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

* Assistant Professor of Law, Harvard Law School. For mentorship and advice throughout the research of this Article, I am immensely grateful to Emma Rothschild, Morton Horwitz, James Kloppenberg, and Ken Mack, as well as the research librarians of the Massachusetts Archives, the Massachusetts Historical Society, and the National Archives in London. For thoughtful feedback and criticism, I thank Mary Bilder, Jud Campbell, David Giepley, Andrew Crespo, Charlie Donahue, Dan Farbman, Michael Klarman, Anna Lvovsky, Daphna Renan, and Rebecca Scott, as well as participants in the Harvard Center for History and Economics Workshop, the Boston College Legal History Workshop, and the Society for Historians of the Early American Republic Annual Conference. For financial support, I thank the Joint Center for History and Economics at Harvard University and the University of Cambridge as well as the Weatherhead Center for International Affairs. For an incredibly thorough job checking every source in the Article and suggesting improvements to the text, I thank the editors of the Stanford Law Review.
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.¹ Then, as now, the British Constitution referred to the unwritten arrangement of laws and institutions that make up, or constitute, the British government.² Paine delighted in contrasting the “so much talked about” but never seen British Constitution³ with the American version “to which you can refer, and quote article by article in a visible form.”⁴

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.⁵ 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.⁶

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.
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. 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."

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

The charter at issue belonged to the Massachusetts Bay Company, a corporation that governed most of New England from 1629 to 1686.10 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.11 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.12 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.13 The founders assumed that, as with any corporation, the Crown would leave them alone so long as they abided by their charter’s terms.14 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.15

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.16 Although the Massachusetts Bay Company was far from the only corporation in Old or New England whose

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.
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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.17 This remoteness led New Englanders to treat the possible dissolution of their government as a catastrophe.18 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.19 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.20

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.21 Although these decisions were controversial, the company’s officials stridently defended them by pointing to specific authorizing text in the charter.22 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,23 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

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. 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.

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. 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. 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.” 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,” its written check on “Arbitrary Government.” 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.”

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” to the “form of . . . constitution” for a New England commonwealth. During the
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."34 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.35 During the Revolutionary War, the leaders of this second coup in Boston argued that their "defective" charter and "antient Constitution" needed to be replaced,36 and that "[a]ll constitutions should be contained in some written Charter."37 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.38 By the time the Constitutional Convention met in 1787, each of the thirteen states already had some written document serving as its constitution.39

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."40 This point—that charters changed into constitutions—has often been assumed by scholars of constitutionalism, who

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-I 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.


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

39. See supra note 6 and accompanying text.

have long noticed the similarities between the two types of documents. But as Mary Sarah Bilder has written, “it is surprisingly difficult to explain the change with precision and persuasive power.” 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,” 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.” 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,” ignoring the intuitive

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 W.M. & 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.


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”).

observation that almost all U.S. institutions “descend directly from Colonial institutions.” 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. 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. 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.

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).
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. 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. 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. Friends in England paid for his ransom, but only a few...
years later those same friends got Gorges in trouble with Queen Elizabeth, who sent him to London’s Gatehouse Prison. 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. 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.

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. Despite his failure there, Raleigh publicly spread word that Virginia was full of gold. These rumors led people all over England to believe that a “company” or a “corporation” could successfully finance an expedition to prospect for it. 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—

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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 Briefe Narration of the Originall 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 Briefer Narration), in 2 Ferdinando Gorges and His Province of Maine, supra note 52, at 1, 1 (noting that Gorges was “Knight and Governor of the Fort and Island of Plymouth”).


57. See 1 Andrews, supra note 47, at 58-59.

58. See id. at 42-46.

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

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. 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.

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. 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." They left after a year.

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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[y]ing 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.


63. See id. at 9-11.

64. See Letter from Thomas Edmondes 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 Briefe Narration*, supra note 54, at 10-11.

65. See 1 Andrews, supra note 47, at 91; Gorges, *A Briefe Narration*, supra note 54, at 13, 16.

66. See 1 Andrews, supra note 47, at 92-95; Gorges, *A Briefe 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. Although the Jamestown settlers also suffered from a bad winter, they made their settlement into the first permanent English colony in North America. 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. 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.* 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."

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. Mason introduced himself to Gorges. Gorges liked Mason, whom he called a "man of action." Gorges ended up recruiting Mason as a lifelong

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68. See id. at 21.
69. See generally id.
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.
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.76

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.77 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.78 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,79 who in turn sold deeds to emigrants and fishermen who were moving to New England on their own.80

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.81 The Council sold these so-called Pilgrims a deed to settle a colony there—which the Pilgrims named New Plymouth.82 In 1623, the Council


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


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

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. 85 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. 86 They left the Council under the leadership of a board member named Robert Rich, Earl of Warwick. 87

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. 88 These dissidents were known as “Puritans” for their desire to purify Church of England practices they regarded as too Catholic. 89 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. 90 Between 1627 and 1629, under the Earl’s direction, the Council for

84. See WHITE, supra note 83, at 14, 75-78.
86. See 1 ANDREWS, supra note 47, at 400-02.
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. The deed clearly conflicted with earlier deeds the Council had given to Gorges and Mason.

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. 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.

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.


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].


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.96

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.97 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.98

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.99

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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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.

north of “any and every parte” of the Merrimack River and three miles south of “any or every parte” of the Charles River. 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. 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.

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. 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 Massachusetts Bay in Newe England.” Later clauses gave this corporation “perpetuall succession” as well as “full and absolute power and authoritie to correct, punishe, pardon, governe, and rule” anyone living in New England.

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[tion], invasion, detriment, or annoyance to the said plantation or inhabitants.”

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. This

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.
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 termes,” which usually fell in May. The board was also authorized to call a monthly “Courte,” or board meeting, at which it could handle “all such busineses and occurreents as shall, from tyme to tyme, happen.” A quorum consisted of eight people: seven directors and the chairman or vice chairman.

The board could also call quarterly “Generall Courts,” or general meetings, at which shareholders could participate. 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. A clause later in the charter authorized general meetings to do various other things, such as to impose “lawfull correct[io]n” on a prisoner, impeach or set “lymytts” on an officer, or figure out how to convert “the natives” to Christianity.

This last point about conversion was labeled “the principall ende of this planta[tion].” 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.

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.” Relatedly, all oaths had to be “warrantable” by the laws of England, all punishments had to be “according to the course of other corpora[tio]ns in this our realme of England,” and Britons living under the corporation’s jurisdiction were entitled to “all liberties and immunities of free

109. Id. at 12; see John Cowell, The Interpreter, or, Booke Containing the Signification of Words, at Tt 2, col. 1 (Cambridge, Eng., John Legate 1607) (“Easter termes . . . 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.
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and naturall subjects . . . as [i]f they and everie of them were borne within the realme of England.” 120 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. 121

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. 122 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. 123 That July, at Cambridge’s commencement, a couple of them began talking with a fellow alumnus named John Winthrop. 124 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. 125

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. 126 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.” 127 More fundamentally, Winthrop also thought the Virginia Company “did not

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.
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.
establslysh a right forme of gover[n]ment." 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." 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[tion] to those that shall inhabite there, and not to continue the same in subordina[tion] to the Company heer, as now it is." From July through August 1629, the company debated the idea. 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[m]on[wealth]." 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. Later that month, the company passed the order. 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

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. 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.

Almost as soon as the company decided that its charter was no bar to relocation, however, the charter became something of an afterthought. 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. In 1630, after the company had established its headquarters in the new town of Boston, it restricted shareholders from electing the chairman, allowing them only to elect directors. 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. 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 “Deputees,” or shareholder representatives, to vote on taxes “by proxie.”

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).


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, eg., 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. 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. Leaders like Winthrop certainly didn’t interpret their charters with the textualist approach of a modern judge. 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.”

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. 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

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 BRIEFENarration, 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.
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. One witness reported that “swarms” of migrants were leaving Old England for New England. 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. A second witness claimed that he had been whipped, mutilated, fined, and banished “for uttering malitious & scandulous speeches against the [government] & the church of Salem.” 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.

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. 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


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).


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 Wigg 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 BRIEFE NARRATION, supra note 54, at 63-64; Letter from Thomas Wigg 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).

the Soveraigne Magistrate.”

So in 1634, the councilors ordered the Massachusetts Bay Company to send its charter back to London for review—and possible dissolution.

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.” 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. Although a few charters stated that this grant was temporary, most explicitly declared that the grant was “per[p]etuall” and intended to last “for ever.” 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. 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.” (This was often shortened to “quo warranto”—as in, “the King just ‘quo warranto’d’ that corporation.”) The procedure is easier to walk through than to define. First,

154. See GORGES, A BRIEFE 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.


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
the King’s attorney general would bring an information, or criminal charge, against the shareholders of a corporation. 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?” 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. 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.

As so far described, this procedure had existed in one form or another since at least the thirteenth century. 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.

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, 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. Using a quo warranto, King

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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." And in 1635, after the Massachusetts Bay Company ignored his privy councilors' request to resign its charter, King Charles ordered his attorney general to file a quo warranto against that company, too.

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. 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. 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. 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").


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).


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 that "the best of them was but an attourney." 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.” 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.” 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. 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.” But the shareholders rejected this excuse, voting to institute their reforms and also to demote Winthrop from the chairmanship he had held since 1629.

By July 1634, however, when the company received its first order from the Privy Council demanding to see the charter, 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.” 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,” 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

177. See id. at 128-29 (entry of Sept. 18, 1634).
178. See id. at 113-14 (entry of Apr. 1, 1634).
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/SNJJW-2ZSD (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." And he and the board banished Roger Williams, who later founded Rhode Island, principally because Williams wrote and lectured “against the kings Patente.”

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." 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." 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." 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." 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

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 (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.
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.

This new mode of charter interpretation was powerfully illustrated in a debate over whether the company had the power to restrict immigration. 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.” 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. 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.

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 plant” in New England. Referencing the charter’s language that gave all residents the same “liberties and
immunities” as if they were in England, 198 Vane argued that these liberties included the right to travel within the Crown’s realms. 199 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.” 200

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. 201 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, 202 in 1637, entered a default judgment ordering the charter to be “Seized into the Kings hands.” 203 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.” 204 In 1638, the privy councilors even learned that the company’s government was preparing to “fortifie

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199. See Vane, supra note 197, at 76-77.
200. See id. at 72-73, 76.
201. See supra text accompanying notes 133-34.
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. Winthowe 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.205

In the face of this shocking resistance, the councilors tasked Gorges and Mason with reclaiming New England on behalf of the King.206 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.207 (King Charles awarded Gorges the “Province of Mayne,” capital “Gorgeana,”208 while Mason got the “Province of New Hampshire,” also called “Masonia”).209 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.210

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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); id. at 42 & n.61 (entry of Dec. 14, 1630); id. at 224 (entry of June 26, 1637).


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.211

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.212 Members of Parliament argued that under the “constitution of the policie of this kindome,” the King had no power to raise revenue without Parliament’s consent.213 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,214 including his diplomatic power to impose tariffs,215 his military power to require local governments to pay for ships of war,216 and his sovereign power to charter

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.


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

corporations for a fee. 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.”

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. In the meantime, Gorges appointed commissioners to establish towns in his province of Maine. He died in 1647, however, having never set foot there.

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. 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.” 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.” Under the terms of that patent, the company

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 COUNCILLS OF TRADE AND PLANTATIONS, 1622-1675, at 15-17 (1908).
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.\footnote{See id. at 527; see also MBC Charter, supra note 94, at 7-9; supra notes 100-02 and accompanying text.} In 1644, Parliament and its military generals controlled that land.\footnote{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 I, 1.} The company therefore allowed Parliament to seize ships in New England waters rather than “renounce our patent and England's protection.”\footnote{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.}

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.”\footnote{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 “muche 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).} 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.\footnote{See Child et al., supra note 228, at 8-10.} 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.\footnote{See id. at 9-11.} More alarmingly, they complained that when they submitted this grievance to the company’s board, it filed criminal charges against them.\footnote{See A Relation of the Effects This Petition Produced, in CHILD, NEW-ENGLANDS JONAS CAST UP AT LONDON, supra note 228, at 14.} 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.”\footnote{By the Court: In the Yeares 1641, 1642; Capital Lawes Established Within the Jurisdiction of Massachusets, 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[ti]on to [th]e fundamentall rules" of the charter. 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 warrantted by our charter." For example, the laws taxing nonshareholders and punishing traitors were both warrantted 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. The company argued that this clause necessarily applied to people who had "no vote in election of the members of the [government]."

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. 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." 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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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 "[petition 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." Shareholders continued to demand "transcript[s]" of records, the power to instruct their representatives "in writing," and "written" laws to limit the board's exercise of discretion. 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. 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.

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—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." A covenant is "the Constituting forme of a

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).
Church,” he wrote. 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.

* * *

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.” While parliamentarians and royalists in England assumed that the “constitution of th[at] Kingdome” did not need to be written down, New Englanders like John Winthrop maintained that “[t]he words of Constitution of this bodey politike” are “sett downe [in] the verye words of the Patent.” 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.” 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.”

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.”

245. MATHER, supra note 243, at 5.
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”).
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 Winnipesaukee, 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.253

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.254 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.255 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.256

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.257 The surveyors followed the river west from its mouth and north all the way up to Lake Winnipesaukee where they declared—

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 interpre\(t\)ation of the terms of the lymitts northward graunted in the patent” was a “streight line east & west” at the top of the “L.”\(^\text{258}\) 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 our patent[]),”\(^\text{259}\) 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.”\(^\text{260}\)

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

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.\(^\text{264}\) 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.”\(^\text{265}\)

\(^{258}\) See Minutes of May 31, 1652, in 3 MBC RECORDS, supra note 233, at 274; 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 [th]e order of the Generall Court”).

\(^{259}\) Minutes of Oct. 7, 1641, in 1 MBC RECORDS, supra note 94, at 336, 342-43; 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; 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.
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. Oliver Cromwell was Lord Protector of the “Commonwealth and Free-State” of England. And Cromwell was a big supporter of the Massachusetts Bay Company. 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. 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.”

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—even though English law books declared that “incorporation

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.
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.
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.
cannot be created without the King.” In 1652, the company established a mint and began coining its own currency—even though earlier lawyers would have considered this “treason” because only the King could “make or coin Money within his dominions.” 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. 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 rebellion, sedition, & presumptuous obtruding themselves upon us, notwithstanding their being sentenced to banishment on pain of death.”

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.’” 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 authority” over all inhabitants within its jurisdiction. 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.

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275. See, e.g., MBC Minutes of May 27, 1652, supra note 273, at 263-64; id. at 269-70.
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
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 “Bodyes corporate,” and he assented to a law declaring that “no Charter of any Corporation” would be “[]voided” for something the corporation did before his restoration. 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 [father].” The King responded affirmatively, asking in return only that the company stop hanging Quakers.

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. 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. 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
& arbitrary Government.” 286 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.” 287

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.” 288 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 government that was instituted by the charter.” 289 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. 290 And, in 1664, he dispatched four commissioners to New England to enforce his demands. 291 The King hoped the commissioners would “suppress & utterly extinguish” any idea that the company was “independent [from] us & our laws” by examining its legal code and hearing “all Complaints and appeals” against the company. 292

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

286. Report of Robert Mason et al. to King Charles II, supra note 284, at 37a.
287. Id. at 37b.
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.
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.
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charter in a “safe & secret” place before the commissioners arrived.293 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.294 That said, he and
the rest of the board had already resolved “to adhere to their pattent,”295 which
they “conceive[d] . . . (under God) to be the first & maine founda[tio]n of our civil
politye here.”296

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 “common-
wealth” and repeal its ban on Christmas.297 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.298 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.”299 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.”300
He and other company representatives argued that the charter gave the
company “full & absolute power & auth ority” 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.”301

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

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,
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.302 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,”303 and the entire company protested that, “instead of being governed by rulers of our own choosing, (which is the fundamental privilege of our patent,) & by laws of our own,” the appeal would subject them “to the arbitrary power of strangers, proceeding not by any established lawe, but by their own discretions.”304

The commissioners were amazed by this “obstruction,” and they warned the company “that the Charter, which you so much idolize, may be forfeited.”305 But while they accused the company of acting “contrary to their allegiance & derogatory to his Majestys Soveraignity,”306 they had trouble pointing to a clause in the charter that the company was definitively violating.307 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.”308 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 Governor & Councill of the Massachusetts to the Kings Commissioners and the Kings Commissioners Reply (July 1665) [hereinafter Letter from the Governor & Councill 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 Governor & Councill 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.


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.”

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. 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. 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 politic.” 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.”

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 MATTACHUSETS, 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 Nadworth 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.


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.”

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. 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. 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.”

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. As will soon become clear, this selection

314. Minutes of May 19, 1677, in 7 BOSTON RECORDS, supra note 303, at 110, 110.
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 CHEFELY 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.\textsuperscript{319} He got this job, which paid reasonably well, soon after fleeing from his “home & a wife very big w[ith] child” to escape creditors “whome [his] delayes ha[d] made deaffe to all entreaties of forbearance.”\textsuperscript{320}

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.\textsuperscript{321} Randolph concluded that the company was merely applying “their usuall methods of discountenancing all Affairs that come to them from his Mal[jes]ty.”\textsuperscript{322}

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.\textsuperscript{323} 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.”\textsuperscript{324} 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 Mal[jesty’s] express orders to seize all

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\item \textsuperscript{319} See MICHAEL GARIBALDI HALL, EDWARD RANDOLPH AND THE AMERICAN COLONIES, 1676-1703, at 1-4 (1960).
\item \textsuperscript{320} Letter from Edward Randolph to Navy Comm’rs (Feb. 2, 1666), in 2 RANDOLPH PAPERS, supra note 318, at 188, 188-89.
\item \textsuperscript{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.
\item \textsuperscript{323} See id. For the Navigation Acts, see, for example, 15 Car. 2 c. 7 (1663); and 12 Car. 2 c. 18 (1660).
\item \textsuperscript{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.
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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 Councill to them in Seven years.”

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. After a brief hearing, the King’s privy councilors rejected the agents’ reading of the charter as based on “imaginary Lynes.” They ultimately confirmed Mason’s title to New Hampshire and Gorges’s title to Maine.

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. And Gorges sold Maine back to the Massachusetts Bay Company for £1,250. (To put that in perspective, John Harvard left the

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.
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.”) \(^{331}\) 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\(^{332}\)—preferably someone who had recently been there and could use the £175 salary plus commissions.\(^{333}\)

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.\(^{334}\) He made enemies with virtually everyone he met. Randolph reported that biased harbormasters refused to arrest ships he suspected were violating the Navigation Acts.\(^{335}\) Biased judges made Randolph repay “the charges of [the] Court” every time he tried to prosecute a suspected violator.\(^{336}\) Biased juries acquitted the people he prosecuted.\(^{337}\) And biased legislators erected a naval office of their own to conduct their own prosecutions and collect fines due to the King.\(^{338}\) After a few months of what was supposed to be a gold mine, Randolph reported that he was broke.\(^{339}\)

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334. See Instructions from the Commissioners for Managing, Levying, 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 Toppan 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.
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.”

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. There wasn’t much—the company repealed its ban on Christmas and most of the other laws objected to by the 1664 commissioners—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,” it illegally coined money while “humbly beg[ging] his maj[es]ties pardon,” it illegally denied the right of dissidents to appeal to the Privy Council in England. It illegally interfered with his attempts to enforce the Navigation Acts. And it illegally “assume[d] other Powers not warranted by [its] Charter.”

Randolph also claimed that nothing short of a quo warranto could “save my life and reform this Governm[ent].” 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.”


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/H2MS-6EERK (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.


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, to begin the paperwork. 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.” Indeed, most cities and universities in England were corporations.

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—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.

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.
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.”\textsuperscript{356} 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.”\textsuperscript{357} Indeed, this is how John Winthrop originally interpreted the Massachusetts Bay Company’s charter.\textsuperscript{358} 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.”\textsuperscript{359} 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.”\textsuperscript{360}

At the time, one of the privileges English charters often gave corporations was to elect members of Parliament.\textsuperscript{361} 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.\textsuperscript{362} 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.\textsuperscript{363}

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.\textsuperscript{364} One witness called the resulting case “the greatest concern to the nation ever contested in any court of Westminster Hall.”\textsuperscript{365} The City’s lawyers, “some of

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  \item \textsuperscript{356} CLARK & SLACK, supra note 143, at 126.
  \item \textsuperscript{357} Id. at 128.
  \item \textsuperscript{358} See supra text accompanying notes 144-45.
  \item \textsuperscript{359} CLARK & SLACK, supra note 143, at 126.
  \item \textsuperscript{360} Id.
  \item \textsuperscript{361} See LEVIN, supra note 49, at 5.
  \item \textsuperscript{362} See 13 Car. 2 c. 1 (authorizing the practice); \textit{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).
  \item \textsuperscript{363} See LEVIN, supra note 49, at 13-15.
  \item \textsuperscript{364} See Proceedings in The King v. City of London (1681-1683), in 8 HOWELL’S STATE TRIALS, supra note 213, at 1039, 1039.
  \item \textsuperscript{365} Id. at 1357.
\end{itemize}
the greatest men that ever appeared at the bar,"366 each gave oral arguments for "about three hours apiece."367 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.368

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.369 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.370 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.”371 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.372 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 of[ ] the Crown and in defiance to it.”373

Observers called the Attorney General’s performance “beyond the expectation of all mankind,”374 and the King was “very well pleased.”375 The court’s unanimous opinion, issued a month later, agreed with the Attorney

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.
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).
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].”

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. He also sent Edward Randolph to serve the quo warranto on the Massachusetts Bay Company along with two hundred copies of the opinion. 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.” 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. 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?”

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

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 903, at 164.
the company voted to “spinn out the case to the uttermost.” 383

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.” 384

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. 385 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. 386 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. 387

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.” 388 When that day arrived four months later with no company in sight, the Court of Chancery vacated the charter. 389

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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[že]d” by what was happening. 390 “[W]ee are . . . a little 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 [henceafter 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.


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).


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).
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understand the procedure against us," they wrote. Nevertheless, life went on much as it had after the first quo warranto in 1637. In August 1685, a victorious Edward Randolph complained that "[m]ore than 9 months are passed 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." 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."

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. 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. 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." 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

391. Minutes of Oct. 15, 1684, in 5 MBC RECORDS, supra note 326, at 453, 458 (reporting the "Courts letter to Mr Robert Humfrys").
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 Revolters.” 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. Members of the new government addressed Simon Bradstreet and the outgoing directors “not as a Governor & Company, but [as . . . some of the principall gentlemen and chiefe of the inhabitants of the severall tounes of the Massachusetts.”

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.” 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.”

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

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.


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—Increase was a child prodigy at home in both Englands. When Increase was twelve, in 1651, he got into Harvard College. 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. 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. Increase ended up marrying Maria and naming their first child Cotton after his famous father-in-law.

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. 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. 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.
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
“Covenant with God,” both of which were “mainly made up of precepts and promises” that were enforced by the penalty of “forfeiture.”\textsuperscript{410} 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.\textsuperscript{411}

Mather considered Edward Randolph “a mortall enemy to our Country,” someone “whose name[] will stink in New England to the worlds end.”\textsuperscript{412} 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.\textsuperscript{413} 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.\textsuperscript{414} And in 1684, Mather offered a number of scriptural objections to surrendering the charter.\textsuperscript{415} The King’s privy councilors began to refer to him as ”that star-gazer: that halfe distracted man.”\textsuperscript{416}

\begin{footnotes}
\footnotetext{410}{See \textit{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, \textit{Foreword to Willard}, supra, at i, i-ix.}
\footnotetext{411}{See \textit{Mather, A Call From Heaven}, supra note 409, at 75-76; see also \textit{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).}
\footnotetext{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 \textit{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.}
\footnotetext{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.}
\footnotetext{414}{See \textit{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).}
\footnotetext{415}{See supra text accompanying notes 380-84.}
\footnotetext{416}{See Letter from Edward Randolph to Simon Bradstreet (Sept. 4, 1684), in \textit{8 Collections of the Massachusetts Historical Society, Fourth Series}, supra note 409, at 527, 528.}
\end{footnotes}
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. 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 & Councill” to temporarily oversee a “Territory & Dominion of New England,” which consisted of the now-former colonies of Massachusetts, New Hampshire, and Maine. It named Randolph, Robert Mason, and fifteen others to the council. 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.

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. It explained that “our Trade for want of money is much perplexed and decayed.” It also ordered the former secretary of the company to deliver its old records. 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.”

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

417. See MBC Minutes of May 20, 1686, supra note 400, at 516.
419. See id. at 38.
420. See id. at 39-42.
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.426 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.427 Second, the government levied a new tax on landowners without first calling for an elected assembly.428 Third, the government required Puritan church buildings to open their doors part-time for the service of the Church of England.429

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.430 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.431 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 Thankes” to build some goodwill with

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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. The following spring, Mather even traveled to England with the ostensible goal of thanking the King in person. 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.”

C. The Glorious Revolution

The England in which Mather arrived in 1688 was in the middle of a generational debate about “the Word Constitution.” 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.” 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. 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.”

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.


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.


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, and agreements such as Magna Charta in 1215 or the Petition of Right in 1628, which required Parliament’s consent before levying new taxes. By contrast, for a “Tory”—someone who supported the Crown—the true Constitution of England, is the Monarchy as established by Law. 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” 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.” When Mather came to praise the King for the declaration, the King warmed to him immediately. 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.”

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

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.


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.”

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,” and that he wanted to give these “ancient Prescriptions and Charters” back to the corporations that lost them.

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.” 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.”

The Prince demanded “a Declaration of the Rights of the subjects” and a Parliament untainted by the Crown’s quo warranto proceedings.

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.” 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.”

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.

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[,] Privileged[,] and Originall Rights

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.
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.
and Constitutions." Mather also intervened when the Prince drafted a letter instructing the Crown's governors in North America to stay in their positions. He convinced William that the letter "should not be sent to New England" and that Andros should be replaced.

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. But the privy councilors also heard from Sir Robert Sawyer—the Attorney General who prosecuted the charters of both the Massachusetts Bay Company and the City of London—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. 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."


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[illia]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.

As the Crown worked on this project, Mather turned to Parliament, which looked even more promising.465 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."466

The final draft of the Bill of Rights omitted this provision,467 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.”468 (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.469 Mather became a fierce advocate of this bill, which promised to "revers[e] the Judgment against the old charter" of the company470 while also declaring generally "that Corporations could not be forfeited, nor their Charters surrendered."471

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


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 only in Parliament and by diverse other Arbitrary and Illegall 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.472 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.473 Mather was “surpris’d with joy” by this news.474 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 design.”475 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.”476

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.477 But even if he truly knew nothing about the armed men’s origins, he immediately capitalized on their “Alacrity.”478 By noon, the
militia had grown to 5,000 people and had captured most of Boston.479 Among their prisoners were Edward Randolph and the crew of the frigate Randolph had parked in Boston Harbor after announcing the new government in 1686.480 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.481 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.”482 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.”483 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.484

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.”485 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.”486 The junta’s plan was to hold Randolph and Andros and await “what Justice, Orders from his Highness, with the English Parliament shall direct.”487 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

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.\textsuperscript{488}

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.”\textsuperscript{489} For the next ten months, Governor Andros and about two dozen other officials—Randolph excepted—were held in one of the forts.\textsuperscript{490} 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.”\textsuperscript{491}

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.”\textsuperscript{492} 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.”\textsuperscript{493}

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.”\textsuperscript{494} The text of the company’s charter set

\begin{thebibliography}{99}
\bibitem{488} Letter from Waite Winthrop et al. to Edmund Andros, \textit{supra} note 476, at 20.
\bibitem{489} A Narrative of the Proceedings att Boston in New England, upon the Inhabitants Seizing the Government There, \textit{supra} note 401, at 7b.
\bibitem{491} BYFIELD JUNE 1689 LETTER, \textit{supra} note 473, at 5; see Letter from Edward Randolph to the Governor of the Colony of Barb. (May 16, 1689), \textit{in THE HUTCHINSON PAPERS, supra} note 15, at 571, 571.
\bibitem{492} See ROBERT CALEF, MORE WONDERS OF THE INVISIBLE WORLD, OR, THE WONDERS OF THE INVISIBLE WORLD, DISPLAYD IN FIVE PARTS 149 (London, Nath. Hillar 1700); Letter from Simon Bradstreet to John Hampden, Jr. (June 8, 1689), \textit{in 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES, supra} note 409, at 538, 538-39.
\bibitem{493} Minutes of the Council for Safety and Conservation of the Peace (Apr. 20, 1689), \textit{in 6 COURT RECORDS (1689-1682), Mass. Archives Felt Collection Doc. No. GC3-1701x}, at 2, 2.
\bibitem{494} See Minutes of the Council for Safety and Conservation of the Peace (May 1, 1689), \textit{in 6 COURT RECORDS, supra} note 493, at 11, 11.
\end{thebibliography}
elections on the last Wednesday in May, and a split emerged between “[a] great part of the Country” who wanted elections “according to our Charter rules” and people who worried that English officials might “treat them as revolters from their allegiance” if, without the Crown’s permission, they held elections for a vacated corporation. 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 Country*, which argued that “[w]e are not in a fit frame nor posture for a present Choice.” 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. 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.

By contrast, members of the “hold elections” camp argued that the only legal path forward was following the text of the charter. In *The Country-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.” 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.” 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 termes yearely”); see also Cowell, supra note 109, at Ttt 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’t Archives Class 5/855, Doc. No. 5, at 6a, 6a, https://perma.cc/9NU9-L6TZ.

499. See id.


501. The Country-Man’s Answer to a Gentleman in Boston: Mr. N.N.’s Letter to a Friend in the Country (1689), U.K. Nat’t 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. 503 “[T]he Charter of this Country is deservedly accounted our Magna Charta,” its author wrote, adding that “without [it], we are wholly without Law.” 504

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 “convention” in Boston on May 9. 505 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. 506 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. 507 At first, members of the old government refused, calling for a new convention with even more representatives on May 22. 508 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. 509 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.” 510

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


504. Id.


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


508. See id.


written down.511 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.”512

These two addresses were shipped to England, published in a single
volume, and read to William and Mary in August 1689.513 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.514
The revolutionaries in Boston were fighting for “their Ancient Constitution”
and against “[a]rbitrary” government, Mather wrote.515 Another pamphlet
argued that “the good or pernition 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.”516 In a letter, Simon Bradstreet cited Parliament’s
declaration that the King’s quo warranto proceedings were “illegal and a
grievance.”517 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 setled in our former Charter Governm[en]t.”518

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

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),
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:
PRESERVED 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).
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.
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deprived of the Laws and Liberties of English-men, forced in their Consciences, suffered death for Religion, and denied Appeals to the King. 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," and wanted to "be at liberty again" 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)."

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," the King responded favorably and agreed to "doe what is in His power towards restoring [their] Liberties." 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. 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." 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.

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 JOINING 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.
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.
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 “cut the throat of their Country” with their conduct.\textsuperscript{528} 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\textsuperscript{529}—much to the annoyance of the privy councilors conducting the trial.\textsuperscript{530} 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.\textsuperscript{531}

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.\textsuperscript{532} 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.\textsuperscript{533} 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.”\textsuperscript{534} The Privy Council rejected this form of pleading, dismissing the charges for being “from nobody.”\textsuperscript{535} After being held captive for almost a year, Andros and Randolph were released a week after the hearing.\textsuperscript{536}

\textsuperscript{528} See Mather Autobiography, supra note 380, at 340-41.
\textsuperscript{529} See Letter from Elisha Cooke to Simon Bradstreet (Oct. 16, 1690), 45 PROC. MASS. HIST. SOC’Y 644, 646-49 (1912).
\textsuperscript{530} See Letter from Thomas Brinley to Francis Brinley (May 28, 1690), 83 PROC. AM. ANTIQUARIAN SOC’Y 244, 246-47 (1973).
\textsuperscript{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 S/855, Doc. No. 80, at 164a, https://perma.cc/R6R8-PYNJ.
\textsuperscript{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.
\textsuperscript{533} See Letter from Elisha Cooke to Simon Bradstreet, supra note 529, at 648-49.
\textsuperscript{534} See Letter from Thomas Brinley to Francis Brinley, supra note 530, at 248-49.
\textsuperscript{535} See id. at 249.
This hearing “extremely Scandalized” all the people whom Mather had recruited “to concern themselves for New England.” 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. 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.

G. The New Charter

Somewhat surprisingly, given the circumstances, the Crown and Attorney General Treby consulted with Mather over the new charter. 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. 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.” 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.”

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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England," he wrote.\footnote{Id. at 15.} 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."\footnote{See id. at 15-16.} 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."\footnote{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.}

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.\footnote{See MATHER, supra note 31, at 17 (emphasis omitted).} Because ordinary people could point to a document that clearly articulated the government's powers, he continued, "New-England is by this Charter more priviledged" than even people "that live in England it self are."\footnote{Id.} Even "a Person as bad as Andross" would be no match for written limits on his power, Mather wrote.\footnote{Id.} 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."\footnote{Id. at 19.}

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 Massachusets-Bay.\footnote{HUTCHINSON, supra note 269.} 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."\footnote{Id. at 415.} 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.
547. See MOTHER, supra note 31, at 17 (emphasis omitted).
548. Id.
549. See id.
550. Id.
551. HUTCHINSON, supra note 269.
552. Id. at 415.

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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.”

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.” That charter was the colony’s “Constitution, dearly purchased by our Ancestors, and dear to us.” 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. 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. As before, this assembly would begin its annual sessions on the last Wednesday in May, during which “represent[atives]” from...
each town would meet and elect a twenty-eight-member “Councill.” 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 wholsome and reasonable Orders Laws Statutes and Ordinances . . . as they shall Judge to be for the good and welfare of our said Province.” 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.” 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.”

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. The charter also replaced the corporation’s elected chairman and vice chairman with a Crown-appointed “Governour” and “Leiuten[an]t or Deputy Governour.” 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.” 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.”

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.

558. See Massachusetts 1691 Charter, supra note 557, at 11-12; see also supra text accompanying note 109.
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.566 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.567 In 1758, the Crown named Hutchinson Lieutenant Governor of the province.568 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.569

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.570 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 Massachusets-Bay, in 1764.571

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”572 to the “form of . . . constitution” for a New England commonwealth.573 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.574

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. 575 “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. 576 “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 Massachusets province happily enjoys.” 577

Hutchinson’s History was immediately popular—printers in London and Boston published a second 578 and third 579 edition within a decade of its first printing in 1764, along with a sequel that extended the history to 1750 580 and a published collection of Hutchinson’s primary sources. 581 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. 582 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.” 583 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. 584 The first was the clause of the Massachusetts charter that gave the General Assembly

575. See id. at 377-95, 408-15.
576. Id. at 415.
577. Id.
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.” 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.” Each of Parliament’s taxes therefore “annihilate[d] our Charter Right to Govern and Tax ourselves.” Otis took this message to heart in his own 1764 pamphlet, The Rights of the British Colonies Asserted and Proved. 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.

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.” 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 tried by Juries; These are the very Pillars of the British Constitution, founded in the common Rights of Mankind.

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.

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

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 prtg. 1962) (entry of Jan. 18, 1766).
authorities as are specially given them in their several charters of incorporation.\textsuperscript{593} 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.\textsuperscript{594} 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.”\textsuperscript{595} The Governor of Pennsylvania accused Randolph in 1697 of “huffing and bouncing” and bad-mouthing people behind their backs.\textsuperscript{596} William Penn accused Randolph of perjury in 1698.\textsuperscript{597} And multiple governors had Randolph imprisoned—including the Governor of Bermuda in 1699 for “pretending great power and

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


\textsuperscript{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).

\textsuperscript{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.”

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. 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.”

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.” 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.” 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


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.


602. See LOCKE, supra note 601, bk. II, §§ 221-226, at 441-47.
the Crown and Parliament, had to respect. 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, Benjamin Franklin argued that "by the same charter, and otherwise, [Pennsylvanians] are intitled to all the privileges and liberties of Englishmen," which included protection from "taxes on the inhabitants, unless it be with the[ir] consent." 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."

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

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

But when Parliament again tried to tax paper and other supplies in 1767, 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." 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." James Otis and Samuel Adams argued that colonists were additionally entitled to the protections of the

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).
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.
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." The British Constitution was "fixed," they declared, and Parliament "cannot overlap the bounds of it, without destroying its own foundation."

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. The town meeting of Boston called this occupation an attempt "to overthrow the Civil Constitution" of the province. John Adams, a lawyer from the Boston suburb of Braintree, wrote that Bernard's actions were a "flagrant and formal Attack upon the Constitution." 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."

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." Another minister, Samuel

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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].


618. JASON HAVEN, A SERMON PREACHED BEFORE HIS EXCELLENCY SIR FRANCIS BERNARD, BARONET, GOVERNOR; HIS HONOR THOMAS HUTCHINSON, ESQ: LIEUTENANT-GOVERNOR,
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.619

The present Governor, Francis Bernard, was recalled to England in late 1769.620 By the terms of the charter, once he left the province, the Lieutenant Governor, Thomas Hutchinson, acquired his powers.621 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.622 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.”623

“[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.”624 A town meeting of Boston agreed that the Assembly should resist any “alteration of the constitution as settled by the Charter.”625 The House of Representatives later lamented “the many attempts that have been made, effectually to render null and void those
Clauses in our Charter, upon which the Freedom of our Constitution depends. 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.”

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.” 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.” 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.” 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.” 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...”...
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.632 Liberally quoting the speeches of John Winthrop, the letters of Edward Randolph, and the text of “the old Charter of this Colony,”633 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.”634 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.”635 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.”636 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.637 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 &

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.
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."

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." 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. The Act made the Massachusetts council an appointed body instead of an elected body; made it unlawful for towns to call meetings “without the leave of the governor;” and, most importantly, "revoked and made void" all the clauses of the 1691 charter to the contrary. 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 Massachusetts Bay."

Almost immediately, Massachusetts residents compared the nullification of its “Constitution of Government” to the loss of its “Charter Constitution” a century earlier. 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.” 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,” the “late attempt to alter the constitution of this province,” and Parliament’s “unparalleled

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638. Minutes of July 26, 1774, in 18 BOSTON RECORDS, supra note 625, at 185, 186.
640. See 14 Geo. 3 c. 45.
641. See id. § 3.
642. See id. § 7.
643. See id. § 1.
644. Id. pmbl.
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.
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.”

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.” 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.” This committee ultimately agreed “to found our rights upon the laws of Nature, the principles of the English Constitution, and charters and compacts.” 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. 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.”

Meanwhile, in Massachusetts, the new Governor, Thomas Gage, called for new elections for an October session of the General Assembly to meet at Salem. 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).
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)).
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. 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. 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.’” 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. They told Governor Gage that they would continue to meet despite his instructions in order to preserve the “freedom and constitution” of the province.

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. 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. An anonymous author agreed that the “Charter to us granted by King William III and Queen Mary” was as “valid and

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.


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.” He implored the provincial leaders to preserve their “Constitution sacred and entire.”

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.” Their words proved prophetic, for on the night of April 18, 1775—eighty-six years to the day after the 1689 Boston coup—Gage ordered British soldiers to march on Concord to arrest the Congress’s leadership. 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.

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.” Warren was in something of a rush: The 1691 charter set the “last

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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 IIL.

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
Wednesday in the Moneth of May” as the date for the Governor to call for a new Assembly, but the Provincial Congress thought that a new plan was needed because Gage had “utterly disqualified himself to serve this colony as a governor.” 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.” 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.” 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.”

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 separate States to institute Governments,” which he thought would set an important precedent when the other colonies sought to adopt their own independent governments. “[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.”

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.”

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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.”679 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.”680 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.”681 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.”682

The new president of the Massachusetts Congress, James Warren (who succeeded Joseph Warren after Joseph’s death in the Battle of Bunker Hill683), was disappointed in the Continental Congress’s suggestion for Massachusetts to continue using the 1691 charter as its constitution.684 Like Samuel Adams, he wanted more latitude to depart from the charter’s royal inheritance and “form for ourselves a constitution worthy of freemen.”685

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.686 The Congress immediately instructed the towns to elect new representatives for a new General Assembly pursuant to the charter.687 The only complication was that the charter called for a Crown-appointed Governor—Thomas Gage—who was at war with the General Assembly.688 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.”

679. Id.
680. Id.
682. Id.
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. On July 21, the newly assembled House of Representatives elected a new council of twenty-eight members. A week later, the House recited the clause in the 1691 charter that permitted the council to replace a displaced governor. The House finally resolved that because Governor Gage "had 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."

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. Members of the House argued that it was their natural right as representatives of the people to appoint the people's army. 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." The councilors had a "firm Attachment to the natural Rights of Men," they explained. 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."

Meanwhile, in Philadelphia, John Adams began "urging Congress to resolve on a general recommendation to all the States to call Conventions and
institute regular Governments.” Adams thought that it would not be long before other states followed Massachusetts’s example and asked Congress for advice about forming new governments. 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. 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.”

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. 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.” 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.” He proposed that each colony preserve its “Governors, and Councils,” houses of “Representatives,” and the “independent Judges” that “We have always had.”

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. 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.” The Continental Congress appointed Adams to a committee of five, which deliberated over an answer for a week. 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.” Soon, South Carolina’s delegation made an identical request of the Congress, which issued an identical response.

It took the New Hampshire convention two months, but on January 5, 1776, it adopted a written “Form of Government.” 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. 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.

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.” 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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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.” 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.” By April 20, 1777, every colony that had declared independence had adopted a written document to serve as its constitution. 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.”

G. The Massachusetts Constitution of 1780

Of course, written constitutions continued to evolve during the American Revolution. 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. “Our situation, my friends, is exceedingly critical,” an anonymous author wrote in the Massachusetts Spy in 1776. 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.


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.”

The residents of the town of Topsfield agreed: “As evasions 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.”

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.” 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. 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. 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.” 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.” 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.”

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 I, 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).


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.” 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.” 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.”

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.” 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.” 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.

731. Minutes of a Meeting of the Inhabitants of the Town of Concord (Oct. 22, 1776), in REVOLUTION—PROVINCIAL CONGRESS, supra note 730, at 182, 182.
732. Id.
735. See id. at 256-57.
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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.736 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.”737 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.”738 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.”739

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.740 A “large majority of the inhabitants of such Towns” agreed and called for a convention to meet on September 1, 1779.741 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.742 Almost single-handedly, he wrote the entire draft constitution that the rest of the convention debated and approved in 1780.743

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

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.


743. See Morison, supra note 658, at 20-22.
of Massachusetts.” But despite these changes, the document also looked strikingly like the charter of 1629. Where the charter created a “Generall Court[]” to govern the colony, the Constitution created a “General Court” to govern the Commonwealth. Where the charter called for annual elections on the “last Wednesday in Easter Tearme,” the Constitution called for annual elections “on the last Wednesday in May.” 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. 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.

The convention gave the towns until June 7, 1780, to return their votes. Most towns, like Boston, voted on each article “Paragraph by Paragraph.” About 16,000 people voted out of a total population of 363,000. 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. 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.

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.
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.
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.\(^{754}\) Even though only half these states had been founded as corporations like the Massachusetts Bay Company,\(^{755}\) 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”?\(^{756}\) 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 [were] corporations or bodies politic of the most important and dignified kind,” with the powers to make bylaws, govern territory, and even charter new corporations.\(^{757}\)

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.”\(^{758}\) 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,”\(^{759}\) 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—

\(^{754}\). 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.760 “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.761 “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.”762

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.763 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.”764

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”765—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

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.

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.”

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,” 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 melt 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. 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

766. See supra text accompanying notes 311-12.
768. See Massachusetts 1691 Charter, supra note 557, at 15-16.
as an effort to “annihilat[e] our free Constitution of Government.”769 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.”770

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.”771

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.772 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.773 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.774

While contemporaries of the Massachusetts Bay Company

769. See supra text accompanying note 638.
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. 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.

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).