the guiding source of fundamental law for the colony had led them to believe that only written constraints on government officials could prevent despotic rule. The story of the coup and the “arbitrary,” unrestrained government that precipitated it would prove to be a major source of inspiration for Massachusetts revolutionaries a century later.

A. Increase Mather

The person who was best prepared to link constitutional developments in Old England and New England was a minister named Increase Mather. Son of Richard Mather—the minister who explained church covenants by analogy to corporate charters<sup>403</sup>—Increase was a child prodigy at home in both Englands. When Increase was twelve, in 1651, he got into Harvard College.<sup>404</sup> By age twenty-two, he had degrees from both Harvard and Trinity College in Dublin, from which he spent four years preaching across the British Isles.<sup>405</sup> When he returned home to Massachusetts, his recently remarried father introduced him to a new stepsister, Maria, whose late father, John Cotton, had been Boston’s most eminent minister.<sup>406</sup> Increase ended up marrying Maria and naming their first child Cotton after his famous father-in-law.<sup>407</sup>

Increase Mather returned to New England in 1661, just as King Charles II returned to the throne and began investigating whether the Massachusetts Bay Company was adhering to its charter.<sup>408</sup> Over the next two decades, Mather delivered sermons that described the Crown’s investigations as evidence of God’s “Controversy with his New-England People,” blaming the investigations on a new generation of churchgoing shareholders who were insufficiently attentive to the “Ecclesiastical and civil Constitution” they inherited from their parents.<sup>409</sup> He joined other ministers in calling the “Charter” analogous to the

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403. See *Mather Autobiography*, *supra* note 380, at 277; *supra* notes 243-46 and accompanying text.

404. *Mather Autobiography*, *supra* note 380, at 278.

405. See *id.* at 280-86.

406. See *id.* at 286 n.6; *John Cotton*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/37VA-KHXB> (archived May 6, 2019).

407. *Mather Autobiography*, *supra* note 380, at 286.

408. See *supra* notes 288-92 and accompanying text.

409. See INCREASE MATHER, A CALL FROM HEAVEN TO THE PRESENT AND SUCCEEDING GENERATIONS 56 (Boston, John Foster 1679) [hereinafter MATHER, A CALL FROM HEAVEN]; INCREASE MATHER, THE NECESSITY OF REFORMATION WITH THE EXPEDIENTS SUBSERVIENT THEREUNTO, ASSERTED 1-2 (Boston, John Foster 1679); see also Letter from Thomas Cobbet to Increase Mather (Nov. 12, 1678), in 8 COLLECTIONS OF THE  
*footnote continued on next page*

“Covenant with God,” both of which were “mainly made up of precepts and promises” that were enforced by the penalty of “forfeiture.”<sup>410</sup> Just as civil leaders argued that the company needed to stick to the words of the charter or else lose the King’s favor, Mather urged the company to pass laws that were tied to biblical text or else lose God’s favor, which would be even worse.<sup>411</sup>

Mather considered Edward Randolph “a mortall enemy to our Country,” someone “whose name[] will stink in New England to the worlds end.”<sup>412</sup> In letters to friends in the early 1680s, Mather wrote that Randolph was pursuing the quo warranto as a mere “pretext” for his real goal of replacing New England’s Puritans in favor of adherents to the Church of England.<sup>413</sup> Mather didn’t like the Church of England. He thought that its prayer book “obliterated” sentences, “omitted” verses, and otherwise modified “the Sacred Word of God” from what was written in scripture.<sup>414</sup> And in 1684, Mather offered a number of scriptural objections to surrendering the charter.<sup>415</sup> The King’s privy councilors began to refer to him as “that star-gazer: that halfe distracted man.”<sup>416</sup>

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MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES, *supra* note 95, at 289 (Boston, Wiggin & Lunt 1868).

410. See SAMUEL WILLARD, COVENANT-KEEPING: THE WAY TO BLESSEDNESS, OR, A BRIEF DISCOURSE WHEREIN IS SHEWN THE CONNEXION WHICH THERE IS BETWEEN THE PROMISE, ON GOD’S PART, AND DUTY, ON OUR PART, IN THE COVENANT OF GRACE 8-9 (Boston, James Glen 1682); Increase Mather, *Foreword* to WILLARD, *supra*, at i, i-ix.
411. See MATHER, A CALL FROM HEAVEN, *supra* note 409, at 75-76; see also SAMUEL WILLARD, The Only Sure Way to Prevent Threatned Calamity: As It Was Delivered in a Sermon, Preached at the Court of Elecion (May 24, 1682), in THE CHILD’S PORTION, OR, THE UNSEEN GLORY OF THE CHILDREN OF GOD, ASSERTED, AND PROVED: TOGETHER WITH SEVERAL OTHER SERMONS OCCASIONALLY PREACHED, AND NOW PUBLISHED 163, 191-97 (Boston, Samuel Green 1684).
412. *Mather Autobiography*, *supra* note 380, at 322; see also Letter from Increase Mather to Thomas Gouge (Nov. 21, 1683) [hereinafter Nov. 1683 Letter from Increase Mather to Thomas Gouge], in 12 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 615 (J.W. Fortescue ed., London, Norfolk Chronicle Co. 1899); Letter from Increase Mather to Thomas Gouge, Eng. Minister at Amsterdam (Dec. 3, 1683) [hereinafter Dec. 1683 Letter from Increase Mather to Thomas Gouge], U.K. Nat’l Archives Class 1/65, Doc. No. 73II, at 325a, 325a-326b, <https://perma.cc/4ERW-8L65>.
413. See Nov. 1683 Letter from Increase Mather to Thomas Gouge, *supra* note 412, at 615; Dec. 1683 Letter from Increase Mather to Thomas Gouge, *supra* note 412, at 326a (discussing how Randolph’s efforts were contributing to New Englanders “whoring after their own Inventions and fall[ing] off from our Church”). Mather later insisted that this letter was forged. See *Mather Autobiography*, *supra* note 380, at 309.
414. See INCREASE MATHER, A BRIEF DISCOURSE CONCERNING THE UNLAWFULNESS OF THE COMMON PRAYER WORSHIP AND OF LAYING THE HAND ON, AND KISSING THE BOOKE IN SWEARING 6-7 (Cambridge, Mass., Samuel Green 1686).
415. See *supra* text accompanying notes 380-84.
416. See Letter from Edward Randolph to Simon Bradstreet (Sept. 4, 1684), in 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES, *supra* note 409, at 527, 528.

B. The Dominion of New England

After 1686, Mather became one of many New Englanders who criticized the “arbitrary” nature of the commission Randolph brought with him.<sup>417</sup> The short document, signed by the new King James II (his brother Charles II died in 1685), offered little textual guidance for the government it established. It “apoint[ed] a President & Council” to temporarily oversee a “Territory & Dominion of New England,” which consisted of the now-former colonies of Massachusetts, New Hampshire, and Maine.<sup>418</sup> It named Randolph, Robert Mason, and fifteen others to the council.<sup>419</sup> And it gave to a majority of the council the authority to act as a court, “levy & distribute” taxes, protect the “liberty of Conscience,” and “countenance[] and encourage[]” the Church of England.<sup>420</sup>

Mather had little to complain about during the first eight months of this new government; it didn’t do very much. Ironically—given Randolph’s and Mason’s participation—the government mainly petitioned the Crown for authority to continue the mint, tax rates, and other laws the Massachusetts Bay Company had once passed.<sup>421</sup> It explained that “our Trade for want of money is much perplexed and decayed.”<sup>422</sup> It also ordered the former secretary of the company to deliver its old records.<sup>423</sup> Even then, the secretary simply refused, insisting that he had taken an oath to the company to maintain its records and that he could not “satisf[y] his Conscience that he is obliged to resign them.”<sup>424</sup>

But the complaints began rolling in after a man named Edmund Andros arrived in December 1686 with a new commission that named him “Captain Generall and Governor in Cheife” of a far more powerful council.<sup>425</sup> Randolph

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417. See MBC Minutes of May 20, 1686, *supra* note 400, at 516.

418. Joseph Dudley’s Commission as President of the Council for New England, *supra* note 399, at 37-38.

419. See *id.* at 38.

420. See *id.* at 39-42.

421. See, e.g., Robert N. Toppan, *Council Records of Massachusetts Under the Administration of President Joseph Dudley*, 33 PROC. MASS. HIST. SOC’Y 222, 241-245 (1899) [hereinafter *Dudley Records*] (entry of June 2, 1686); Letter from the President & Council of Boston to the Lords of Trade (July 25, 1686), U.K. Nat’l Archives Class 1/59, Doc. No. 95, at 312a, <https://perma.cc/KA2U-2W22>.

422. *Dudley Records*, *supra* note 421, at 244 (entry of June 2, 1686).

423. See *id.* at 250 (entry of June 13, 1686), *id.* at 271 (entry of Sept. 24, 1686); *id.* at 273 (entry of Oct. 21, 1686); see also Robert N. Toppan, *Andros Records*, 13 PROC. AM. ANTIQUARIAN SOC’Y 237, 249-50 (1901) [hereinafter *Andros Records*] (entry of Feb. 4, 1686); *id.* at 491-92 (entry of Feb. 3, 1688); *id.* at 493 (entry of Mar. 6, 1688).

424. Letter from Benjamin Bullivant to Edward Randolph (Sept. 11, 1686), U.K. Nat’l Archives Class 1/60, Doc. No. 48, at 151a, 151a, <https://perma.cc/766E-YW4M>.

425. See Sir Edmund Andros’s First Commission as Governor of the Territory and Dominion of New England (June 3, 1686) [hereinafter *Andros’s First Commission*], *footnote continued on next page*



and Mason continued their roles in a government that now had authority to pass virtually any law, with jurisdiction over everything from Maine to New York.<sup>426</sup> Three of these laws proved to be immediately controversial. First—thanks in part to the government’s inability to collect the company’s land records—the government assumed that no one properly owned his land and began making landowners pay for the government to confirm their titles.<sup>427</sup> Second, the government levied a new tax on landowners without first calling for an elected assembly.<sup>428</sup> Third, the government required Puritan church buildings to open their doors part-time for the service of the Church of England.<sup>429</sup>

These issues enraged Mather and other Puritan ministers, who generally saw them as “arbitrary” efforts to suppress their local autonomy and their religious disagreement with the Church of England.<sup>430</sup> Accordingly, Mather was relieved to hear it when King James II issued a “Gracious Declaration To all His Loving Subjects for Liberty of Conscience”—a declaration that the government would respect religious dissenters.<sup>431</sup> This was a controversial declaration for the Catholic King to make in Protestant England, in part because it purported to suspend pro-Anglican acts of Parliament without Parliament’s consent. But Mather persuaded his fellow Puritan ministers in New England to send an “Address of Thanks” to build some goodwill with

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in 2 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS, *supra* note 399, at 44, 44-47; *see also Andros Records*, *supra* note 423, at 240 (entry of Dec. 20, 1686).

426. *See Andros’s First Commission*, *supra* note 425, at 44-47; *see also supra* text accompanying note 418.

427. *See, e.g., Land Warrants Issued Under Andros, 1687-1688*, in 21 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 292, 292 (1920); Letter from Samuel Sewall to Edward Hull (Nov. 29, 1687), in 1 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, SIXTH SERIES 67, 68-73, 68 n.1 (Boston, Mass. Historical Soc’y 1886); *Andros Records*, *supra* note 423, at 468 (entry of June 22, 1687); *id.* at 471 (entry of July 20, 1687); *id.* at 487-88 (entry of Dec. 19, 1687).

428. *See Andros Records*, *supra* note 423, at 256 (entry of Mar. 1, 1687).

429. *See* 1 SEWALL’S DIARY, *supra* note 394, at 127-28 (entry of Dec. 20, 1686); *id.* at 128 (entry of Dec. 21, 1686); Letter from Edward Randolph to the Lords of the Comm. with Lawes (Mar. 25, 1687), U.K. Nat’l Archives Class 5/904, Doc. No. 175, at 171b, 171b-172a, <https://perma.cc/UC4Z-3JX6>.

430. *See* MATHER, *supra* note 30; Increase Mather, Memorial of Grievances Presented to James II (June 1, 1688) [hereinafter Mather, Memorial of Grievances], in 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES, *supra* note 409, at 114, 114-15; *see also* EDWARD RAWSON & SAMUEL SEWALL, THE REVOLUTION IN NEW ENGLAND JUSTIFIED, AND THE PEOPLE THERE VINDICATED FROM THE ASPERSIONS CAST UPON THEM BY MR. JOHN PALMER, IN HIS PRETENDED ANSWER TO THE DECLARATION 9-10 (Boston, Joseph Brunning 1691).

431. King James II, *His Majesties Gracious Declaration to All His Loving Subjects for Liberty of Conscience*, LONDON GAZETTE, Apr. 4-7, 1687, at 1, 1-2.

the King.<sup>432</sup> The following spring, Mather even traveled to England with the ostensible goal of thanking the King in person.<sup>433</sup> But Mather's real goal was to bad-mouth the new government while petitioning for a confirmation of land titles, a representative assembly for raising taxes, and "a Magna Charta for liberty of conscience."<sup>434</sup>

### C. The Glorious Revolution

The England in which Mather arrived in 1688 was in the middle of a generational debate about "the Word *Constitution*."<sup>435</sup> As in the pre-civil war debates about whether the King could raise revenue without an act of Parliament, post-civil war debates about the King's powers centered on whether they were compatible with the "Constitution of England."<sup>436</sup> By this point, the term *constitution* popularly referred to the laws and customs that constituted the metaphorical body politic of England. This metaphor was powerfully illustrated by the frontispiece to Thomas Hobbes's 1651 work *Leviathan*, which represented England as an enormous king whose body, or physical constitution, was made up of hundreds of tiny people.<sup>437</sup> Later works, such as Henry Care's 1680 *English Liberties*, similarly described England as a "Politick Body" whose "Constitution" and "Fundamental Laws" kept it "knit and preserv'd together, as the Natural Body [is] by the Bones and Sinews."<sup>438</sup>

For a "Whig"—someone who opposed King Charles II's and King James II's policies—the term constitution implied that the King required Parliament to take action in the same way that a head requires a body to take action. This principle was expressed in statutes such as the Habeas Corpus Act of 1679;<sup>439</sup>

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432. *Mather Autobiography*, *supra* note 380, at 320; see *The Humble Address of Sundry Ministers of the Gospel in New England, in Behalf of Themselves and Brethren, to the King's Most Excellent Majesty*, LONDON GAZETTE, Dec. 1-5, 1687, at 2.

433. See *Mather Autobiography*, *supra* note 380, at 320-25. In his diary, Mather wrote that Edward Randolph tried to prevent him from leaving by arresting him for writing allegedly defamatory letters about Randolph. See *id.* at 321-23; see also *supra* note 413.

434. See COTTON MATHER, PARENTATOR: MEMOIRS OF REMARKABLES IN THE LIFE AND THE DEATH OF THE EVER-MEMORABLE DR. INCREASE MATHER, WHO EXPIRED, AUGUST 23, 1723, at 109-12 (Boston, B. Green 1724); see also *Mather Autobiography*, *supra* note 380, at 320-25. But see MATHER, *supra*, at 112 (erroneously crediting the Magna Charta idea to the King).

435. See NORTH, *supra* note 362, at 332.

436. See *id.*

437. See HOBBS, *supra* note 218.

438. See HENRY CARE, ENGLISH LIBERTIES, OR, THE FREE-BORN SUBJECT'S INHERITANCE 1-4 (London, G. Larkin 1680).

439. See 31 Car. 2 c. 2, § 2 (authorizing prisoners to petition the Lord Chancellor, among others, to review the causes of their detentions).

unwritten traditions, such as when Parliament asserted its power to veto Crown appointments in 1641,<sup>440</sup> and agreements such as Magna Charta in 1215 or the Petition of Right in 1628, which required Parliament's consent before levying new taxes.<sup>441</sup> By contrast, for a "Tory"—someone who supported the Crown—"the true Constitution of England, is the Monarchy as established by Law."<sup>442</sup> The King was the only body that mattered, and Parliament was a mere collaborator.

In this atmosphere, when Mather's well-connected friends introduced him to King James II, the King was in the middle of defending his declaration of "Liberty of Conscience"<sup>443</sup> from accusations that it violated the constitution. As mentioned, the declaration suspended laws that punished religious dissidents, and a prominent group of Anglican bishops were calling this suspension "illegal" because, by the "constitution of the government in England," the "legislative power" did not "reside in the king alone, but in the king, Lords, and Commons."<sup>444</sup> When Mather came to praise the King for the declaration, the King warmed to him immediately.<sup>445</sup> In four meetings between June 1688 and October 1688, the King told Mather that he would "take care" of Mather's concerns in New England "with expedition."<sup>446</sup>

But before the King could take care of anything, he received news that he was about to lose his job. In September 1688, Prince William of Orange, the

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440. See Minutes of Dec. 1, 1641, in 4 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, WEIGHTY MATTERS IN LAW, REMARKABLE PROCEEDINGS IN FIVE PARLIAMENTS 436, 437-51 (John Rushworth ed., London, J.A. 1682) (reporting the "Petition of the House of Commons, which accompanied the Remonstrance of the State of the Kingdom").

441. See Magna Charta 1215, John 16; Petition of Right 1628, 3 Car. c. 1.

442. NORTH, *supra* note 362, at 332.

443. See King James II, *supra* note 431.

444. See Petition of William Sancroft, Archbishop of Canterbury, et al. to James II, King of Eng. (1688), in A COMPLETE COLLECTION OF PAPERS IN TWELVE PARTS: RELATING TO THE GREAT REVOLUTIONS IN ENGLAND AND SCOTLAND collection 1, at 1, 1-2 (Gilbert Burnet ed., London, J.D. 1689); Proceedings in the Trial of the Seven Bishops (1688), in 12 HOWELL'S STATE TRIALS, *supra* note 213, at 183, 193-95; *id.* at 365-67 (argument of Sir Heneage Finch).

445. See *Mather Autobiography*, *supra* note 380, at 328-30, 341. Mather delivered several petitions to the King during their meetings. See, e.g., Mather, Memorial of Grievances, *supra* note 430, at 115; Petition of Increase Mather et al. to James II, King of Eng. (Aug. 10, 1688), U.K. Nat'l Archives Class 1/65, Doc. No. 39, at 91a, <https://perma.cc/MGN5-35SV>; Petition of Increase Mather et al. to James II, King of Eng. (Aug. 1688), U.K. Nat'l Archives Class 1/65, Doc. No. 52, at 162a, <https://perma.cc/F335-M5R3>.

446. See *Mather Autobiography*, *supra* note 380, at 328-31; see also, e.g., Memorandum of James II, King of Eng. (Aug. 1688), U.K. Nat'l Archives Class 1/65, Doc. No. 53, at 165a, <https://perma.cc/RX46-FP3N>; Minutes of the Committee for Trade and Plantations (Oct. 17, 1688), U.K. Nat'l Archives Class 5/905, Doc. No. 1, at 42b, <https://perma.cc/R7EL-2RN6>.

leader of the Netherlands, announced that he planned to lead an army across the English Channel to defend “the whole Constitution of the English government.”<sup>447</sup> The Prince argued that the King had arbitrarily “seized on the Charters of most of those Towns that have a right to be represented by their burgesses in parliament,”<sup>448</sup> and that he wanted to give these “ancient Prescriptions and Charters” back to the corporations that lost them.<sup>449</sup> A terrified King James II tried to preempt William’s invasion, responding that he would restore every corporation in England “into the same State and condition they were . . . before any Deed of Surrender was made of their Charters or Franchises, or Proceedings against them . . . upon any *Quo Warranto*.”<sup>450</sup> But the Prince wrote back that it was insufficient for the King to “retract some of the arbitrary and despotic powers that [he] had assumed.”<sup>451</sup> The Prince demanded “a Declaration of the Rights of the subjects” and a Parliament untainted by the Crown’s *quo warranto* proceedings.<sup>452</sup>

Even though Mather had a good relationship with King James II, he quickly concluded that William was going to win this conflict. In an anonymous pamphlet, he urged the Prince to restore the charters of not just English corporations but also the Massachusetts Bay Company. “[I]f it be an illegal and unjust thing to deprive good Subjects here of their *Ancient Rights and Liberties*,” he wrote, “it cannot be consistent with Justice and Equity to deal so with those that are afar off[.]”<sup>453</sup> Using language from the Prince’s public declarations, Mather also emphasized that with “their *Charter* being gone,” New Englanders were being governed by a “Despotick and Absolute Power.”<sup>454</sup>

Soon after Mather published this pamphlet in late 1688, William invaded England. By December 1688, James II had escaped to France, and William had become the *de facto* leader of England.<sup>455</sup> Mather “lost no Time” trying to get in touch with the Prince, meeting him in January to petition for the restoration of New England’s “Charters[,] Priviledges[,] and Originall Rights

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447. First Declaration of Prince William, *supra* note 402, cols. 10-11.

448. *Id.* col. 5.

449. *See id.* col. 10.

450. King James II, *A Proclamation for Restoring Corporations to Their Ancient Charters, Liberties, Rights and Franchises*, LONDON GAZETTE, Oct. 15-18, 1688, at 1, 1; *see also* King James II, *A Declaration*, LONDON GAZETTE, Nov. 5-8, 1688, at 1.

451. The Prince of Orange’s Additional Declaration, 24 Oct. 1688, 5 Parl. Hist. Eng. cols. 11-12.

452. *See id.* cols. 12-13.

453. MATHER, *supra* note 30, at 7-8.

454. *Id.* at 4; *see also* First Declaration of Prince William, *supra* note 402, cols. 2-7.

455. *See* 23-28 Dec. 1688, 5 Parl. Hist. Eng. cols. 23-26.

and Constitutions.”<sup>456</sup> Mather also intervened when the Prince drafted a letter instructing the Crown’s governors in North America to stay in their positions.<sup>457</sup> He convinced William that the letter “should not be sent to New England”<sup>458</sup> and that Andros should be replaced.<sup>459</sup>

In February 1689, Parliament formally offered the Crown to William and his wife, Mary, as joint sovereigns of England. For the first few months of their reign, it appeared that Mather might be able to convince either the Crown or Parliament to restore the Massachusetts Bay Company’s charter. Mather began with the Crown, testifying before William and Mary’s Privy Council that the judgment against the charter was invalid because the legal procedure of the scire facias made it impossible for the company to appear in court and defend itself.<sup>460</sup> But the privy councilors also heard from Sir Robert Sawyer<sup>461</sup>—the Attorney General who prosecuted the charters of both the Massachusetts Bay Company and the City of London<sup>462</sup>—and their enthusiasm for Mather’s side of the case dimmed. After hearing about some of the “irregularities in government there,” King William III told Mather that he had no interest in reestablishing an independent commonwealth in Massachusetts.<sup>463</sup> But his Administration did agree to replace Andros’s Dominion of New England with “a new establishment” that would “preserve the rights of the people of New England.”<sup>464</sup>

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456. See *Mather Autobiography*, *supra* note 380, at 331-32; Petition of William Phipps and Increase Mather to William, Prince of Orange, and Mary, Princess of Orange (Feb. 18, 1689), U.K. Nat’l Archives Class 5/751, Doc. No. 2, at 3a, 3a, <https://perma.cc/VLA5-9PFW>; see also Letter from Abraham Kick to Mary, Princess of Orange (Feb. 1, 1689), U.K. Nat’l Archives Class 5/855, Doc. No. 1, at 93, <https://perma.cc/79QV-VZ73>.

457. See *Mather Autobiography*, *supra* note 380, at 331-32; see also Letter from William, Prince of Orange, to Edmund Andros (Jan. 12, 1689) [hereinafter Letter from Prince William to Edmund Andros], U.K. Nat’l Archives Class 5/905, Doc. No. 1, at 25a, <https://perma.cc/YJU6-VZZN>.

458. See *Mather Autobiography*, *supra* note 380, at 331-32; Letter from Prince William to Edmund Andros, *supra* note 457, at 25b (“Upon the Application of S[ir] W[ilia]m Phipps & Mr Mather this Letter was stopt: & ordered not to be sent.”).

459. See Journal of Lords of Trade and Plantations (Feb. 20, 1689) [hereinafter Lords of Trade Minutes of Feb. 20, 1689], in 13 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 8, 8 (J.W. Fortescue ed., 1901); Journal of Lords of Trade and Plantations (Feb. 22, 1689) [hereinafter Lords of Trade Minutes of Feb. 22, 1689], in 13 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra*, at 8, 8.

460. See MATHER, *supra* note 30, at 2; Lords of Trade Minutes of Feb. 20, 1689, *supra* note 459, at 8.

461. See Lords of Trade Minutes of Feb. 22, 1689, *supra* note 459, at 8.

462. See *supra* text accompanying notes 350-51.

463. See *Mather Autobiography*, *supra* note 380, at 332-36.

464. Lords of Trade Minutes of Feb. 22, 1689, *supra* note 459, at 8.

As the Crown worked on this project, Mather turned to Parliament, which looked even more promising.<sup>465</sup> When Parliament offered the Crown to William and Mary, it conditioned the offer on a “Declaration of Rights,” later known as the “Bill of Rights,” which included a list of actions it expected the Crown never again to attempt. An early draft of this declaration included a provision that would cause all corporations to forever be secured “against *Quo Warranto*’s, and Surrenders, and Mandates; and restor[ed] . . . to their ancient Rights.”<sup>466</sup>

The final draft of the Bill of Rights omitted this provision,<sup>467</sup> but the House of Commons took the deleted language and separately declared in March 1689 “That the Judgment given upon the *Quo Warranto* against the City of *London* . . . [and] the other Cities . . . and Plantations . . . are illegal, and a Grievance.”<sup>468</sup> (The term “Plantations” referred to colonial corporations like the Massachusetts Bay Company.) A week later, the House of Commons began debating a Bill for Restoring Corporations.<sup>469</sup> Mather became a fierce advocate of this bill, which promised to “revers[e] the Judgment against the old charter” of the company<sup>470</sup> while also declaring generally “that Corporations could not be forfeited, nor their Charters surrendered.”<sup>471</sup>

#### D. The Coup

This was where things stood at the end of June 1689, when Mather and the rest of England received some startling news from Boston. According to

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465. See, e.g., Letter from Samuel Sewall to Thomas Papillon (Apr. 26, 1689), in 1 SEWALL’S DIARY, *supra* note 394, at 212, 212-13. Samuel Sewall, Mather’s friend and confidant, arrived in London to help Mather in January. See 1 SEWALL’S DIARY, *supra* note 394, at 192 (entry of Jan. 12, 1689); *id.* (entry of Jan. 13, 1689).

466. 7 Feb. 1689, 10 HC Jour. 22; see 2 Feb. 1689, 10 HC Jour. 16-18; 7 Feb. 1689, 10 HC Jour. 20-22; 11 Feb. 1689, 10 HC Jour. 24-26; 13 Feb. 1689, HC Jour. 29-30.

467. It did allude to quo warrantos, however, criticizing King James II for his “Prosecutions in the Court of Kings Bench for Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegal Courses.” Bill of Rights 1688, 1 W. & M. sess. 2 c. 2.

468. 5 Mar. 1689, 10 HC Jour. 41-42.

469. See 16 Mar. 1689, 10 HC Jour. 50-51. For continuations of the debate, see 30 Apr. 1689, 10 HC Jour. 112-13; 2 May 1689, 10 HC Jour. 117-20; 25 June 1689, 10 HC Jour. 196-98; 23 July 1689, 10 HC Jour. 231-34; 30 Oct. 1689, 10 HC Jour. 276-77; 12 Nov. 1689, 10 HC Jour. 284; 19 Dec. 1689, 10 HC Jour. 312-13; 2 Jan. 1690, 10 HC Jour. 321-23; and 10 Jan. 1690, 10 HC Jour. 328-30.

470. See *Mather Autobiography*, *supra* note 380, at 327; see also 1 SEWALL’S DIARY, *supra* note 394, at 218 (entry of May 31, 1689) (recounting the lobbying of Thomas Papillon, a member of Parliament).

471. 3 BURNET, *supra* note 350, at 52 (London, A. Millar 1753).

sources there, the royal government had just been overturned by a coup.<sup>472</sup> Governor Edmund Andros was under arrest, Edward Randolph was in jail, and former chairman Simon Bradstreet, “tho’ he [was] well towards Ninety Years of Age,” was in control.<sup>473</sup> Mather was “surpris’d with joy” by this news.<sup>474</sup> But the Crown and Parliament became increasingly horrified as letters slowly trickled in explaining what had happened.

The letters revealed that on April 18, 1689, the town of Boston awoke to the sound of shouting, drums, and “at least a Thousand men in Armes crying One and all; seizing and carrying to Prison whosoever they suspected would oppose or disprove their designs.”<sup>475</sup> None of the letters seemed sure of where these men came from; Simon Bradstreet, for example, wrote on behalf of a group of prominent Bostonians that they were “Surprised with the Peoples sudden taking to Arms,” a “motion whereof we were wholly ignorant.”<sup>476</sup>

There were plenty of hints that Bradstreet was being disingenuous and that he planned the insurrection in response to news of the Glorious Revolution in England.<sup>477</sup> But even if he truly knew nothing about the armed men’s origins, he immediately capitalized on their “Alacrity.”<sup>478</sup> By noon, the

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472. See, e.g., NATHANAEL BYFIELD, An Account of the Late Revolution in New-England (Apr. 29, 1689) [hereinafter Byfield Apr. 1869 Letter], in AN ACCOUNT OF THE LATE REVOLUTION IN NEW-ENGLAND TOGETHER WITH THE DECLARATION OF THE GENTLEMEN, MERCHANTS, AND INHABITANTS OF BOSTON, AND THE COUNTRY ADJACENT 3, 3-5 (London, Ric. Chiswell 1689) [hereinafter BYFIELD, ACCOUNT AND DECLARATION]; Letter from an Ingenious Merchant of Boston in New England to His Friend in London (May 16, 1690), U.K. Nat’l Archives Class 5/855, Doc. No. 3, at 4a, 4a, <https://perma.cc/D5BT-9PSK>.

473. See Byfield Apr. 1869 Letter, *supra* note 472, at 4-5; NATHANIEL BYFIELD, AN ACCOUNT OF THE LATE REVOLUTIONS IN NEW-ENGLAND; IN A LETTER 5-6 (n.p., 1689) [hereinafter BYFIELD JUNE 1689 LETTER].

474. See 1 SEWALL’S DIARY, *supra* note 394, at 222 (entry of June 28, 1689).

475. A Narrative of the Proceedings att Boston in New England, upon the Inhabitants Seizeing the Government There, *supra* note 401, at 7a.

476. Letter from Waite Winthrop et al. to Edmund Andros (Apr. 18, 1689), in BYFIELD, ACCOUNT AND DECLARATION, *supra* note 472, at 20, 20.

477. See C. DOVE, NEW-ENGLAND’S FACTION DISCOVERED, OR, A BRIEF AND TRUE ACCOUNT OF THEIR PERSECUTION OF THE CHURCH OF ENGLAND; THE BEGINNING AND PROGRESS OF THE WAR WITH THE INDIANS; AND OTHER LATE PROCEEDINGS THERE, IN A LETTER FROM A GENTLEMAN OF THAT COUNTRY, TO A PERSON OF QUALITY 2-4 (London, J. Hindmarsh 1690); RAWSON & SEWALL, *supra* note 430, at 5-6 (reproducing a February 1689 affidavit of John Winslow); Edmund Andros, The State of New England and the Government of Sir Edmund Andros (May 27, 1690), U.K. Nat’l Archives Class 5/855, Doc. No. 93, at 223a, 223a, <https://perma.cc/XN5Y-S88U>. For more on the immediate lead-up to the coup, see generally MARY LOU LUSTIG, THE IMPERIAL EXECUTIVE IN AMERICA: SIR EDMUND ANDROS, 1637-1714 (2002).

478. See BYFIELD JUNE 1689 LETTER, *supra* note 473, at 4.

militia had grown to 5,000 people and had captured most of Boston.<sup>479</sup> Among their prisoners were Edward Randolph and the crew of the frigate Randolph had parked in Boston Harbor after announcing the new government in 1686.<sup>480</sup> With Governor Andros still at large and some fortifications still occupied by the Governor's soldiers, Bradstreet and the other "gentlemen" of Boston read aloud a public declaration criticizing Andros's commission as "Illegal," both procedurally and substantively.<sup>481</sup> Procedurally, the commission was made possible only because "Our *Charter*," the "hedge which kept us from the wild Beasts of the field, [was] effectually broken down . . . with a most injurious pretence (and scarce that) of Law."<sup>482</sup> Without identifying Edward Randolph by name, the junta blamed the charter's demise on a defective legal process initiated by the "unwearied sollicitations, and slanderous accusations of a man, for his *Malice* and *Falshood*, well known unto us all."<sup>483</sup> Substantively, the commission was "Absolute and Arbitrary" because it could not check the controversial practices about which Increase Mather "undertook a Voyage into *England*" to complain.<sup>484</sup>

Bradstreet's junta explained that going forward, the militia captains were going to "seize upon the Persons of those few *Ill Men* which have been (next to our Sins) the grand Authors of our Miseries."<sup>485</sup> In seizing people, the group said that it was merely following the example of "the Prince of *Orange*," who had invaded England and punished "those *worst of men*, by whom *English Liberties* have been destroy'd."<sup>486</sup> The junta's plan was to hold Randolph and Andros and await "what Justice, Orders from his Highness, with the *English Parliament* shall direct."<sup>487</sup> Immediately after finishing this declaration, the junta wrote Andros and his soldiers a letter, saying: "[T]endering your own Safety, We judge it necessary you forthwith surrender and deliver up the

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479. See A Narrative of the Proceedings att Boston in New England, upon the Inhabitants Seizeing the Government There, *supra* note 401, at 7a.

480. See *Whitehall, July 25*, *supra* note 398, at 2; A Narrative of the Proceedings att Boston in New England, upon the Inhabitants Seizeing the Government There, *supra* note 401, at 7b.

481. See The Declaration of the Gentlemen, Merchants and Inhabitants of Boston, and the Country Adjacent (Apr. 18, 1689), in BYFIELD, ACCOUNT AND DECLARATION, *supra* note 472, at 7, 9 (capitalization altered).

482. *Id.* at 8.

483. *Id.*

484. See *id.* at 9-13, 15-16.

485. *Id.* at 19.

486. *Id.* at 18.

487. *Id.* at 19.



Government and Fortification to be preserved to be disposed according to Order and Direction from the Crown of England, which suddenly is expected may arrive.”<sup>488</sup>

It didn’t take long for Andros to surrender. His fortified soldiers surrendered too after someone took Randolph, “clapp[ed] a Pistoll to his Brest, [and] threat[ened] to shoot him, if hee did not goe with them to the Fort and acquaint those in it . . . that it was [the Governor’s] pleasure and direction, that they should deliver it up.”<sup>489</sup> For the next ten months, Governor Andros and about two dozen other officials—Randolph excepted—were held in one of the forts.<sup>490</sup> Randolph was kept in the common jail for being “the very man, whose lyes and clamours, and malicious unwearied Applications, had the greatest influence in the overthrow of our former Government.”<sup>491</sup>

Although this coup had dozens of untold motivations, the reason mentioned by “the greatest part of the People” was the return of their “ancient Charter Government.”<sup>492</sup> Until it arrived, the junta and militia captains agreed that Bradstreet and other members of the company’s 1686 board, together with “such other Gentlemen as they shall Judge meet to Associate to them,” would be “entrusted with the Safety of the People and Conservation of the Peace.”<sup>493</sup>

#### E. The Restoration of the Charter Constitution

This relative unanimity lasted until May 1, 1689, when former shareholders of the Massachusetts Bay Company began “agitat[ng] for “the Necessity of Settling some forms of Government.”<sup>494</sup> The text of the company’s charter set

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488. Letter from Waite Winthrop et al. to Edmund Andros, *supra* note 476, at 20.

489. A Narrative of the Proceedings att Boston in New England, upon the Inhabitants Seizeing the Government There, *supra* note 401, at 7b.

490. See Byfield Apr. 1869 Letter, *supra* note 472, at 3-5; Sir Edmond Andros’ Report of His Administration to the Right Honorable the Lords of the Committee for Trade and Plantations (1690), in 3 THE ANDROS TRACTS: BEING A COLLECTION OF PAMPHLETS AND OFFICIAL PAPERS ISSUED DURING THE PERIOD BETWEEN THE OVERTHROW OF THE ANDROS GOVERNMENT AND THE ESTABLISHMENT OF THE SECOND CHARTER OF MASSACHUSETTS 19, 22-24 (W.H. Whitmore ed., Boston, John Wilson & Son 1874).

491. BYFIELD JUNE 1689 LETTER, *supra* note 473, at 5; see Letter from Edward Randolph to the Governor of the Colony of Barb. (May 16, 1689), in THE HUTCHINSON PAPERS, *supra* note 15, at 571, 571.

492. See ROBERT CALEF, MORE WONDERS OF THE INVISIBLE WORLD, OR, THE WONDERS OF THE INVISIBLE WORLD, DISPLAY’D IN FIVE PARTS 149 (London, Nath. Hillar 1700); Letter from Simon Bradstreet to John Hampden, Jr. (June 8, 1689), in 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES, *supra* note 409, at 538, 538-39.

493. Minutes of the Council for Safety and Conservation of the Peace (Apr. 20, 1689), in 6 COURT RECORDS (1689-1682), Mass. Archives Felt Collection Doc. No. GC3-1701x, at 2, 2.

494. See Minutes of the Council for Safety and Conservation of the Peace (May 1, 1689), in 6 COURT RECORDS, *supra* note 493, at 11, 11.

elections on the last Wednesday in May,<sup>495</sup> and a split emerged between “[a] great part of the *Country*” who wanted elections “according to our Charter rules”<sup>496</sup> and people who worried that English officials might “treat them as revoltors from their allegiance” if, without the Crown’s permission, they held elections for a vacated corporation.<sup>497</sup> To both groups, there also seemed to be something uncomfortable about elections in which the only people who could participate were members of the Puritan Church. A member of the “wait and see” camp wrote an anonymous pamphlet, *From a Gentleman of Boston to a Friend in the Countrey*, which argued that “[w]e are not in a fit frame nor posture for a present Choice.”<sup>498</sup> Instead of holding elections, the author proposed resuming the government last elected in 1686, which could pass laws admitting more shareholders so that the next election would be more representative.<sup>499</sup> Other pamphleteers agreed with this sort of compromise on the ground that reconstituting a corporation without the Crown’s permission would simply open up the company to a new quo warranto.<sup>500</sup>

By contrast, members of the “hold elections” camp argued that the only legal path forward was following the text of the charter. In *The Countrey-Man’s Answer to a Gentleman in Boston*, another anonymous pamphleteer responded to the first one: “It is absolutely inconsistent with our *Charter-Priviledges & Directions, After a Three-years Vacancy, for an Old Court to Reasume Governmentt without a new Choice.*”<sup>501</sup> The author added, “If there be a *Reasuming* of our former Government according to CHARTER, then the *very Day of Election* must be attended, otherwise we have no War[r]ant to pitch upon any *other* day till a Twelve moneth be roll’d round.”<sup>502</sup> A third pamphlet,

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495. See MBC Charter, *supra* note 94, at 12 (providing for elections “yearely once in the yeare for ever hereafter, namely, the last Wednesday in Easter terme yearely”); see also COWELL, *supra* note 109, at Tt 2, col. 1.

496. See BYFIELD JUNE 1689 LETTER, *supra* note 473, at 5; Minutes of the Council for Safety and Conservation of the Peace (May 9, 1689), in 6 COURT RECORDS, *supra* note 493, at 15, 16.

497. Letter from Edward Randolph to the Governor of the Colony of Barb., *supra* note 491, at 572; see also BYFIELD JUNE 1689 LETTER, *supra* note 473, at 5-6; CALEF, *supra* note 492, at 149.

498. From a Gentleman of Boston to a Friend in the Countrey (1689), U.K. Nat’l Archives Class 5/855, Doc. No. 5, at 6a, 6a, <https://perma.cc/9NU9-L6TZ>.

499. See *id.*

500. See GERSHOM BULKELEY, THE PEOPLE’S RIGHT TO ELECTION OR ALTERATION OF GOVERNMENT IN CONNECTICUTT, ARGUED IN A LETTER 4-8 (Philadelphia, William Bradford 1689).

501. The Countrey-Man’s Answer to a Gentleman in Boston: Mr. N.N.’s Letter to a Friend in the Countrey (1689), U.K. Nat’l Archives Class 5/855, Doc. No. 6, at 7a, 7a, <https://perma.cc/T7EA-MCLJ>.

502. *Id.*

*The Case of Massachusetts Colony Considered, in a Letter to a Friend at Boston*, agreed with the second one.<sup>503</sup> “[T]he Charter of this Countrey is deservedly accounted our *Magna Charta*,” its author wrote, adding that “*without* [it], we are wholly without *Law*.”<sup>504</sup>

Bradstreet’s Council for Safety tried to resolve this dispute by calling for the “Advice of the People,” asking towns to send representatives to meet in a “conven[tion]” in Boston on May 9.<sup>505</sup> These representatives ended up agreeing not to hold “an *Election* on the proper Day” in light of the even more important consideration of how “the Authority of *England*” might respond.<sup>506</sup> Instead, the representatives demanded that the government of 1686 resume governing “according to our Charter Rights . . . till we have Confirmation from the Crown of England which we daily hope for,” and that it increase the number of people who could vote in elections.<sup>507</sup> At first, members of the old government refused, calling for a new convention with even more representatives on May 22.<sup>508</sup> But when these representatives of fifty-four towns and villages met, they again voted “to settle a Government according to our ancient Patent” with Bradstreet back in the chairmanship.<sup>509</sup> This time, the living members of the 1686 board agreed to “Accept the Care and Government of the People of this Colony, according to the Rules of the Charter,” but they added a disclaimer “that they do not intend an Assumption of Charter Government.”<sup>510</sup>

Around this time, in two addresses to King William III and Queen Mary II, Bradstreet and the rest of the Massachusetts government explained their behavior by comparing the Boston coup to the Glorious Revolution—with the only difference being that the constitution the Bostonians were protecting was

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503. See *The Case of Massachusetts Colony Considered, in a Letter to a Friend at Boston* (May 18, 1689), U.K. Nat’l Archives Class 5/855, Doc. No. 4, at 5a, 5a, <https://perma.cc/W6N2-5DY6>.

504. *Id.*

505. Minutes of the Council for Safety and Conservation of the Peace (May 2, 1689), in 6 COURT RECORDS, *supra* note 493, at 11, 12.

506. See BYFIELD JUNE 1689 LETTER, *supra* note 473, at 6.

507. See Minutes of the Council for Safety and Conservation of the Peace (May 10, 1689), in 6 COURT RECORDS, *supra* note 493, at 16, 16-18.

508. *See id.*

509. See Declaration of the Convention of Massachusetts (May 24, 1689), in 13 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 459, at 95, 95; Minutes of the Council for Safety and Conservation of the Peace (May 22, 1689), in 6 COURT RECORDS, *supra* note 493, at 25, 25-26; Minutes of the Council for Safety and Conservation of the Peace (May 23, 1689), in 6 COURT RECORDS, *supra* note 493, at 26, 26; Minutes of the Council for Safety and Conservation of the Peace (May 24, 1689) [hereinafter Council for Safety Minutes of May 24, 1689], in 6 COURT RECORDS, *supra* note 493, at 26, 26-27.

510. Council for Safety Minutes of May 24, 1689, *supra* note 509, at 26-27.

written down.<sup>511</sup> Bradstreet explained that they didn't think it safe "to fall into the full Exercise of Charter Government" without the Crown's permission, but that governing themselves "according to the Rules of the Charter, for the Conservation of the Peace, and Common Safety," was most "agreeable to Our Charter Constitution."<sup>512</sup>

These two addresses were shipped to England, published in a single volume, and read to William and Mary in August 1689.<sup>513</sup> Meanwhile, in London, Increase Mather led a pamphleteering and letter-writing campaign that talked up the coup's goals in the language of English constitutionalism.<sup>514</sup> The revolutionaries in Boston were fighting for "their Ancient Constitution" and against "[a]rbitrary" government, Mather wrote.<sup>515</sup> Another pamphlet argued that "the good or perdition of [a body] Politick, as well as other Bodies, proceeds from their Constitution," and that the Massachusetts Bay Company "had a Sweet, Easie, and Gentle Government, Made and Constituted by, as well as for the good of the People."<sup>516</sup> In a letter, Simon Bradstreet cited Parliament's declaration that the King's quo warranto proceedings were "illegal and a grievance."<sup>517</sup> He hoped "that in this day of General Restoration of Charters and English Liberties we shall not be forgotten, nor left without our Share therein, but be again fixt and settled in our former Charter Governm[en]t."<sup>518</sup>

But friends of the company were not the only ones writing about it.<sup>519</sup> One of the officials imprisoned with Andros urged the Crown and Parliament not to return New England to its former "Tyrannical and Arbitrary Constitution,

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511. See Address of the President and Council for Safety of the People and Conservation of the Peace to William III, King of Eng., and Mary II, Queen of Eng. (May 20, 1689), in 6 COURT RECORDS, *supra* note 493, at 22, 22-24.

512. Simon Bradstreet, Address and Petition of the Governour and Council and Convention of Representatives of the People of the Colony of the Massachusets in New England to William III, King of Eng., and Mary II, Queen of Eng. (June 6, 1689), in 6 COURT RECORDS, *supra* note 493, at 32, 33. For a different version of the address, see Bradstreet, *supra* note 401.

513. See HENRY ASHURST, TWO ADDRESSES FROM THE GOVERNOUR, COUNCIL, AND CONVENTION OF THE MASSACHUSETS COLONY ASSEMBLED AT BOSTON IN NEW-ENGLAND: PRESENTED TO HIS MAJESTY AT HAMPTON-COURT, AUGUST 7, 1689 (London, Richard Baldwin 1689).

514. See, e.g., BYFIELD JUNE 1689 LETTER, *supra* note 473; Byfield Apr. 1869 Letter, *supra* note 472.

515. See MATHER, *supra* note 30, at 10-11.

516. See THE HUMBLE ADDRESS OF THE PUBLICANS OF NEW-ENGLAND, TO WHICH KING YOU PLEASE: WITH SOME REMARKS UPON IT 21, 24-25 (London, 1691) (emphasis omitted).

517. See Letter from Simon Bradstreet to John Hampden, Jr., *supra* note 492, at 538-39.

518. *Id.* at 539.

519. See, e.g., Answer to the Account of the Late Revolution at Boston (1689), U.K. Nat'l Archives Class 5/855, Doc. No. 11, at 20a, <https://perma.cc/PBL4-J5KQ>.

deprived of the Laws and Liberties of *English-men*, forced in their Consciences, suffered death for Religion, and denied *Appeals* to the King.”<sup>520</sup> Anonymous pamphleteers and petitioners joined him in reminding the English public that the company had called itself a “*Commonwealth*,” had tried to “wholly shake off the Royal jurisdiction,”<sup>521</sup> and wanted to “be at liberty again”<sup>522</sup> to oversee “the slavery and thraldome of a most extravagant and Arbitrary Government . . . under Colour and pretence of a Charter (wherein no part thereof but the name was ever made use of or regarded).”<sup>523</sup>

King William III’s perception of Massachusetts changed with each of these back-and-forth missives. At the beginning of July 1689, when Mather first asked the King if he had been “informed of the great service which your subjects in New England have done for your Majesty,”<sup>524</sup> the King responded favorably and agreed to “doe what is in His power towards restoring [their] Liberties.”<sup>525</sup> By the end of July, however, as the King received letters opposing the government, he ordered Massachusetts to send by “the first ship” everyone it was imprisoning to be tried in England.<sup>526</sup> In August, after the King received the addresses from the Council for Safety, he wrote a letter signifying “Our Royal approbation” and “Gratious acceptance” of the government, authorizing it “to continue in Our name your care in the administration thereof and preservation of the Peace.”<sup>527</sup> But the following April, when Randolph and Andros finally arrived back in England on charges of treason, the King’s perception hardened against the colony for good.

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520. PALMER, *supra* note 162, at 21.

521. See SOME CONSIDERATIONS HUMBLY OFFERED TO THE PARLIAMENT: BEING A SHORT DISCOURSE SHEWING THE GREAT INCONVENIENCE OF JOYNING THE PLANTATION CHARTERS WITH THOSE OF ENGLAND IN THE GENERAL ACT OF RESTORATION, AND THE NECESSITY OF HAVING FOR THEM A PARTICULAR ACT 1-2 (London, J. Prideaux 1689); see also The Case of Massachusetts Colony Considered, in a Letter to a Friend at Boston, *supra* note 503.

522. See Considerations Humbly Offered to the Parliament (1689), in 3 THE ANDROS TRACTS, *supra* note 490, at 3, 6.

523. See Address of Members of the Church of England in Boston to William III, King of Eng. (Jan. 1690), U.K. Nat’l Archives Class 5/905, Doc. No. 3, at 93a, 93a-93b, <https://perma.cc/2DNH-DG97>.

524. See Mather *Autobiography*, *supra* note 380, at 332-33.

525. See Letter from Samuel Sewall to Thomas Goodwin (July 6, 1689), in 1 SEWALL’S DIARY, *supra* note 394, at 226, 226.

526. See Order in Council of King William III (July 25, 1689), U.K. Nat’l Archives Class 5/905, Doc. No. 2, at 58a, 58a, <https://perma.cc/X2WQ-UUYQ>.

527. Letter from William III, King of Eng., to the Mass. Colony (Aug. 12, 1689), U.K. Nat’l Archives Class 5/905, Doc. No. 2, at 68a, 68a, <https://perma.cc/892A-ABCZ>; see also Mather *Autobiography*, *supra* note 380, at 339.

F. The Trial of Edward Randolph

Andros and Randolph's treason trial in England was a disaster for Massachusetts; Mather later wrote that the Massachusetts agents prosecuting the charges "cutt the throat of their Countrey" with their conduct.<sup>528</sup> When the prosecutors arrived with Andros and Randolph for a preliminary hearing on April 10, 1690, they didn't bring with them any written, formal charges<sup>529</sup>—much to the annoyance of the privy councilors conducting the trial.<sup>530</sup> Over the next week, the prosecutors drafted charges accusing the men of the same thing the Bradstreet junta did one year earlier: making laws pursuant to an illegal commission.<sup>531</sup>

But when the prosecutors returned to the hearing with written charges, things only got worse. First of all, they saw that Andros and Randolph were being represented by England's two most famous defense lawyers at the time: Sir Robert Sawyer, the former Attorney General who had prosecuted the City of London and Massachusetts Bay Company's charters, and Sir George Treby, the current Attorney General who had defended the City of London and recently served as the principal author of the Bill of Rights.<sup>532</sup> More importantly, the prosecutors learned that if they lost the case after signing the charges, they could be held personally liable for defamation or other civil actions.<sup>533</sup> In this context—with weak charges, strong opponents, and a massive penalty for losing—the prosecutors simply refused to sign the charges, saying the charges came "from the People."<sup>534</sup> The Privy Council rejected this form of pleading, dismissing the charges for being "from nobody."<sup>535</sup> After being held captive for almost a year, Andros and Randolph were released a week after the hearing.<sup>536</sup>

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528. See *Mather Autobiography*, *supra* note 380, at 340-41.

529. See Letter from Elisha Cooke to Simon Bradstreet (Oct. 16, 1690), 45 PROC. MASS. HIST. SOC'Y 644, 646-49 (1912).

530. See Letter from Thomas Brinley to Francis Brinley (May 28, 1690), 83 PROC. AM. ANTIQUARIAN SOC'Y 244, 246-47 (1973).

531. See Letter from Elisha Cooke to Simon Bradstreet, *supra* note 529, at 646-47; The Charge Against Sir Edmund Andros and Others (Apr. 14, 1690), U.K. Nat'l Archives Class 5/855, Doc. No. 80, at 164a, <https://perma.cc/R6R8-PYNJ>.

532. See Letter from Elisha Cooke to Simon Bradstreet, *supra* note 529, at 647; Letter from Thomas Brinley to Francis Brinley, *supra* note 530, at 247-48; see also *supra* text accompanying notes 350-51; *supra* text accompanying notes 364-70.

533. See Letter from Elisha Cooke to Simon Bradstreet, *supra* note 529, at 648-49.

534. See Letter from Thomas Brinley to Francis Brinley, *supra* note 530, at 248-49.

535. See *id.* at 249.

536. See Order Discharging Sir Edmund Andros (Apr. 24, 1690), U.K. Nat'l Archives Class 5/905, Doc. No. 3, at 98b, <https://perma.cc/4WXH-8Z9Z>.

This hearing “extremely Scandalized” all the people whom Mather had recruited “to concern themselves for New England.”<sup>537</sup> The colony’s treatment of Andros and Randolph suggested that Massachusetts needed something other than its old charter back to ensure that its future administration of justice would be fair. Soon after the hearing, Parliament passed a law that restored the corporate charter of the City of London but not that of the Massachusetts Bay Company.<sup>538</sup> And in 1691, William and Mary ordered their Attorney General to draft a new charter for a new Province of the Massachusetts Bay—one that took away the colony’s corporate status and made its laws and governor subject to Crown oversight.<sup>539</sup>

### G. The New Charter

Somewhat surprisingly, given the circumstances, the Crown and Attorney General Treby consulted with Mather over the new charter.<sup>540</sup> Mather wanted the new charter to “Reestablish the[] Corporation” while explicitly codifying rights and institutions the old corporation had read into its charter, including clear title to Maine, an admiralty court, the power to tax all inhabitants, and a powerful “Generall Assembly” of representatives elected by shareholders.<sup>541</sup> The Crown accepted virtually all of these requests except for the first; instead of creating a new corporation, King William III decided that he wanted to appoint an executive council and “Governour of his own,” with “a Negative Voice on all Acts of Government.”<sup>542</sup> Mather later recalled that he balked at this change, but the Privy Council replied that his “*Consent* was not expected nor desired: For they did not think the *Agents of New-England* were *Plenipotentiaries* from another Sovereign State.”<sup>543</sup>

Mather returned home to Boston proud of what he was able to bring back. “[B]y this *New Charter* great Priviledges are granted to the People in *New-*

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537. See *Mather Autobiography*, *supra* note 380, at 340-41.

538. See London, Quo Warranto Judgment Reversed Act 1690, 2 W. & M. c. 8; Letter from Thomas Brinley to Francis Brinley, *supra* note 530, at 246; *see also* 23 May 1690, 10 HC Jour. 423-24.

539. See Order upon the Report Touching a New Charter for the Colony of the Massachusetts Bay (Apr. 30, 1691), U.K. Nat’l Archives Class 5/905, Doc. No. 4, at 140a, <https://perma.cc/PJN2-GW2B>.

540. See, e.g., *Mather Autobiography*, *supra* note 380, at 335-36; George Treby, Abstract of the Minutes for the Charter of the Massachusetts Colony Directed at the Committee of Plantations, with the Report of Mr. Attorney Generall (July 29, 1691), U.K. Nat’l Archives Class 5/856, Doc. No. 176, at 520a, <https://perma.cc/W3MU-KHAC>.

541. See The Agents Proposals and Desire Concern a New Charter (n.d.), U.K. Nat’l Archives Class 5/855, Doc. No. 115, at 472a, 472a, <https://perma.cc/DGW4-XUY4>.

542. See MATHER, *supra* note 31, at 8-10; *see also* Treby, *supra* note 540.

543. MATHER, *supra* note 31, at 10.

England,” he wrote.<sup>544</sup> It expanded the franchise, expanded the colony’s territory, and gave the legislature “as much Power in *New-England*, as the King and Parliament have in *England*; which is more than could be said in the time of the former Government there, which had only the Power of a Corporation.”<sup>545</sup> Now, legislators had “Power to . . . make Laws which shall Incorporate Towns, or Schools of Learning” like Harvard, “which by the First Charter they had not Power to do.”<sup>546</sup>

But the most important attribute of the charter, Mather wrote, was that it once again provided “the People” with a written “Negative” on the power of the government.<sup>547</sup> Because ordinary people could point to a document that clearly articulated the government’s powers, he continued, “*New-England* is by this Charter more privileged” than even people “that live in England it self are.”<sup>548</sup> Even “a Person as bad as Andross” would be no match for written limits on his power, Mather wrote.<sup>549</sup> Such a governor could not “disturb any Man for his Religion,” or “pack Juries to serve his turn,” or do any number of other bad acts “without violating the *Magna Charta* of *New-England*.”<sup>550</sup>

#### IV. The Revolution, 1691-1787

A few decades later, in 1764, a politician and historian named Thomas Hutchinson published a book project he had been working on for years: *The History of the Colony of Massachusetts-Bay*.<sup>551</sup> In it, he summarized the story of the colony from Sir Ferdinando Gorges to Edward Randolph, from the 1629 corporate charter to the 1691 “new charter, in many respects to be preferred to the old.”<sup>552</sup> He too shared Increase Mather’s enthusiasm for all that the new

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544. *Id.* at 15.

545. *See id.* at 15-16.

546. *Id.* at 16; *see also* Massachusetts Bay Charter (Oct. 7, 1691), U.K. Nat’l Archives Class 5/272, Doc. No. 2, at 14a, <https://perma.cc/XY7H-U52L>. One of the new legislature’s first acts was to incorporate Harvard. *See* Minutes of the General Assembly of Massachusetts Bay (June 27, 1692), in MASSACHUSETTS: PROCEEDINGS OF COUNCIL IN ASSEMBLY, 1686-1695, U.K. Nat’l Archives Class 5/785, Doc. No. 12, at 169a, <https://perma.cc/LFL2-3K6N>.

547. *See* MATHER, *supra* note 31, at 17 (emphasis omitted).

548. *Id.*

549. *See id.*

550. *Id.*

551. HUTCHINSON, *supra* note 269.

552. *Id.* at 415.



charter offered, writing that “[m]any of the most sensible men in [other] governments would be glad to be under the same constitution that the Massachusetts province happily enjoys.”<sup>553</sup>

This was not the only lesson people could take from Hutchinson’s comprehensive history of the Massachusetts Bay Company. When John Adams and other Massachusetts residents began debating the legitimacy of parliamentary taxation in 1765, they had no difficulty pointing out that while the English Constitution might be ethereal, “the Fundamentals of the Constitution of this Province are stipulated in the Charter.”<sup>554</sup> That charter was the colony’s “Constitution, dearly purchased by our Ancestors, and dear to us.”<sup>555</sup> It both framed the government of the province and imposed limits on the power of Parliament or the Crown to stray from that framework.

Ironically, as Hutchinson emerged as a staunch defender of Parliament’s power to tax Massachusetts despite its charter, Adams often wielded “large Extracts we have made from your Excellency’s History of the Colony” in debates with Hutchinson himself.<sup>556</sup> Throughout the two decades that followed, the Massachusetts tradition of equating a “constitution” with a written, corporate charter guided revolutionaries, just as it had one hundred years earlier.

#### A. The Charter of 1691

The 1691 charter of the Province of Massachusetts Bay codified many attributes of the corporate government that had existed in 1686. The charter established a “Generall Court of Assembly” modeled after the Massachusetts Bay Company’s annual meetings.<sup>557</sup> As before, this assembly would begin its annual sessions on the last Wednesday in May, during which “represent[at]ives” from

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553. *Id.*

554. See Letter from John Adams et al. to Thomas Hutchinson, Governor, Province of Mass. Bay (Jan. 26, 1773), in *THE SPEECHES OF HIS EXCELLENCY GOVERNOR HUTCHINSON, TO THE GENERAL ASSEMBLY OF THE MASSACHUSETTS-BAY: AT A SESSION BEGUN AND HELD ON THE SIXTH OF JANUARY, 1773, WITH THE ANSWERS OF HIS MAJESTY’S COUNCIL AND THE HOUSE OF REPRESENTATIVES RESPECTIVELY* 33, 54 (Boston, Edes & Gill 1773).

555. See Letter from the Council of the Province of Mass.-Bay to the Earl of Hillsborough (Apr. 15, 1769), in *LETTERS TO THE RIGHT HONORABLE THE EARL OF HILLSBOROUGH FROM GOVERNOR BERNARD, GENERAL GAGE, AND THE HONORABLE HIS MAJESTY’S COUNCIL FOR THE PROVINCE OF MASSACHUSETTS-BAY* 23, 39 (Boston, Edes & Gill 1769).

556. See, e.g., Reply of the House to Hutchinson’s Second Message (Mar. 2, 1773), in *1 PAPERS OF JOHN ADAMS*, *supra* note 34, at 331, 340.

557. See The Charter of the Province of the Massachusetts-Bay (1691) [hereinafter Massachusetts 1691 Charter], in *1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY: TO WHICH ARE PREFIXED THE CHARTERS OF THE PROVINCE* 1, 11 (Boston, Wright & Potter 1869); see also Massachusetts Bay Charter, *supra* note 546.

each town would meet and elect a twenty-eight-member “Councill.”<sup>558</sup> The council, like the board of directors it replaced, functioned as a second house of the legislature alongside the House of Representatives. Together, this legislature possessed “full power and Authority” to erect courts, to “name and settle Annually all Civill Officers,” to “Impose and leavy proportionable . . . Taxes,” and to “establish all manner of wholesome and reasonable Orders Laws Statutes and Ordinances . . . as they shall Judge to be for the good and welfare of our said Province.”<sup>559</sup> This power came with a familiar proviso: None of the courts, offices, or laws could be “repugnant or contrary to the Lawes of this our Realme of England.”<sup>560</sup> Moreover, the charter guaranteed Massachusetts residents “liberty of Conscience” and all the other “Libertyes and Immunities of Free and naturall Subjects,” as if they had been “borne within . . . England.”<sup>561</sup>

The principal distinction between the 1691 charter and the one it replaced was that the new charter included a number of safeguards to ensure that the Province of Massachusetts Bay would not drift toward independence in the same way the Massachusetts Bay Company had. For example, the 1691 charter required the General Assembly to send all legislation to England for the Crown’s Privy Council to review and, if necessary, disallow.<sup>562</sup> The charter also replaced the corporation’s elected chairman and vice chairman with a Crown-appointed “Governour” and “Leiuten[an]t or Deputy Governour.”<sup>563</sup> The charter gave the governor full power to veto or give his “Negative voice” to proposed bills, to “adjourne Prorogue and dissolve” the General Assembly, and, with “the advice and consent of the Councill,” to “nominate and appoint Judges . . . and other Officers.”<sup>564</sup> If the governor died or was recalled, his powers devolved to the lieutenant governor; and if both governors were “displaced,” the charter gave the council “full power and Authority to doe and execute all and every such Acts matters and things which the said Governour . . . could lawfully doe.”<sup>565</sup>

## B. Thomas Hutchinson

Among the first generations who lived under this charter, perhaps no one better understood its words or the history behind it than Thomas Hutchinson.

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558. See Massachusetts 1691 Charter, *supra* note 557, at 11-12; see also *supra* text accompanying note 109.

559. Massachusetts 1691 Charter, *supra* note 557, at 15-16.

560. *Id.*

561. *Id.* at 14.

562. See *id.* at 17.

563. See *id.* at 13-14.

564. See *id.* at 12-13, 16-17.

565. See *id.* at 18-19.

An enormously successful politician, Hutchinson began his career holding virtually every office the charter authorized. Beginning in 1737, when Hutchinson was twenty-five years old, his hometown of Boston elected him eleven times to the House of Representatives, where in 1748 he made a name for himself by proposing a successful plan to replace the province's paper money with currency backed by precious metals.<sup>566</sup> This plan so angered his Boston constituents that they threw him out of office a week after celebrating the unexpected burning of his house in a fire—but his friends in the legislature immediately elected Hutchinson to the council, where he served for another decade.<sup>567</sup> In 1758, the Crown named Hutchinson Lieutenant Governor of the province.<sup>568</sup> And in 1760, the Governor gave him the additional responsibility of chief justice of the highest court established by the provincial legislature. This last appointment earned Hutchinson several enemies, notably James Otis, a representative from Boston who wanted the chief justiceship for himself.<sup>569</sup>

As passionate as Hutchinson was for provincial politics, his real passion was provincial history. Hutchinson prided himself on the collection of “ancient records and papers” that he inherited from his many famous relatives, including his great-grandmother Anne Hutchinson and his brother-in-law Samuel Mather, grandson of Increase Mather.<sup>570</sup> Hutchinson dedicated much of his life to compiling these records into a coherent narrative. He published the first edition of this narrative, *The History of the Colony of Massachusetts-Bay*, in 1764.<sup>571</sup>

Hutchinson's *History* described in thorough detail the evolution of the Massachusetts Bay Company's charter from its “original design . . . to constitute a corporation in England”<sup>572</sup> to the “form of . . . constitution” for a New England commonwealth.<sup>573</sup> He documented how company officials believed themselves immune from Parliament's Navigation Acts so long as they did not forfeit their charter by straying from its text. He recounted how the “messenger of death” Edward Randolph “went up and down seeking to devour them” until Randolph persuaded the Crown to vacate the company's charter.<sup>574</sup>

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566. See BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* 10-15 (1974); Malcolm Freiberg, *Thomas Hutchinson and the Province Currency*, 30 *NEW ENG. Q.* 190, 196-97 (1957).

567. See Freiberg, *supra* note 566, at 199-200.

568. See BAILYN, *supra* note 566, at 4-5.

569. See *id.* at 47-50.

570. See HUTCHINSON, *supra* note 269, at i.

571. HUTCHINSON, *supra* note 269.

572. *Id.* at 13.

573. *Id.* at 243.

574. See *id.* at 319, 337.

And he described the 1689 coup, the subsequent “desire to reassume the charter,” and the charter William and Mary granted in 1691.<sup>575</sup> “Seventy years practice under a new charter, in many respects to be preferred to the old, has taken away, not only all expectation, but all desire of ever returning to the old charter,” Hutchinson concluded.<sup>576</sup> “Many of the most sensible men” in the corporate governments of Rhode Island and Connecticut, which “retained . . . their ancient charters[,] . . . would be glad to be under the same constitution that the Massachusetts province happily enjoys.”<sup>577</sup>

Hutchinson’s *History* was immediately popular—printers in London and Boston published a second<sup>578</sup> and third<sup>579</sup> edition within a decade of its first printing in 1764, along with a sequel that extended the history to 1750<sup>580</sup> and a published collection of Hutchinson’s primary sources.<sup>581</sup> But its publication could not have come at a worse time for Hutchinson’s political career. His *History* reminded readers that their ancestors strongly believed that their “charter privileges” insulated them from parliamentary and Crown authority.<sup>582</sup> But in April 1764, while Hutchinson was serving as one of the officials in charge of executing parliamentary and Crown authority in Massachusetts, the British government began enacting a series of unpopular taxes whose goal was “raising . . . Revenue in *America*.”<sup>583</sup> The Sugar Act of 1764 and the Stamp Act of 1765 startled Massachusetts residents, who expressed their displeasure in the language of Hutchinson’s seventeenth-century subjects.

As news of the two taxes reached Boston, residents named two “fundamental laws of our constitution” they believed the taxes violated.<sup>584</sup> The first was the clause of the Massachusetts charter that gave the General Assembly

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575. See *id.* at 377-95, 408-15.

576. *Id.* at 415.

577. *Id.*

578. THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSET’S BAY, FROM THE FIRST SETTLEMENT THEREOF IN 1628, UNTIL ITS INCORPORATION WITH THE COLONY OF PLIMOUTH, PROVINCE OF MAIN, &C. BY THE CHARTER OF KING WILLIAM AND QUEEN MARY, IN 1691 (London, M. Richardson 2d ed. 1765).

579. THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY, FROM THE FIRST SETTLEMENT THEREOF IN 1628, UNTIL ITS INCORPORATION WITH THE COLONY OF PLIMOUTH, PROVINCE OF MAIN, &C. BY THE CHARTER OF KING WILLIAM AND QUEEN MARY, IN 1691 (Boston, I. Thomas 3d ed. 1774).

580. 1-2 THOMAS HUTCHINSON, THE HISTORY OF MASSACHUSETTS, FROM THE FIRST SETTLEMENT THEREOF IN 1628, UNTIL THE YEAR 1750 (Salem, Mass., Thomas C. Cushing 3d ed. 1795).

581. THE HUTCHINSON PAPERS, *supra* note 15.

582. See HUTCHINSON, *supra* note 269, at 331.

583. Sugar Act 1764, 4 Geo. 3 c. 15, § 1; see Stamp Act 1765, 5 Geo. 3 c. 12.

584. See Minutes of May 26, 1766, in 16 BOSTON RECORDS, *supra* note 303, at 180, 182-83 (Boston, Rockwell & Churchill 1886).

“full power and Authority” to “Impose and leavy . . . Taxes.”<sup>585</sup> As a Boston town meeting explained to James Otis and other town representatives, “[b]y the Royal Charter granted to our Ancestors the power of making Laws for our internal Government and of levying Taxes, is vested in the General Assembly.”<sup>586</sup> Each of Parliament’s taxes therefore “annihilate[d] our Charter Right to Govern and Tax ourselves.”<sup>587</sup> Otis took this message to heart in his own 1764 pamphlet, *The Rights of the British Colonies Asserted and Proved*.<sup>588</sup> As recipients of William and Mary’s charter—living “under the best national civil constitution in the world”—Massachusetts residents possessed exclusive powers to do certain things within their jurisdiction free from parliamentary intrusion.<sup>589</sup>

The second fundamental law at issue was the clause in the charter guaranteeing the colonists the “Libertyes and Immunities of Free and naturall Subjects . . . of England.”<sup>590</sup> As the town meeting of Boston told its representatives:

By the . . . Charter[,] the Inhabitants of this Province are entitled to all the Rights & Privileges of natural free born Subjects of Great Britain; the most essential Rights of British Subjects are those of being represented in the same Body which exercises the power of levying Taxes upon them, and of having their Property tryed by Juries; These are the very Pillars of the British Constitution, founded in the common Rights of Mankind.<sup>591</sup>

In other words, the constitution of Massachusetts, expressed in its charter, incorporated the Constitution of Britain, an amorphous concept that forbade Parliament from taxing anyone not represented in its assembly.<sup>592</sup>

### C. Charters in Other Colonies

The arguments of Boston’s residents were not unique in America: By the 1760s, almost all the colonies had what William Blackstone called “Charter governments, in the nature of civil corporations, . . . with such rights and

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585. See Massachusetts 1691 Charter, *supra* note 557, at 11.

586. Minutes of Sept. 18, 1765 [hereinafter City of Boston Minutes of Sept. 18, 1765], in 16 BOSTON RECORDS, *supra* note 584, at 153, 155.

587. See Minutes of May 24, 1764, in 16 BOSTON RECORDS, *supra* note 584, at 119, 121-22.

588. JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (Boston, Edes & Gill 1764).

589. See *id.* at 32, 35-37; see also CHARLES CHAUNCY, A DISCOURSE ON “THE GOOD NEWS FROM A FAR COUNTRY” 19-20 (Boston, Kneeland & Adams 1766).

590. See Massachusetts 1691 Charter, *supra* note 557, at 14.

591. City of Boston Minutes of Sept. 18, 1765, *supra* note 586, at 155.

592. See OTIS, *supra* note 588, at 37; see also 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 296-99 (L.H. Butterfield ed., 2d prt. 1962) (entry of Jan. 18, 1766).

authorities as are specially given them in their several charters of incorporation.”<sup>593</sup> Many of these colonies had gone through similar experiences as the Massachusetts Bay Company—including an inquisition from Edward Randolph himself.

Randolph’s relentless enforcement of corporate and colonial charters perhaps perfectly embodies the driving spirit behind American-style constitutionalism in the early eighteenth century. Randolph’s career as a colonial administrator didn’t end when he was released from custody in 1691. For the last thirteen years of his life, Randolph served as Deputy Auditor of Maryland, Auditor General of the Chesapeake Bay, Surveyor General of the Plantations on the North Coast of America, and in a host of other colonial administrative positions.<sup>594</sup> In his zeal to enforce the Navigation Acts and root out corruption among colonial governors, Randolph alienated virtually everyone he met as much as he had alienated the board of the Massachusetts Bay Company. The Governor of Maryland wrote in 1692 of Randolph’s “insolent and too well known behavior,” and that Randolph “hath indeed effected here what he hath done in all other parts of the world (where ever he sett foot) [that] made the whole Countrey weary of him.”<sup>595</sup> The Governor of Pennsylvania accused Randolph in 1697 of “huffing and bouncing” and bad-mouthing people behind their backs.<sup>596</sup> William Penn accused Randolph of perjury in 1698.<sup>597</sup> And multiple governors had Randolph imprisoned—including the Governor of Bermuda in 1699 for “pretending great power and

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593. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *supp.* at iii (Oxford, Clarendon Press 1769).

594. *See, e.g.*, Minutes of the Council of Maryland (May 20, 1695), U.K. Nat’l Archives Class 5/740, Doc. No. 4, at 146, 146, <https://perma.cc/67D7-BM27>; Letter from Francis Nicholson, Governor, Colony of Va., to the Council of Trade & Plantations (July 1703), in 21 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 589, 590 (Cecil Headlam ed., 1913); Lionel Copley, Governor, Province of Md., Speech to the Assembly (Apr. 13, 1692), U.K. Nat’l Archives Class 5/713, Doc. No. 46, at 193, 193, <https://perma.cc/LN2Z-JEJB>.

595. Letter from Lionel Copley, Governor, Province of Md., to the Lords of Trade (July 29, 1692), in MARYLAND: COMMISSION, INSTRUCTIONS, BOARD OF TRADE CORRESPONDENCE, 1691-1696, U.K. Nat’l Archives Class 5/724 Part 1, Doc. No. 31, at 87, 89-90, <https://perma.cc/5J56-AVKD>.

596. *See* Letter from William Markham, Governor, Province of Pa., to William Penn (Apr. 24, 1697), in 16 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 49, 49-50 (J.W. Fortescue ed., 1905).

597. *See* Memorial of William Penn to Council of Trade and Plantations (Dec. 19, 1698), in 16 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 596, at 578, 578-79.

authority, and that [His Majesty's] Governors must be accountable to him, and using them in a very strange manner, not sparing to call them villains and rogues."<sup>598</sup>

As much as these governors didn't like Randolph, he played an important role in North American colonial governance: He forced governors across the continent to be "accountable" to someone other than themselves despite the thousands of miles of ocean separating them from their superiors.<sup>599</sup> Under the scrutiny of Randolph and the generation of colonial administrators who followed him, written charters provided these governors with notice of what actions could cost them both personal embarrassment and the loss of power. They also showed colonists all of the rights they had to lose if they forfeited their charters by violating the charters' terms; in the words of Randolph's biographer, Michael G. Hall: "Confiscation of charter privileges was at stake."<sup>600</sup>

This sort of threat existed in a completely different form than in England. When the English political philosopher John Locke wrote during the Glorious Revolution about the "Constitution" and "Dissolution" of governments, he, like Thomas Hobbes before him, emphasized the "Compact" by which individuals agreed "to unite into one political Society."<sup>601</sup> For Locke, every government legitimately continued to exist only so long as its officers abided by the terms of the "Constitution[]" that created it, and the threat that forced legislators to pay attention to these terms was the fear of "Revolutions."<sup>602</sup> The English Civil War and the Glorious Revolution were prime examples of this threat realized: Each time, a King violated the terms of the English Constitution, and, as a consequence, people revolted. Nothing about this "Constitution" needed to be written down to be enforceable.

But from Massachusetts to Georgia and everywhere in between, colonial administrators, not revolutionaries, policed violations of charters' terms. By the 1760s, charters generally functioned as written constitutions: documents that not only brought governments into existence but also delineated the boundaries of their power—boundaries that everyone, including

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598. Letter from Samuel Day, Governor, Colony of Berm., to the Council of Trade & Plantations (May 18, 1699), in 17 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 52, at 231, 232 (Cecil Headlam ed., 1908).

599. See HALL, *supra* note 319, at 171-72; see also, e.g., Order of Lords Justices in Council (July 13, 1699), in 17 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 598, at 344 (sending orders to a colonial governor in light of Randolph's messages).

600. HALL, *supra* note 319, at 173; see *id.* at 172-75.

601. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 99, at 319 (London, Awnsham Churchill 1690); *id.* bk. II, §§ 211-219, at 432-39; see also HOBBS, *supra* note 218, at 62-72.

602. See LOCKE, *supra* note 601, bk. II, §§ 221-226, at 441-47.

the Crown and Parliament, had to respect.<sup>603</sup> Colonists across the continent emphasized these boundaries during the debates over the Stamp Act. For example, in Pennsylvania, whose 1681 charter expressly authorized Parliament to “assesse and impose” taxes,<sup>604</sup> Benjamin Franklin argued that “by the same charter, and otherwise, [Pennsylvanians] are intituled to all the privileges and liberties of Englishmen,” which included protection from “taxes on the inhabitants, unless it be with the[ir] consent.”<sup>605</sup> Such arguments drew scorn from Crown-appointed officials who saw nothing in the “*charter*, which is the ancient constitution of the Colony, which could serve to justify [anyone] in refusing to pay any tax.”<sup>606</sup>

#### D. The Charter Constitution in the Lead-Up to Revolution

Parliament eventually repealed the Stamp Act in 1766<sup>607</sup>—too late to save Thomas Hutchinson’s rebuilt home, however, which an antitax mob destroyed, along with many of his historical manuscripts.<sup>608</sup>

But when Parliament again tried to tax paper and other supplies in 1767,<sup>609</sup> Massachusetts residents once again sought refuge in Massachusetts’s “charter constitution.” “[T]he levying Money within this Province for the use and service of the Crown, in other manner than the same is granted by the Great & General Court or Assembly of this Province is in violation of the said Royal Charter,” a Boston town meeting declared in 1768, adding that “the same is also in violation [o]f the undoubted natural Rights of Subjects.”<sup>610</sup> During an election day sermon, Daniel Shute added that “[t]his Province has not the least share in privileges derived from the civil constitution of her parent country, and which are amply secured to us by royal charter.”<sup>611</sup> James Otis and Samuel Adams argued that colonists were additionally entitled to the protections of the

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603. See WOOD, *supra* note 7, at 268-71.

604. See Charter for the Province of Pennsylvania (1681), in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 6, at 3035, 3041.

605. THE EXAMINATION OF DOCTOR BENJAMIN FRANKLIN BEFORE AN AUGUST ASSEMBLY, RELATING TO THE REPEAL OF THE STAMP-ACT, &c. 21 (n.p., 1766).

606. WILLIAM KNOX, THE CONTROVERSY BETWEEN GREAT-BRITAIN AND HER COLONIES REVIEWED 62 (Boston, Mein & Fleeming 1769).

607. See American Colonies Act 1766, 6 Geo. 3 c. 12.

608. See BAILYN, *supra* note 566, at 35-36.

609. See, e.g., Revenue Act 1767, 7 Geo. 3 c. 46.

610. Minutes of Sept. 13, 1768, in 16 BOSTON RECORDS, *supra* note 584, at 261, 262.

611. DANIEL SHUTE, A SERMON PREACHED BEFORE HIS EXCELLENCY FRANCIS BERNARD, ESQ; GOVERNOR, HIS HONOR THOMAS HUTCHINSON, ESQ; LIEUTENANT-GOVERNOR, THE HONOURABLE HIS MAJESTY’S COUNCIL, AND THE HONOURABLE HOUSE OF REPRESENTATIVES 54 (Boston, Richard Draper 1768).



British Constitution “exclusive of any consideration of charter rights.”<sup>612</sup> The British Constitution was “fixed,” they declared, and Parliament “cannot overleap the bounds of it, without destroying its own foundation.”<sup>613</sup>

The Crown-appointed Governor of Massachusetts, Francis Bernard, responded to Boston’s protests by dissolving the House of Representatives and requesting two military regiments to occupy Boston in October 1768.<sup>614</sup> The town meeting of Boston called this occupation an attempt “to overthrow the Civil Constitution” of the province.<sup>615</sup> John Adams, a lawyer from the Boston suburb of Braintree, wrote that Bernard’s actions were a “flagrant and formal Attack upon the Constitution.”<sup>616</sup> And the Massachusetts council wrote a public letter to the Crown lamenting “the Destruction of our Constitution, derived to us by Charter”—a “Constitution, dearly purchased by our Ancestors, and dear to us.”<sup>617</sup>

In a sermon that could have been delivered a century earlier, minister Jason Haven explained that “our happy constitution” was “secured to us by *royal charter*,” and that “Our fathers faithfully performed the conditions, on which the charter privileges were granted.”<sup>618</sup> Another minister, Samuel

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612. See A Circulatory Letter, Directed to the Speakers of the Respective Houses of Representatives and Burgesses on This Continent (Feb. 11, 1768) [hereinafter A Circulatory Letter], in 44 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 236, 237 (Mass. Historical Soc’y 1975) (1768). For more on Otis and Adams’s authorship of the anonymous letter, see 4 THE PAPERS OF FRANCIS BERNARD: GOVERNOR OF COLONIAL MASSACHUSETTS, 1760-69, app. 1 at 361-62 (Colin Nicolson ed., 2015).

613. A Circulatory Letter, *supra* note 612, at 237.

614. See Letter from Francis Bernard to the Earl of Hillsborough (June 11, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 612, at 185 (informally requesting military aid); Letter from Francis Bernard to Thomas Gage (July 2, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 612, at 235 (same); Letter from Thomas Gage to Francis Bernard (Aug. 31, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 612, at 290 (discussing the military deployment); see also Circular of the Boston Selectmen to the Massachusetts Towns (Sept. 14, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 612, app. 13 at 400 (discussing Bernard’s dissolution of the House of Representatives).

615. Minutes of July 4, 1769, in 16 BOSTON RECORDS, *supra* note 584, at 295, 296.

616. See Minutes of May 8, 1769, in 16 BOSTON RECORDS, *supra* note 584, at 284, 286. Adams was appointed to lead the Boston town committee that produced these instructions. See Instructions of the Town of Boston to Their Representatives (May 15, 1769), in 3 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 505, 505 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1885) [hereinafter WORKS OF JOHN ADAMS].

617. Letter from the Council of the Province of Mass.-Bay to the Earl of Hillsborough, *supra* note 555, at 39.

618. JASON HAVEN, A SERMON PREACHED BEFORE HIS EXCELLENCY SIR FRANCIS BERNARD, BARONET, GOVERNOR; HIS HONOR THOMAS HUTCHINSON, ESQ: LIEUTENANT-GOVERNOR, *footnote continued on next page*

Cooke, cited Hutchinson's *History* to emphasize that the "New-England Charter" was the only thing separating the province from the "despotic power" of a historically bad Governor like Edmund Andros.<sup>619</sup>

The present Governor, Francis Bernard, was recalled to England in late 1769.<sup>620</sup> By the terms of the charter, once he left the province, the Lieutenant Governor, Thomas Hutchinson, acquired his powers.<sup>621</sup> As tensions exploded after the Boston Massacre in 1770, Hutchinson engaged in several disputes with the General Assembly over the interpretation of the Massachusetts Constitution. Most of these disputes turned on mundane questions such as whether Hutchinson had the power to decide whether the General Assembly would meet in Boston or in Cambridge.<sup>622</sup> But in each of these disputes, John Adams, James Otis, and other members of the General Assembly framed their disagreement with Hutchinson by arguing that "[t]he Charter of the Province, as it creates and defines the Powers of its Governor, is the only Rule . . . by which to judge of those Powers."<sup>623</sup>

"[E]very Power should have a Check," the Assembly declared in one debate; the checks on the Crown-appointed Governor's powers were contained in "the Royal Grant made to them in the Charter."<sup>624</sup> A town meeting of Boston agreed that the Assembly should resist any "alteration of the constitution as settled by the Charter."<sup>625</sup> The House of Representatives later lamented "the many attempts that have been made, effectually to render null and void those

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THE HONORABLE HIS MAJESTY'S COUNCIL, AND THE HONORABLE HOUSE OF REPRESENTATIVES 44-45 (Boston, Richard Draper 1769).

619. See SAMUEL COOKE, A SERMON PREACHED AT CAMBRIDGE, IN THE AUDIENCE OF HIS HONOR THOMAS HUTCHINSON, ESQ; LIEUTENANT-GOVERNOR AND COMMANDER IN CHIEF; THE HONORABLE HIS MAJESTY'S COUNCIL, AND THE HONORABLE HOUSE OF REPRESENTATIVES 33-36 (Boston, Edes & Gill 1770) (quoting HUTCHINSON, *supra* note 581, at 324).
620. See Instruction Permitting Leave of Absence (June 22, 1768), in 4 THE PAPERS OF FRANCIS BERNARD, *supra* note 612, at 218.
621. See *supra* text accompanying note 569.
622. See Minutes of June 15, 1770, in 47 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 36, 36-37 (Mass. Historical Soc'y 1978) (1770).
623. Minutes of June 19, 1770, in 47 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 622, at 39, 39; see 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 592, at 294-95; see also JOHN TUCKER, A SERMON PREACHED AT CAMBRIDGE, BEFORE HIS EXCELLENCY THOMAS HUTCHINSON, ESQ; GOVERNOR; HIS HONOR ANDREW OLIVER, ESQ; LIEUTENANT-GOVERNOR, THE HONORABLE HIS MAJESTY'S COUNCIL, AND THE HONORABLE HOUSE OF REPRESENTATIVES 17-18, 32-33 (Boston, Richard Draper 1771).
624. Minutes of June 19, 1771, in 48 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 61, 63-64 (Mass. Historical Soc'y 1979) (1771).
625. See Minutes of Nov. 20, 1772, in 18 BOSTON RECORDS, *supra* note 303, at 94, 101 (Boston, Rockwell & Churchill 1887).

Clauses in our Charter, upon which the Freedom of our Constitution depends.”<sup>626</sup> All in all, Hutchinson’s opponents feared that the “total subversion of the constitution” would result if “any person may by his conduct, break through the constitution of the province grounded on the charter.”<sup>627</sup>

These debates came to a head in 1773, when Hutchinson publicly defended Parliament’s power to tax Massachusetts. He explained his position with a historical account of the colony’s corporate origins. Hutchinson argued that the “Constitution” of the colony, as “appears from the Charter itself and from other irresistible Evidence,” is like all other “Corporations still remaining subject to the general Laws of the Kingdom.”<sup>628</sup> Invoking Sir Ferdinando Gorges and other contemporaries of the Massachusetts Bay Company’s founding, Hutchinson argued that “it was the Sense of our Predecessors at the Time when the Charter was granted” that the corporate government was supposed to remain in England and “remain subject to the Supreme Authority of Parliament.”<sup>629</sup> Hutchinson declared that he knew of “no Line that can be drawn between the supreme Authority of Parliament and the total Independence of the Colonies.”<sup>630</sup> In other words, if the Assembly resisted parliamentary taxes, it would be moving toward independence just as the Massachusetts Bay Company had wrongfully done.

Hutchinson’s speeches outraged John Adams and other members of the General Assembly, who returned fire with their own historical account of the Massachusetts Constitution. The Assembly agreed that “the Fundamentals of the Constitution of this Province are stipulated in the Charter.”<sup>631</sup> But they argued that both the 1629 charter and the 1691 charter were contracts with the *Crown*, not with *Parliament*, which had never exercised any authority over the colony. Indeed, from “large Extracts we have made from [Hutchinson’s] History

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626. Minutes of Feb. 12, 1773, in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 223, 224 (Mass. Historical Soc’y 1980) (1773).

627. See Minutes of Mar. 7, 1774, in 50 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 231, 235 (Mass. Historical Soc’y 1981) (1774).

628. Minutes of Jan. 6, 1773 [hereinafter Massachusetts House of Representatives Minutes of Jan. 6, 1773], in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 626, at 137, 138-39. Many debates over the “Constitution,” including this one, mixed discussions of the unwritten “English Constitution” with discussions of the colony’s “Constitution,” as described by the text and context of its charter. See *id.* Yet as these debates also make clear, the interlocutors generally kept the two concepts distinct from one another even as they used the same word, *constitution*, to describe the framework of each government. See WOOD, *supra* note 7, at 261-62.

629. See Minutes of Feb. 16, 1773, in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 626, at 228, 233-34.

630. Massachusetts House of Representatives Minutes of Jan. 6, 1773, *supra* note 628, at 141.

631. Minutes of Jan. 26, 1773 [hereinafter Massachusetts House of Representatives Minutes of Jan. 26, 1773], in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 626, at 177, 188.

of the Colony,” the Assembly could cite dozens of examples in which the Massachusetts Bay Company had resisted parliamentary authority, such as when Simon Bradstreet refused to enforce the Navigation Acts in the 1670s.<sup>632</sup> Liberally quoting the speeches of John Winthrop, the letters of Edward Randolph, and the text of “the old Charter of this Colony,”<sup>633</sup> the Assembly concluded “that under both Charters it hath been the Sense of the People and of the Government that they were not under the Jurisdiction of Parliament.”<sup>634</sup> From the perspective of the present, both Hutchinson and the Assembly appeared to be interpreting the colonial constitution with reference to its original public meaning.

Hutchinson accused the Assembly of misreading his *History* while taking “particular Parts or Clauses of the Charter” out of context “to represent the Constitution very different from what it has always been understood to be.”<sup>635</sup> But the battle lines were drawn. Hutchinson believed that the Massachusetts Constitution was a charter that the Crown and Parliament could unilaterally amend. John Adams and other local politicians believed “That our Constitution was a Miniature of the British: that the Charter had given Us every Power, Jurisdiction and right within our Limits which could be claimed by the People or Government of England, with no other exceptions than those in the Charter expressed.”<sup>636</sup> For Adams, as with his predecessors a century earlier, only a forfeiture or breach of the charter by Massachusetts’s government would allow the Crown to amend it.

#### E. The Nullification of the Charter Constitution

These debates between Thomas Hutchinson and the General Assembly were interrupted in December 1773, when a group of Bostonians disguised as members of the Mohawk people destroyed a shipment of tea in Boston Harbor to protest a recently enacted parliamentary tax.<sup>637</sup> As rumors of Parliament’s planned response reached New England, the town meeting of Boston drafted a letter warning that “Two Acts of Parliament, altering the Course of Justice &

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632. See Minutes of Mar. 2, 1773 [hereinafter Massachusetts House of Representatives Minutes of Mar. 2, 1773], in 49 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 626, at 267, 275-80; *supra* Parts II.B-C.

633. Massachusetts House of Representatives Minutes of Jan. 26, 1773, *supra* note 631, at 182; *see id.* at 179-88.

634. Massachusetts House of Representatives Minutes of Mar. 2, 1773, *supra* note 632, at 275.

635. See Minutes of Feb. 22, 1774, in 50 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 627, at 180, 182.

636. 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 592, at 301.

637. See Tea Act 1773, 13 Geo. 3 c. 44.

annihilating our free Constitution of Government, are every day expected.”<sup>638</sup> In spite of these fears, when General Thomas Gage arrived in Boston to replace Hutchinson as Governor, the General Assembly congratulated him. It expressed its hope that Gage “will make the known Constitution and Charter of the Province the Rule of your Administration.”<sup>639</sup>

This hope did not last long. Soon after Gage’s arrival, Boston received copies of the Massachusetts Government Act, one of four so-called “coercive acts” passed by Parliament in 1774.<sup>640</sup> The Act made the Massachusetts council an appointed body instead of an elected body,<sup>641</sup> made it unlawful for towns to call meetings “without the leave of the governor,”<sup>642</sup> and, most importantly, “revoked and made void” all the clauses of the 1691 charter to the contrary.<sup>643</sup> Parliament explained its reasoning in the preface to the law, declaring that “repeated experience” and “an open resistance to the execution of the laws . . . in the town of *Boston*” had demonstrated that the elected council and town meetings were “extremely ill adapted to the plan of government established in the province of the Massachuset’s Bay.”<sup>644</sup>

Almost immediately, Massachusetts residents compared the nullification of its “Constitution of Government” to the loss of its “Charter Constitution” a century earlier.<sup>645</sup> “It seems cruel and unjust to be deprived of our chartered rights and privileges,” Peter Whitney declared in a sermon, “and so it seemed to our forefathers, when the first charter was inhumanly murdered.”<sup>646</sup> Beginning in July 1774, conventions of leaders from Berkshire County in western Massachusetts to Plymouth County in eastern Massachusetts condemned “the alteration of our constitution and laws,”<sup>647</sup> the “late attempt to alter the constitution of this province,”<sup>648</sup> and Parliament’s “unparalleled

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638. Minutes of July 26, 1774, in 18 BOSTON RECORDS, *supra* note 625, at 185, 186.

639. Minutes of June 9, 1774, in 50 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 627, at 264, 264.

640. See 14 Geo. 3 c. 45.

641. See *id.* § 3.

642. See *id.* § 7.

643. See *id.* § 1.

644. *Id.* pmb1.

645. See *supra* text accompanying note 512.

646. PETER WHITNEY, THE TRANSGRESSION OF A LAND PUNISHED BY A MULTITUDE OF RULERS: CONSIDERED IN TWO DISCOURSES 47 (Boston, John Boyle 1774).

647. See Minutes of the Convention of Essex County (Sept. 6-7, 1774), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 615, 615-16.

648. See Minutes of the Convention of Middlesex County (Aug. 30-31, 1774), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 609, 613.

usurpation of unconstitutional power.”<sup>649</sup> One county, alluding to the quo warrantos of the previous century, added that “whenever any franchises and liberties are granted to a corporation or body politic, those franchises and liberties cannot legally be taken from such corporations and bodies politic, but by their consent or by forfeiture.”<sup>650</sup>

John Adams and his cousin, Samuel Adams, went to Philadelphia as delegates to the First Continental Congress, where they sought the help of other colonies whose “charters have not yet been torn to pieces by the harpies of power.”<sup>651</sup> The Continental Congress appointed the Adams cousins to a committee “to State the rights of the Colonies in general, the several instances in which these rights are violated or infringed, and the means most proper to be pursued for obtaining a restoration of them.”<sup>652</sup> This committee ultimately agreed “to found our rights upon the laws of Nature, the principles of the English Constitution, and charters and compacts.”<sup>653</sup> And in a subsequent petition to the Crown, the Continental Congress emphasized that the Massachusetts Government Act was at odds with these rights: “[T]he fore-fathers of the present inhabitants of the Massachusetts-Bay left their former habitations” only because of the promises “pledged in a royal charter,” it wrote.<sup>654</sup> Yet without “a forfeiture of their rights, without being heard, without being tried, without law, and without justice, by an Act of Parliament, their charter is destroyed, their liberties violated, their constitution and form of government changed.”<sup>655</sup>

Meanwhile, in Massachusetts, the new Governor, Thomas Gage, called for new elections for an October session of the General Assembly to meet at Salem.<sup>656</sup> He canceled this assembly, however, after reading some of the

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649. See Minutes of the Convention of Suffolk County (Sept. 6, 1774), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 601, 601-02.

650. See Minutes of the Convention of Berkshire County (July 6, 1774), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 652, 652.

651. RICHARD FROTHINGHAM, LIFE AND TIMES OF JOSEPH WARREN 357 (Boston, Little, Brown & Co. 1865) (quoting a September 4, 1774 letter from Joseph Warren to Samuel Adams).

652. Minutes of Sept. 6, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 25, 26 (Worthington Chauncey Ford ed., 1904) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS]; see Minutes of Sept. 7, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 27, 28.

653. See 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 592, at 131 (entry of Sept. 9, 1774) (quoting Samuel Ward, Diary (Sept. 9, 1774), in 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 27, 27 (Edmund C. Burnett ed., 1921)).

654. Minutes of Oct. 21, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 652, at 81, 87.

655. *Id.*

656. See Thomas Gage, A Proclamation (Sept. 28, 1774), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 3, 3-4.

“extraordinary resolves” of the county conventions.<sup>657</sup> The representatives who were elected to the canceled assembly nevertheless met at Salem on the appointed day and waited for the Governor to show up.<sup>658</sup> After a day on which the Governor failed to appear, the representatives organized themselves into a convention and resolved that the Governor’s conduct was “against the express words . . . of the charter, and unconstitutional” because the charter gave the Governor power to dissolve the General Assembly only after “they have first ‘met and convened.’”<sup>659</sup> Over the next several weeks, the convention resolved themselves into a “Provincial Congress,” reappointed the councilors formerly elected to serve as “constitutional members of his majesty’s council of this colony, by the royal charter,” and began functioning as an extralegal version of the General Assembly.<sup>660</sup> They told Governor Gage that they would continue to meet despite his instructions in order to preserve the “freedom and constitution” of the province.<sup>661</sup>

Pamphleteers generally supported the Provincial Congress’s attempt to continue the charter government extralegally, just as their ancestors had done a century earlier. Josiah Quincy, Jr., for example, compared the situation to when the allies of Edmund Andros overthrew the charter in 1686.<sup>662</sup> He described how “from the days of . . . Gorges and Mason, Randolph and Cranfield[,] down to the present day,” an “undiminished race of villains” had sought “to make void the charter of our Liberties,” and it was up to the Provincial Congress to fight back.<sup>663</sup> An anonymous author agreed that the “Charter to us granted by King William III and Queen Mary” was as “valid and

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657. *See id.*

658. For a general history of this Provincial Congress and the debates over the Massachusetts Constitution that followed, see SAMUEL ELIOT MORISON, *A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS* (1917).

659. Minutes of the First Provincial Congress (Oct. 7, 1774) [hereinafter First Provincial Congress Minutes of Oct. 7, 1774], in *JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS*, *supra* note 6, at 5, 5 (quoting the 1691 charter).

660. *See id.* at 5-6; Minutes of the First Provincial Congress (Oct. 28, 1774), in *JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS*, *supra* note 6, at 37, 40.

661. *See* First Provincial Congress Minutes of Oct. 7, 1774, *supra* note 659, at 6.

662. *See* JOSIAH QUINCY, JR., *OBSERVATIONS ON THE ACT OF PARLIAMENT COMMONLY CALLED THE BOSTON PORT-BILL; WITH THOUGHTS ON CIVIL SOCIETY AND STANDING ARMIES* 77-81 (Boston, Edes & Gill 1774).

663. *Id.* at 77 (emphasis omitted) (footnotes omitted); *see id.* at 77-81.

sacred” as the Magna Charta “granted by King John.”<sup>664</sup> He implored the provincial leaders to preserve their “Constitution sacred and entire.”<sup>665</sup>

#### F. The First Written Constitutions

While this debate raged through the winter of 1774-1775, Thomas Gage remained in Boston and the Provincial Congress assembled in nearby Concord and Cambridge. As tensions increased, the Congress resolved that it was “necessary for this colony to make preparations for their security and defence, by raising and establishing an army.”<sup>666</sup> Their words proved prophetic, for on the night of April 18, 1775—eighty-six years to the day after the 1689 Boston coup<sup>667</sup>—Gage ordered British soldiers to march on Concord to arrest the Congress’s leadership.<sup>668</sup> The American War for Independence began the following morning with the battles of Lexington and Concord. The Provincial Congress soon reassembled in Watertown and began overseeing what would become a yearlong siege of British forces garrisoned in Boston.<sup>669</sup>

A few weeks later, the president of the Provincial Congress, Joseph Warren, wrote a letter to the delegates at the Second Continental Congress in Philadelphia requesting “the direction and assistance of your respectable assembly.”<sup>670</sup> Warren was in something of a rush: The 1691 charter set the “last

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664. Letter to a Gentleman of Distinction in England (Jan. 17, 1769), in *A FREE AND CALM CONSIDERATION OF THE UNHAPPY MISUNDERSTANDINGS AND DEBATES, WHICH HAVE OF LATE YEARS ARISEN, AND YET SUBSIST, BETWEEN THE PARLIAMENT OF GREAT-BRITAIN, AND THESE AMERICAN COLONIES* 16, 23 (Salem, Mass., S. & E. Hall 1774) [hereinafter *A FREE AND CALM CONSIDERATION*].

665. See Letter to a Gentleman of Distinction in England (Aug. 16, 1768), in *A FREE AND CALM CONSIDERATION*, *supra* note 664, at 3, 4. For similar examples of how contemporaries described their charter, see DANIEL LEONARD, Letter to the Inhabitants of the Province of Massachusetts-Bay (Jan. 9, 1775), in *MASSACHUSETTENSIS* 39 (Boston, 1775); ADAMS, *Novanglus No. VI*, *supra* note 34; JOHN ADAMS, *Novanglus No. XII* (1775), in 2 *PAPERS OF JOHN ADAMS*, *supra* note 34, at 373; and JOHN ADAMS, *Novanglus No. XIII* (1775), in 2 *PAPERS OF JOHN ADAMS*, *supra* note 34, at 380.

666. Minutes of the Second Provincial Congress (Apr. 8, 1775), in *JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS*, *supra* note 6, at 135.

667. See *supra* Part III.D.

668. See Minutes of the Second Provincial Congress (Apr. 22, 1775) [hereinafter *Second Provincial Congress Minutes of Apr. 22, 1775*], in *JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS*, *supra* note 6, at 147, 147 n.1; A Narrative of the Excursion and Ravages of the King’s Troops, Under the Command of General Gage, on the Nineteenth of April, 1775: Together with the Depositions Taken by Order of Congress to Support the Truth of It (May 22, 1775) [hereinafter *A Narrative of the Excursion*], in *JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS*, *supra* note 6, at 661, 661-62.

669. See *Second Provincial Congress Minutes of Apr. 22, 1775*, *supra* note 668, at 147 & n.1; *A Narrative of the Excursion*, *supra* note 668, at 661-62.

670. See Minutes of the Second Provincial Congress (May 3, 1775), in *JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS*, *supra* note 6, at 185, 187; see also Minutes of  
*footnote continued on next page*



Wednesday in the Moneth of May” as the date for the Governor to call for a new Assembly,<sup>671</sup> but the Provincial Congress thought that a new plan was needed because Gage had “utterly disqualified himself to serve this colony as a governor.”<sup>672</sup> Accordingly, Warren asked the Philadelphia delegates for “your most explicit advice, respecting the taking up and exercising the powers of civil government, which we think absolutely necessary for the salvation of our country.”<sup>673</sup> Warren even added that “we shall readily submit to such a general plan as you may direct for the colonies; or make it our great study to establish such a form of government here, as shall not only most promote our advantage, but the union and interest of all America.”<sup>674</sup> The Provincial Congress’s letter was fittingly similar to the letter Simon Bradstreet’s Committee of Safety had written to King William III and Queen Mary II in 1689, in which it asked for the Crown’s permission to form a new government “agreeable unto our Charter Constitution.”<sup>675</sup>

It took until June 1775 for the Philadelphia Congress to consider the Provincial Congress’s letter. The Congress had to resolve two questions: first, whether it was even appropriate for the Continental Congress to offer its advice for how Massachusetts should govern itself, and second, what form of government the Congress would advise. Regarding the first question, John Adams emerged as an influential proponent of giving “Advice to the seperate States to institute Governments,” which he thought would set an important precedent when the other colonies sought to adopt their own independent governments.<sup>676</sup> “[T]he Case of Massachusetts was the most urgent,” he wrote, but “it could not be long before every other Colony must follow her example.”<sup>677</sup>

The Continental Congress had a more difficult time, however, reaching a consensus on the second question—what form of government Massachusetts should adopt. Some of the delegates, led by Samuel Adams, proposed placing “all Power in a House of Representatives” or a “single Sovereign Assembly.”<sup>678</sup>

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May 3, 1775, in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 652, at 24, 24-25 (Worthington Chauncey Ford ed., 1905).

671. See Massachusetts 1691 Charter, *supra* note 557, at 11.

672. See Minutes of the Second Provincial Congress (May 5, 1775), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 192, 192-93.

673. Minutes of the Second Provincial Congress (May 16, 1775), in JOURNALS OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 229, 230.

674. *Id.* at 230-31.

675. See Bradstreet, *supra* note 401, at 25.

676. See 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 592, at 353-54 (entry of June 9, 1775).

677. *Id.* at 352.

678. See *id.* at 354.

Others, led by John Adams, “hoped they would be wiser, and preserve the English Constitution in its Spirit and Substance, as far as the Circumstances of this Country required or would Admit.”<sup>679</sup> In particular, John Adams wanted the colony to maintain its independent executive, its House of Representatives and “Senate or Council,” and “above all things the Independence of the Judges.”<sup>680</sup> Ultimately, John Adams won out again. The Continental Congress proposed that Massachusetts should ignore “the Act of Parliament for altering the charter” as well as the Governor “who will not observe the directions of, but endeavour to subvert that charter.”<sup>681</sup> Instead, Massachusetts should “conform as near as may be, to the spirit and substance of the charter,” and “exercise the powers of Government, until a Governor, of his Majesty’s appointment, will consent to govern the colony according to its charter.”<sup>682</sup>

The new president of the Massachusetts Congress, James Warren (who succeeded Joseph Warren after Joseph’s death in the Battle of Bunker Hill<sup>683</sup>), was disappointed in the Continental Congress’s suggestion for Massachusetts to continue using the 1691 charter as its constitution.<sup>684</sup> Like Samuel Adams, he wanted more latitude to depart from the charter’s royal inheritance and “form for ourselves a constitution worthy of freemen.”<sup>685</sup>

Nevertheless, the Massachusetts Congress as a whole agreed to adopt the 1691 charter as the first written constitution for the de facto independent state of Massachusetts.<sup>686</sup> The Congress immediately instructed the towns to elect new representatives for a new General Assembly pursuant to the charter.<sup>687</sup> The only complication was that the charter called for a Crown-appointed Governor—Thomas Gage—who was at war with the General Assembly.<sup>688</sup> The General Assembly resolved this complication by taking advantage of the clause in the charter that gave the council the “full power and Authority” of the governor whenever the governor and the lieutenant governor were “displaced”

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679. *Id.*

680. *Id.*

681. See Minutes of June 9, 1775, in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 670, at 83, 83-84.

682. *Id.*

683. See Winfred E.A. Bernhard, *Warren, James*, AM. NAT’L BIOGRAPHY (Feb. 2000), <https://perma.cc/AQB3-BFXH>.

684. FROTHINGHAM, *supra* note 651, at 512 n.5 (quoting a June 21, 1775 letter from James Warren to John Adams).

685. *Id.* (quoting a June 20, 1775 letter from James Warren to Samuel Adams).

686. See Minutes of the Third Provincial Congress (June 20, 1775) [hereinafter Third Provincial Congress Minutes of June 20, 1775], in JOURNAL OF THE MASSACHUSETTS PROVINCIAL CONGRESS, *supra* note 6, at 358, 358-59.

687. See *id.* at 359.

688. See Massachusetts 1691 Charter, *supra* note 557, at 13-14.

from the colony.<sup>689</sup> On July 21, the newly assembled House of Representatives elected a new council of twenty-eight members.<sup>690</sup> A week later, the House recited the clause in the 1691 charter that permitted the council to replace a displaced governor.<sup>691</sup> The House finally resolved that because Governor Gage “ha[d] refused to govern the Province according to said Charter,” the House would “consider the constitutional Council of the Province, or the major Part of them, as Governor of this Province; and will acquiesce in whatever said Council, or the major Part of them, shall constitutionally do in said Capacity.”<sup>692</sup>

Over the next five years, the General Assembly governed Massachusetts according to the letter of their charter constitution. Occasionally, this produced some friction between the House and the Council. For example, in November 1775, the two sides disagreed over which branch had the authority to appoint military officers to lead the provincial militia.<sup>693</sup> Members of the House argued that it was their natural right as representatives of the people to appoint the people’s army.<sup>694</sup> But the Council disagreed, noting that the charter empowered the governor to lead the militia and gave the Council the governor’s power in his absence, and that it was therefore the council’s duty “to conform as near as may be to the Spirit and Substance of the Charter.”<sup>695</sup> The councilors had a “firm Attachment to the natural Rights of Men,” they explained.<sup>696</sup> But “if there is an Incompatibility between those Rights and the Charter-Constitution of this Colony, the Council can only lament their being bound to the Observation of such a Constitution.”<sup>697</sup>

Meanwhile, in Philadelphia, John Adams began “urging Congress to resolve on a general recommendation to all the States to call Conventions and

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689. *See id.* at 18-19; Third Provincial Congress Minutes of June 20, 1775, *supra* note 686, at 359.

690. *See* Minutes of July 21, 1775, in 51-I JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 6, 6.

691. *See* Minutes of July 28, 1775 [hereinafter Massachusetts House of Representatives Minutes of July 28, 1775], in 51-I JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 18, 21; *see also* Massachusetts 1691 Charter, *supra* note 557, at 18-19.

692. Massachusetts House of Representatives Minutes of July 28, 1775, *supra* note 691, at 21.

693. *See* Minutes of Nov. 9, 1775, in 51-I JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 250, 251.

694. *See id.*

695. *See* Minutes of Nov. 10, 1775, in 51-I JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 258, 261-62.

696. *Id.* at 262.

697. *Id.*

institute regular Governments.”<sup>698</sup> Adams thought that it would not be long before other states followed Massachusetts’s example and asked Congress for advice about forming new governments.<sup>699</sup> Adams additionally worried about the “Absurdity of carrying on War, against a King, When so many Persons were daily taking Oaths and Affirmations of Allegiance to him” thanks to the royal charters.<sup>700</sup> He also believed that the American people had a unique opportunity to consult “the Theories of the Wisest Writers” and “to erect the whole Building with their own hands upon the broadest foundation.”<sup>701</sup>

Adams hoped that each colony would assemble a “Convention[] of Representatives, freely, fairly and proportionally chosen,” which could “fabricate[] a Government, or a Constitution rather,” to replace their charters.<sup>702</sup> He explained that if any colony’s residents expressed skepticism about their convention’s plan, then “the Convention may send out their Project of a Constitution, to the People in their several Towns, Counties or districts, and the People may make the Acceptance of it their own Act.”<sup>703</sup> Adams also advised that the Congress should recommend “[a] Plan as nearly resembling the Governments under which We were born and have lived as the Circumstances of the Country will admit.”<sup>704</sup> He proposed that each colony preserve its “Governors, and Councils,” houses of “Representatives,” and the “independent Judges” that “We have always had.”<sup>705</sup>

Adams’s proposal was a unique blend of radicalism and conservatism. He radically wanted each colony to assemble its best citizens in popular conventions to purify themselves of any traces of British royalism. But he conservatively hoped that these conventions would adopt constitutions that looked like the charter governments the people already lived under. Also evident to Adams was that these new constitutions would be written documents, like the charters. Indeed, the very idea of a constitution, to Adams, was an age-old document dressed in revolutionary clothes.

Among the delegates in the Continental Congress, only “Mr. John Rutledge of South Carolina and Mr. John Sullivan of New Hampshire” took Adams’s ideas home with them.<sup>706</sup> In October 1775, Sullivan returned with

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698. 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 592, at 355 (entry of Oct. 18, 1775).

699. *See id.*

700. *Id.*

701. *Id.* at 352 (entry of June 2, 1775).

702. *See id.* at 355-56 (entry of Oct. 18, 1775).

703. *Id.* at 356.

704. *Id.*

705. *Id.*

706. *See id.* at 352 (entry of June 2, 1775).

instructions from New Hampshire's provincial convention "to obtain the advice and direction of the Congress, with respect to a method for our administering Justice, and regulating our civil police."<sup>707</sup> The Continental Congress appointed Adams to a committee of five, which deliberated over an answer for a week.<sup>708</sup> Ultimately, this committee, and the Continental Congress, recommended that New Hampshire "call a full and free representation of the people, and that the representatives, if they think it necessary, establish such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province."<sup>709</sup> Soon, South Carolina's delegation made an identical request of the Congress, which issued an identical response.<sup>710</sup>

It took the New Hampshire convention two months, but on January 5, 1776, it adopted a written "Form of Government."<sup>711</sup> South Carolina followed on March 26, when its provincial legislature adopted a series of resolutions creating a "general assembly," a "legislative council," a "president and commander-in-chief," a "privy council," and a bevy of other governmental institutions.<sup>712</sup> In April, John Adams anonymously published a widely read pamphlet, *Thoughts on Government*, in which he proposed a template for the "constitutions of government" that other colonies could adopt, with bicameral legislatures, independent executives, and independent judiciaries.<sup>713</sup>

On July 4, 1776, members of the Continental Congress signed the Declaration of Independence, which accused the Crown of "taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments."<sup>714</sup> Within nine months, the legislatures of Delaware, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, and Virginia had enacted or proclaimed versions of Adams's advice with documents they called a "Constitution or Form of Government,"

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707. Minutes of Oct. 18, 1775, in 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 652, at 298, 298 (Worthington Chauncey Ford ed., 1905); *see also* 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 592, at 354 (entry of Oct. 18, 1775).

708. *See* Minutes of Oct. 26, 1775, in 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 707, at 306, 307.

709. Minutes of Nov. 3, 1775, in 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 707, at 319, 319.

710. *See* Minutes of Nov. 4, 1775, in 3 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 707, at 320, 326-27.

711. *See* N.H. CONST. of 1776, *supra* note 6, at 2451-52.

712. *See* S.C. CONST. of 1776, *supra* note 6, at 3243-44.

713. *See* JOHN ADAMS, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES, IN A LETTER FROM A GENTLEMAN TO HIS FRIEND 3, 11-16, 21-22 (Philadelphia, John Dunlap 1776).

714. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776).

the “Charter of this Colony,” the “Declaration of Rights,” or, simply, the “Constitution of this State.”<sup>715</sup> As Thomas Paine anonymously wrote during Pennsylvania’s deliberations, “[a]ll constitutions should be contained in some written Charter,” one “drawn up and framed by the people.”<sup>716</sup> By April 20, 1777, every colony that had declared independence had adopted a written document to serve as its constitution.<sup>717</sup> All of these written constitutions looked and functioned like the charters that preceded them. Indeed, the corporate colonies of Connecticut and Rhode Island simply continued the charters they had received in the 1660s, modifying them only “so far as an adherence to the same will be consistent with an absolute independence . . . [from] the Crown of Great Britain.”<sup>718</sup>

#### G. The Massachusetts Constitution of 1780

Of course, written constitutions continued to evolve during the American Revolution.<sup>719</sup> The first generations of written constitutions were adopted as positive legislation—statutes—implying that the constitutions could later be amended by legislatures. In addition, none of the constitutions were reviewed and ratified by the general public before they were adopted. Between 1775 and 1780, Massachusetts once again became a site of constitutional innovation. The Massachusetts Constitution of 1780—which was drafted by a specially elected convention and ratified by a vote of the people—set the template for the U.S. Constitution of 1787 and the dozens of state constitutions that followed.

Most people in Massachusetts, including John Adams, were at first reluctant to second-guess their charter constitution while a war was raging around them.<sup>720</sup> “Our situation, my friends, is exceedingly critical,” an anonymous author wrote in the *Massachusetts Spy* in 1776.<sup>721</sup> War was not the

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715. See DEL. CONST. of 1776, *supra* note 6; GA. CONST. of 1777, *supra* note 6; MD. CONST. of 1776, *supra* note 6; N.J. CONST. of 1776, *supra* note 6; N.Y. CONST. of 1777, *supra* note 6; N.C. CONST. of 1776, *supra* note 6; PA. CONST. of 1776, *supra* note 6; VA. CONST. of 1776, *supra* note 6.

716. PAINE, *supra* note 37, at 15.

717. See sources cited *supra* note 6.

718. See, e.g., General Assembly of Connecticut Minutes of Oct. 10, 1776, *supra* note 6, at 3.

719. See WOOD, *supra* note 7, at 259-60.

720. For the proclamation making this point, see Minutes of Jan. 23, 1776, in 51-II JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 188, 189-92 (Mass. Historical Soc’y 1983) (1776). Adams wrote this proclamation. See A Proclamation by the Great and General Court of the Colony of Massachusetts Bay (1776), in 1 WORKS OF JOHN ADAMS, *supra* note 616, at 193, 193-96 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856).

721. O.P.Q., *To the Electors of Representatives for the Colony of Massachusetts-Bay, and to the Electors of Counsellors for the Same (No. 1)*, THOMAS’S MASS. SPY (Worcester, Mass.), May 18, 1776, at 1, 1.

time to permanently resolve “our constitution of civil government.”<sup>722</sup> The residents of the town of Topsfield agreed: “As enovasions are always dangerous, we hartily wish that the antiant rules in the Charter, which this province has been so much contending for, might be strictly adheared to till such time as the whole of the people of this Colony have Liberty to express their Sentiments.”<sup>723</sup>

But many residents, particularly in the rural, western half of the state, refused to accept the legitimacy of “that Constitution now adopting in this province.”<sup>724</sup> Led by a minister in Berkshire County named Thomas Allen, these dissidents argued that the charter had become “lame & essentially defective” and had ceased to function as a “fundamental Constitution” for Massachusetts.<sup>725</sup> From Allen’s perspective, the charter had been “of great value” when Massachusetts was a colony of Great Britain because its written terms offered a check “against the wanton Exercise of power” by the Crown, Parliament, or the provincial government.<sup>726</sup> But it was unclear how that check could still operate after 1775, when the General Assembly of Massachusetts, acting under the Continental Congress’s instructions, “had taken up the old Constitution contrary to the minds of the People.”<sup>727</sup> Allen concluded that the only way to make Massachusetts’s Constitution “fundamental” and “set above” the government was to make it impossible to create or amend absent “the Approbation of the Majority of the people.”<sup>728</sup> That is, “[i]f this fundamental Constitution is above the whole Legislature, the Legislature cannot certainly make it, [so] it must be the Approbation of the Majority which gives Life & being to it.”<sup>729</sup>

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722. See O.P.Q., *To the Electors of Representatives for the Colony of Massachusetts-Bay, and to the Electors of Counsellors for the Same (No. 2)*, THOMAS’S MASS. SPY (Worcester, Mass.), May 18, 1776, at 1, 2.

723. Topsfield’s Instructions to Its Representatives (June 14, 1776), in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 97, 98 (Oscar Handlin & Mary Handlin eds., 1966).

724. See Dec. 1775 Petition of Pittsfield, *supra* note 36, at 150. For more on the constitutionalists and their effect on the Massachusetts Constitution, see MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780 (Robert J. Taylor ed., 1961); and ROBERT J. TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION (1954).

725. See Dec. 1775 Petition of Pittsfield, *supra* note 36, at 150-150a; May 1776 Petition of Pittsfield, *supra* note 36, at 43-44.

726. See Dec. 1775 Petition of Pittsfield, *supra* note 36, at 150-150a; May 1776 Petition of Pittsfield, *supra* note 36, at 44.

727. See Affidavit on Thomas Allen (Mar. 2, 1776), in MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 724, at 24, 25.

728. See May 1776 Petition of Pittsfield, *supra* note 36, at 43-44.

729. *Id.* at 44.

In other words, to make the checks of the Massachusetts Constitution as enforceable as the colonial charters had been, Allen was calling for the charter to be ratified by the general public. Over the next eighteen months, through June 1777, towns across Massachusetts increasingly agreed that “our former Constitution (the Charter) is at an End, and a New Constitution of Government, as soon as may be is absolutely Necessary.”<sup>730</sup> The town meeting of Concord best exemplified the logical conclusion of Allen’s arguments, writing that “a Constitution in its Proper Idea intends a System of Principles Established to Secure the Subject in the Possession & enjoyment of their Rights & Privileges, against any Encroachments of the Governing Part,” but that “a Constitution alterable by the Supreme Legislative is no Security at all to the Subject against any Encroachment of the Governing part on any or on all of their Rights and privileges.”<sup>731</sup> Like Allen, the town believed that the only way the Constitution could check the legislature would be if a new “Convention, or Congress be immediately Chosen, to form & establish a Constitution, by the Inhabitents of the Respective Towns in this State.”<sup>732</sup>

Responding to these calls for a new constitution, on June 17, 1777, the Massachusetts General Assembly resolved itself into a convention “on the Subject of forming a new Constitution of Government.”<sup>733</sup> Eight months later, on February 28, 1778, it approved a new “Constitution and Form of Government for the State of Massachusetts Bay” for the towns’ “approbation or disapprobation.”<sup>734</sup> The proposed constitution created a government similar to the existing situation under the 1691 charter after Governor Thomas Gage’s forced abdication. For example, it created a “General Court” composed of “a Senate and House of Representatives,” but instead of an independent governor, the elected “Governor and Lieutenant Governor” would be part of the Senate.<sup>735</sup>

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730. Minutes of the Meeting of the Freemen in Lexington (Oct. 21, 1776) [hereinafter Lexington Freemen Minutes of Oct. 21, 1776], in REVOLUTION—PROVINCIAL CONGRESS, 1774-1778, Mass. Archives Felt Collection Vol. 156, at 178, 179.

731. Minutes of a Meeting of the Inhabitants of the Town of Concord (Oct. 22, 1776), in REVOLUTION—PROVINCIAL CONGRESS, 1774-1778, *supra* note 730, at 182, 182.

732. *Id.*

733. See Minutes of June 17, 1777, in 53-I JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS, *supra* note 34, at 27, 28 (Mass. Historical Soc’y 1987) (1777).

734. See A Constitution and Form of Government for the State of Massachusetts Bay, Agreed upon by the Convention of Said State, February 28, 1778—to Be Laid Before the Several Towns and Plantations in Said State, for Their Approbation or Disapprobation (Feb. 28, 1778), in JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 255 (Boston, Dutton & Wentworth 1832) [hereinafter JOURNAL OF THE CONVENTION FOR THE MASSACHUSETTS CONSTITUTION].

735. See *id.* at 256-57.



Voters overwhelmingly rejected this constitution, 9,972 to 2,083, for all sorts of reasons—including that the General Assembly that drafted the constitution had not been elected for that express purpose.<sup>736</sup> The most famous of the responses, written by Theophilus Parsons of Essex County, added that the constitution lacked “a bill of rights, clearly ascertaining and defining” those rights over which “the supreme power [of the state] hath no controul.”<sup>737</sup> Parsons demanded that the constitution clearly define “the rights of conscience, and the security of person and property each member of the State is entitled to.”<sup>738</sup> Parsons also objected to the fact that the executive was not independent of the legislature. He thought the limits on each branch’s responsibilities needed to be written “with a precision sufficient to limit the legislative power.”<sup>739</sup>

Chastened by the response to the 1778 constitution, on February 19, 1779, the House of Representatives asked the towns to vote on a new constitutional convention elected for that particular purpose.<sup>740</sup> A “large majority of the inhabitants of such Towns” agreed and called for a convention to meet on September 1, 1779.<sup>741</sup> John Adams was only one of over 300 people elected to serve in this new constitutional convention, but he was by far the most important.<sup>742</sup> Almost single-handedly, he wrote the entire draft constitution that the rest of the convention debated and approved in 1780.<sup>743</sup>

The “Constitution or Frame of Government” that Adams drafted included several of the innovations proposed by the towns in 1778, including a “Declaration of the Rights of the Inhabitants of the Commonwealth

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736. See MORISON, *supra* note 658, at 16; *see also, e.g.*, A Berkshire Convention Addresses the Superior Court (May 3, 1779), in MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 724, at 110, 110-11; Resolutions of a Hampshire Convention (Mar. 30, 1779), in MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 724, at 109-10.

737. See Result of the Convention of Delegates Holden at Ipswich in the County of Essex Who Were Deputed to Take into Consideration the Constitution and Form of Government Proposed by the Convention of the State of Massachusetts-Bay (1778), in MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS; WITH NOTICES OF SOME OF HIS CONTEMPORARIES app. at 359, 359, 367 (Theophilus Parsons ed., Boston, Ticknor & Fields 1859).

738. *Id.* app. at 360.

739. *See id.*

740. See MORISON, *supra* note 658, at 18; Resolve for Taking the Sense of the People upon the Subject of a New Constitution (Feb. 19, 1779), in JOURNAL OF THE CONVENTION FOR THE MASSACHUSETTS CONSTITUTION, *supra* note 734, app. at 189, 189-90.

741. See House of Representatives, State of Mass. Bay, Resolve Recommending a Convention (June 15, 1779), in JOURNAL OF THE CONVENTION FOR THE MASSACHUSETTS CONSTITUTION, *supra* note 734, at 5, 5-6.

742. MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 724, at 112-13.

743. See MORISON, *supra* note 658, at 20-22.

of Massachusetts.”<sup>744</sup> But despite these changes, the document also looked strikingly like the charter of 1629. Where the charter had created a “Generall Court[]” to govern the colony, the Constitution created a “General Court” to govern the Commonwealth.<sup>745</sup> Where the charter had called for annual elections on the “last Wednesday in Easter Tearme,” the Constitution called for annual elections “on the last Wednesday in May.”<sup>746</sup> And where the charter had protected the “liberties and immunities of free and naturall subjects” under the “Lawes and Statut[e]s of this our Realme of England,” the Constitution enumerated what these liberties were.<sup>747</sup> Indeed, even the new declaration of rights protected things already included in the 1641 *Body of Liberties*, such as the right to counsel and freedom from excessive bail or cruel and inhumane punishment.<sup>748</sup>

The convention gave the towns until June 7, 1780, to return their votes.<sup>749</sup> Most towns, like Boston, voted on each article “Paragraph by Paragraph.”<sup>750</sup> About 16,000 people voted out of a total population of 363,000.<sup>751</sup> After adopting a tabulation system that “to-day might be called political jugglery,” the Convention processed the returns and determined that every article in the document had received a majority of support.<sup>752</sup> The new Constitution went into effect on October 25, 1780, with the “ringing of bells, firing of cannon,” and the election of John Hancock as the first popularly elected Governor in Massachusetts since Simon Bradstreet in 1686.<sup>753</sup>

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744. See A Constitution or Frame of Government, Agreed upon by the Delegates of the People of the State of Massachusetts-Bay (1780) [hereinafter *Massachusetts Constitution of 1780*], in JOURNAL OF THE CONVENTION FOR THE MASSACHUSETTS CONSTITUTION, *supra* note 734, app. at 222, 222-23.

745. Compare MBC Charter, *supra* note 94, at 11, with Massachusetts Constitution of 1780, *supra* note 744, app. at 228.

746. Compare MBC Charter, *supra* note 94, at 12, with Massachusetts Constitution of 1780, *supra* note 744, app. at 228.

747. Compare MBC Charter, *supra* note 94, at 12, 16, with Massachusetts Constitution of 1780, *supra* note 744, app. at 223-27.

748. See Massachusetts Constitution of 1780, *supra* note 744, app. at 225, 227; see also *Body of Liberties*, *supra* note 232, at 220-21, 224.

749. See Minutes of Feb. 29, 1780, in JOURNAL OF THE CONVENTION FOR THE MASSACHUSETTS CONSTITUTION, *supra* note 734, at 150, 155; Minutes of Mar. 2, 1780, in JOURNAL OF THE CONVENTION FOR THE MASSACHUSETTS CONSTITUTION, *supra* note 734, at 168, 169.

750. See Minutes of May 4, 1780, in 16 BOSTON RECORDS, *supra* note 584, at 126, 126.

751. MORISON, *supra* note 658, at 21.

752. See *id.* at 21-22. But see *id.* at 22 (“[A] fair tabulation would have shown only a bare majority for at least two.”).

753. See *Boston*, October 26, CONTINENTAL J. & WKLY. ADVERTISER (Boston), Oct. 26, 1780, at 2, 2.

H. The Federal Constitution of 1787

In the years between 1775, when Massachusetts adopted its seventeenth-century charter as its written Constitution, and 1780, when Massachusetts finally adopted a new written Constitution, every other state also adopted some sort of written document to serve as its constitution.<sup>754</sup> Even though only half these states had been founded as corporations like the Massachusetts Bay Company,<sup>755</sup> in all of them there was a close identification between written constitutions and corporate charters. In 1785, for example, one of the United States's best-known lawyers, James Wilson of Pennsylvania, asked aloud: What was the "constitution of the United States"?<sup>756</sup> He did not, of course, mean the document that was drafted two years later in Philadelphia. Instead, he meant "constitution" in the British sense—what were the rules and institutions that constituted the United States? Wilson answered that the United States as a whole, and states like Pennsylvania in particular, were nothing more than corporations—even though Pennsylvania had never literally been a corporate colony. To him, "States [we]re corporations or bodies politick of the most important and dignified kind," with the powers to make bylaws, govern territory, and even charter new corporations.<sup>757</sup>

Wilson took this view with him to the Constitutional Convention of 1787, during which delegates from across the United States met in Philadelphia to discuss "sundry propositions, in writing, concerning the american confederation, and the establishment of a national government."<sup>758</sup> Part of these debates included what relationship a new federal government would have with the states. Once again, Wilson argued that the "States are now subordinate corporations or Societies,"<sup>759</sup> by which he meant they governed territory relative to the U.S. government in the same way the City of London governed territory relative to Parliament. Wilson and other proponents of a strong federal government—particularly Alexander Hamilton and James Madison—

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754. See sources cited *supra* note 6.

755. See *supra* note 47 and accompanying text.

756. See JAMES WILSON, *Considerations on the Bank of North America* (1785), in 1 COLLECTED WORKS OF JAMES WILSON 60, 60 (Kermit L. Hall & Mark David Hall eds., 2007).

757. See *id.* at 67.

758. See Minutes of May 29, 1787 (Journal), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15, 16 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS].

759. Minutes of June 19, 1787 (King), in 1 FARRAND'S RECORDS, *supra* note 758, at 329, 331.

spent much of the convention attempting to reduce the states to this “corporate” role.<sup>760</sup> “The states, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation,” Madison argued.<sup>761</sup> “The states ought to be placed under control of the general government,” he continued, “at least as much so as they formerly were under the king and British parliament.”<sup>762</sup>

In the end, Madison’s view was rejected—as were many other proposals for what the text of the U.S. Constitution would say. But one thing the delegates never even questioned was that this new Constitution, like the corporate charters and state constitutions that preceded it, would be written down.

### Conclusion

The similarities between the written constitutions of the 1770s and 1780s and the Massachusetts Bay Company’s charter of 1629 were more than coincidental. From a very early period, officers of the Massachusetts Bay Company thought of their charter as a “Charter Constitution”—the written document that *constituted*, or established, their colonial government and its powers.<sup>763</sup> In the words of Thomas Paine that opened this Article, the 1629 charter functioned identically to a modern constitution—a document “to which you can refer, and quote article by article,” and which contained “the compleat organization of a civil government, and the principles on which it shall act, and by which it shall be bound.”<sup>764</sup>

The 1629 charter didn’t become Massachusetts’s Constitution of 1780 simply because time passed, however. What gave the charter its constitutional force—something whose “bounds” a government could transgress only by “destroying its own foundation”<sup>765</sup>—was the popular understanding that any violation of its terms could threaten disaster. This understanding began with an explicit threat: the quo warranto against the Massachusetts Bay Company

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760. See, e.g., Minutes of June 19, 1787 (Yates), in 1 FARRAND’S RECORDS, *supra* note 758, at 325, 328 (views of Wilson); *id.* (views of Hamilton); Minutes of July 7, 1787 (Madison), in 1 FARRAND’S RECORDS, *supra* note 758, at 549, 551 (views of Madison).

761. Minutes of June 29, 1787 (Yates), in 1 FARRAND’S RECORDS, *supra* note 758, at 470, 471.

762. *Id.*

763. See, e.g., Bradstreet, *supra* note 401, at 25.

764. PAINE, RIGHTS OF MAN, *supra* note 1, at 56-57.

765. A Circulatory Letter, *supra* note 612, at 237.

initiated by Sir Ferdinando Gorges and Captain John Mason. But the understanding became a lasting and implied part of Massachusetts's constitutional culture.

The history of the lawsuits against the Massachusetts Bay Company illustrates how this constitutional culture evolved. The corporations that preceded the company—the Virginia Company, the Council for New England, and others—operated small corporate governments in England that were meant to oversee large, disenfranchised communities overseas. The terms of their charters were read far more closely for the monopolies and privileges they contained than for the structure of the corporate governments they established—particularly before the Virginia Company of London was made the test subject of a quo warranto prosecution in 1624. Similarly, before the Massachusetts Bay Company was put in the Crown's crosshairs, its leaders hid its charter from view and blatantly ignored its terms—skipping elections, changing quorum rules, and amending its provisions on the fly.

But as soon as the company learned of Gorges's and Mason's attempts to dissolve it, the charter's terms took on increased importance. This transition was particularly noteworthy, because the charter was the first to cross the Atlantic and serve as a template for how English colonists would govern themselves in North America. Its leaders and shareholders consulted the charter when deciding which laws the company had authority to pass, and they used the charter as a rhetorical trump card when debating public policy. The charter influenced other attributes of the company's political culture, as it showed the importance of writing down the limits on a leader's exercise of discretion. Using the charter as a model, shareholders wrote instructions to their representatives, urged the codification of all laws, and otherwise used writing as a tool of political accountability.

The threat of a quo warranto never left the company. Even after the English Civil War made it clear that the Crown couldn't prosecute the quo warranto, there was always the lingering possibility that an angry Parliament could send warships or take other actions to dissolve the company. Indeed, while the 1650s were seen by the company's critics as a period of excess—in which the company established a mint, executed Quakers, and annexed Maine—the company offered a reasonable textual basis for each of these decisions.

The fact that the Massachusetts Bay Company was run by Puritans likely contributed to the charter's prominent place in the company's political culture. It was easy for New England ministers to associate the covenants that established their churches with the corporate charter that established their government. And it was also easy for later generations to compare the company's contract with the King to Abraham's covenant with God. The Puritans were a textualist people who cared deeply about citations to

authority and individual words. It is not surprising that a company full of experts in biblical exegesis also cared about the clauses of their “civil constitution.”<sup>766</sup>

For all of these reasons, the term “constitution” in New England evolved differently from how the term evolved in England. English political theorists never had a need to put every rule that governed English society into a single book or document. English plaintiffs who challenged corporate actions were far more likely to challenge the action as repugnant to the common law or an act of Parliament than as repugnant to a provision of the corporation’s charter. And, due to circumstance, English theorists and pamphleteers often appealed to unwritten traditions or customs to explain the ideal relationship between the King and Parliament, or between the people and government. Although the Massachusetts Bay Company’s charter also referenced many unwritten traditions, particularly through its clause that cited the “laws of England,”<sup>767</sup> the four pieces of parchment that composed the charter contained many more-specific textual limits and took on many of the attributes of English constitutionalism. Where “arbitrary government” in England was a government that exceeded its unwritten limits, “arbitrary” government in New England was a government whose limits weren’t written down in the first place.

Even after the charter was vacated in 1686 and replaced by a noncorporate charter in 1691, the new charter did not molt its corporate lineage. Thomas Hutchinson, John Adams, and other advocates on both sides of the revolutionary debates of the 1760s and 1770s continued to describe the 1691 charter in constitutional terms. From Hutchinson’s perspective, the charter was something like the charter of the City of London: an important document to be sure, but one that expressly offered no immunity from “the Lawes of this our Realme of England” passed by Parliament.<sup>768</sup> But from Adams’s perspective, the charter was the legacy of the corporate contract made between the Crown and the original shareholders of the Massachusetts Bay Company: a document that set the exclusive rules for how the colony would be governed so long as both sides of the contract respected its terms. Adams’s view was widely shared by participants in the American Revolution, who saw Parliament’s nullification of the 1691 charter

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766. See *supra* text accompanying notes 311-12.

767. See MBC Charter, *supra* note 94, at 16-17.

768. See Massachusetts 1691 Charter, *supra* note 557, at 15-16.

as an effort to “annihilat[e] our free Constitution of Government.”<sup>769</sup> From that point on, it was only a matter of time before town meetings declared that “our former Constitution (the Charter) is at an End, and a New Constitution of Government, as soon as may be is absolutely Necessary.”<sup>770</sup>

Considered from this perspective, written constitutionalism wasn’t the “discovery” of the Framers of the U.S. Constitution. The Constitutional Convention of 1787 took place a decade after every state had already adopted its own written constitution. Significantly, however, written constitutionalism also wasn’t the discovery of John Adams and the other framers of these earlier constitutions. Their constitutional conventions took place over a century after John Winthrop and other politicians, ministers, and voters in Massachusetts wrote that “[t]he words of Constitution of this bodye politike” are “sett downe [in] the verye words of the Patent.”<sup>771</sup>

And this is not the only respect in which the charter constitutionalism of the Massachusetts Bay Company anticipated the written constitutionalism of the United States. The debates Winthrop had with other members of the Massachusetts Bay Company over who possessed the authority to interpret the charter anticipated later constitutional debates over whether the U.S. Supreme Court or “the people themselves” should be the primary interpreter of the U.S. Constitution.<sup>772</sup> His company’s refusal to comply with the Privy Council’s attempts to enforce violations of the charter anticipated current debates over how constitutional violations should be remedied—if at all.<sup>773</sup> And the diverse sources he and his interlocutors referenced to support their interpretations of the charter—the common law, practical consequences, the charter’s history, and the Bible among them—anticipated the current diversity of sources that lawyers and constitutional scholars draw upon to understand the Constitution.<sup>774</sup> While contemporaries of the Massachusetts Bay Company

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769. See *supra* text accompanying note 638.

770. Lexington Freeman Minutes of Oct. 21, 1776, *supra* note 730, at 179.

771. Winthrop, *Arbitrary Government Described*, *supra* note 249, at 469.

772. *Cf., e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the Supreme Court should not be the only institution capable of interpreting the Constitution).

773. *Cf., e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (rejecting a claim that the judiciary should “intrud[e] on the President’s constitutional responsibilities in the area of foreign affairs” to protect the constitutional rights of Muslim immigrants); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1853-54, 1859-60 (2017) (rejecting the claim that immigrant detainees have an implied right of action to sue federal officials for abusive detention conditions).

774. See HULSEBOSCH, *supra* note 45, at 7-8, 40-41 (discussing the relevance of nontextual sources in interpreting corporate charters); Bilder, *supra* note 42, at 1553-54 (same).

were unusually faithful to their charter's text, they often interpreted the terms of that text flexibly to accommodate an evolving government—one that developed an elected House of Representatives, bicameralism, the power of incorporation, and other innovations.

In the centuries since America's first constitutions were written down, the relationship between corporate charters and constitutions has slowly been forgotten.<sup>775</sup> But in America, both documents are descendants, at least in part, of seventeenth-century corporations like the Massachusetts Bay Company. Long before the American Revolution, that company's charter acquired the attributes of a "Charter Constitution." Long after the company's demise, its charter has set the standard for what a constitution should look like for generations that followed.

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775. But not immediately by everyone. Many early judicial opinions, including ones by the U.S. Supreme Court, continued to refer not only to "each State singly, but even the *United States*," as "corporations." See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 447 (1793) (opinion of Iredell, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI; see also *Dixon v. United States*, 7 F. Cas. 761, 763 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 3934).