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Corporate America: A History of Corporate Statehood Since 1629

A dissertation presented

by

Nikolas Bowie

to

The Department of History

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

History

Harvard University

Cambridge, Massachusetts

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Dissertation Advisor: Emma Rothschild Nikolas Bowie

Corporate America: A History of Corporate Statehood Since 1629

Abstract

This dissertation examines the history of "corporate statehood," or how Americans have understood the corporation as a governmental institution. In contrast to historical accounts of "corporate personhood," which describe how Americans have understood corporations as if they were legal or metaphorical individuals, this account focuses on the remarkable consistencies between the explicitly governmental corporations of the seventeenth century and the business and municipal corporations of the present. It is a history of how corporations supplied the institutional frameworks for American government and how the normative values associated with American government—like the existence of checks and balances or the need for representatives to govern with the consent of the governed—were reapplied to the corporate form. The dissertation argues that it is impossible to understand the development of the American state without also understanding the development of the American corporation, and vice versa.

The dissertation is divided into four chapters, each of which focuses on an event from the seventeenth, eighteenth, nineteenth, or twentieth century in which Americans debated the question of what a corporation actually is. The dissertation limits its geographic scope to Massachusetts—a state that has been at the forefront of corporate innovations since its founding in 1629 by the Massachusetts Bay Company. The first chapter discusses the story of that company from its founding to its dissolution by the English crown in 1684. Analyzing how colonists, English administrators, and lawyers described the company and its written charter, the chapter argues that the corporation

established a model for the governmental institutions that followed it, particularly the idea that a government's "constitution" should be written down in a charter-like document.

The second chapter describes eighteenth-century debates over the American colonies' relationship with Great Britain. These often took the form of debates over whether the colonies were corporations like their predecessors. The chapter argues that the American Revolution began, in part, due to Americans' strong identification of their governments with corporations like the Massachusetts Bay Company, as evidenced by the practice of every colony's adoption of a written constitution after the Revolution when no similar document existed in Great Britain.

The third chapter discusses how corporations began the nineteenth century as public-service corporations chartered by state legislatures but ended the century as "private" entities with a much weaker relationship to their states of incorporation. The chapter argues that despite this so-called privatization of the corporation, workers and regulators continued to think of corporations as governmental institutions that could either be autocratic toward their employees or exemplars of "industrial democracy."

The final chapter describes a Supreme Court case in the twentieth century that interpreted the U.S. Constitution to protect corporate executives from regulations that prohibited them from spending their corporations' money on political expenditures. In response to this decision, the mayor of the city of Boston, a municipal corporation, argued for the similar constitutional treatment of cities. The chapter argues that the political campaign that followed highlighted for a twentieth-century audience the persistent institutional and conceptual similarities between business corporations and municipal corporations. It concludes that "corporate democracy," or the idea that corporations should be governed by the same norms as other governmental institutions, remains a guiding principle into the twenty-first century.

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Introduction

Most of the colonies that formed the original United States of America were founded by corporations. Financial corporations such as the Virginia Company of London recruited investors for the first Protestant explorers. The Massachusetts Bay Company and other colonial corporations crossed the Atlantic on the first colonists' ships. When these corporations disembarked, they then served as the colonies' first governments. Virginia, Massachusetts, Delaware, New York, Connecticut, Rhode Island, and Georgia all began their histories as colonies governed by, and sometimes for, corporations. As the Dutch governor of Manhattan promised residents in 1647, "I shall govern you as a father his children for the advantage of the chartered West India Company."[1]

Corporations did not disappear with the American Revolution, of course. Immediately after the colonies declared independence, their new governments modeled their new written constitutions on the old charters they inherited from their corporate predecessors—if they bothered to change their charters at all. (Connecticut and Rhode Island retained their seventeenth-century corporate charters as their constitutions well into the nineteenth century.[2]) Even though the United States Constitution did not mention corporations, members of all three of the federal government's branches considered the power of incorporation such an inherent attribute of any sovereign nation that they

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[1] 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; Connecticut was chartered as a corporation in 1662, Rhode Island followed in 1663, and Georgia in 1732. See JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS (1917); 4 THE HISTORY OF NORTH AMERICA 94 (Guy Carleton Lee & Francis Newton Thorpe eds., 1904).

[2] *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

authorized Congress to charter corporations as the Constitution's first "implied power."[3] States did the same, passing laws to incorporate local governments, universities, central banks, infrastructure projects, health and welfare agencies, and every other service that the public demanded but which state legislatures did not have enough resources or time to finance or manage directly. Corporations were the nation's original administrative agencies, its original provincial legislatures, its original public-private partnerships—its original governmental institutions. "The United States of America will be admitted to be a corporation," wrote the country's first Supreme Court Justices and encyclopedias. "All the American governments are corporations created by their charters, viz., their constitutions."[4]

Eventually, corporations did more than just govern. In contrast with public-service or municipal corporations, so-called private corporations emerged in the nineteenth century to manage businesses and resources on behalf of handfuls of profit-minded individuals. But even these mining, manufacturing, and railroad corporations continued to be supervised by legislators, administrators, and judges concerned about protecting the "public interest." Moreover, from the perspective of these corporations' employees, even the most private corporation was still a government. Workers who had no role to play in a corporation's decisionmaking considered themselves subjects of a "financial oligarchy" or an "industrial autocracy." Workers who went on strike, conducted sabotage, or otherwise fought to influence the conditions of their employment did so to create what they called an "industrial democracy." Employers who resisted these strikes protested that their corporations were

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[3] *See* McCulloch v. Maryland, 17 U.S. 422 (1819); Act of Feb. 25, 1791, Pub. L. No. 1-10, 1 Stat. 191; Alexander Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett et al. eds., 1961).

[4] Dixon v. United States, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (Marshall, C.J.); 3 ENCYCLOPAEDIA AMERICANA 547 (Francis Lieber ed., 1830).

already democratic. Although workers had no formal role to play in corporate governance, the country's largest corporations were "shareholder democracies," in which voting constituents (shareholders) elected legislatures (boards of directors) who oversaw chief executives (managers).

By the twentieth century, this model of shareholder democracy was constitutionalized. The Supreme Court of the United States began interpreting the U.S. Constitution to protect corporations from legislative and judicial oversight on the ground that "corporate democracy"—the checks and balances provided by shareholders and directors—was a sufficient form of regulation. The assumptions underlying this rationale were challenged when public-service and municipal corporations, like the city of Boston, began seeking the same protections. But the idea that a corporation was a self-regulating government survived. Indeed, it remains the Supreme Court's stated justification for extending constitutional protections to corporations into the twenty-first century.[5]

In sum, many of America's oldest institutions, including its forms of government, were founded as or by corporations, which in turn have long been understood as and influenced by American government. But this historical relationship between the corporation and democracy—what British historian F.W. Maitland has described as a co-evolution from "a genus of which State and Corporation are species"—has gone largely unappreciated by the general public and by contemporary historians.[6] Few recent histories of the United States mention the role played by corporations in the creation or development of American government, and even fewer chart the history of how corporations themselves

[5] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

[6] F.W. Maitland, *Translator's Introduction*, *in* OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (F.W. Maitland trans., 1900).

have been understood as governmental.[7] The handful of centuries-long histories of the corporation tend to describe the narrative as one of "corporate personhood," where corporations slowly accumulated the rights of individual people and divested themselves of state oversight.[8]

This dissertation tells a different narrative: a history of "corporate statehood," or how Americans have understood the corporation as a governmental institution. In contrast to historical accounts of the American corporation that focus on how the institution changed, this account focuses on the remarkable consistencies between the corporations and colonies of the 1620s and the corporations, cities, and states of the present. It is a history of how corporations supplied the institutional frameworks for American government and how the normative values associated with American government—like the existence of checks and balances or the need for representatives to govern with the consent of the governed—were reapplied to the corporate form. The dissertation argues that it is

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[7] *See, e.g.*, J.S. MALOY, THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT (2008); ANDREW SCHOCKET, FOUNDING CORPORATE POWER IN EARLY NATIONAL PHILADELPHIA (2007); DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE (2005); MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION (2004); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969); OSCAR HANDLIN & MARY HANDLIN, COMMONWEALTH (1947); CHARLES H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 241 (1939); CHARLES MCLEAN ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY (1934); ANDREW C. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1932); DAVIS, *supra* note 1; Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & M. Q. 51 (1993); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945).

[8] *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018); CORPORATIONS AND AMERICAN DEMOCRACY (Naomi Lamoreaux & William Novak eds. 2017); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed., 2005); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); RONALD SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855 (1982); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE UNITED STATES: 1780–1970 (1970).

impossible to understand the development of the American state without also understanding the development of the American corporation, and vice versa.

The history of any idea that covers four hundred years will necessarily entail tradeoffs. This dissertation has two limitations to keep its scope manageable. First, the dissertation's geographic focus is largely limited to Massachusetts. Massachusetts is a good focal point because it began its history as a trading corporation in 1629 before becoming a royal colony in 1686, an independent commonwealth in 1776, and a federated state of the United States of America in 1789. Its corporate origins contributed to eighteenth-century theories of how governments and empires should be structured, and its written charter became a model for how people up and down the Atlantic coast defined a constitution. Once Massachusetts became a state, it applied Revolution-era political objectives to the corporations it chartered, leading the nation in its use of the corporate form. After the Civil War, when Massachusetts began losing corporations to neighboring states with more liberalized charter regimes, it embarked on a new type of regulation that focused on limiting what any corporation could do, regardless of where that corporation was chartered. This sort of legislative restriction became the target of one of the first Supreme Court cases that protected the First Amendment rights of corporations, which in turn laid the groundwork for the present constitutional regime identified with the 2010 Supreme Court decision *Citizens United v. Federal Election Commission*. So while Massachusetts's history is unique, it reveals much about the development of corporations nationally.

The dissertation also limits its narrative focus to four discrete events: a coup in 1689, the state constitutional convention of 1780, a strike in 1912, and a referendum in 1978. Each event functions as a stand-in for the seventeenth, eighteenth, "long nineteenth," and twentieth centuries, respectively. This narrative format follows the examples of Daniel T. Rodgers's 1998 *Contested Truths* and Thomas K. McCraw's 1986 *Prophets of Regulation*.

Rodgers's work captures a similarly long timeline by focusing on several "keywords," explaining how the terms developed new connotations and conceptual meanings across decades by showing how particular individuals rhetorically deployed them in particular political contexts. McCraw's work tells the biographies of four regulators from different generations to show how ideas of regulation changed from one to the next. Each chapter of this dissertation similarly focuses on several rhetorical terms—*charter*, *constitution*, *democracy*, *corporation*—to illustrate how the terms, and the institutions signified, evolved over time. The events also provide narrative anchors for what would otherwise be an amorphous timeline.

The first chapter tells the origin of written constitutionalism in the Massachusetts Bay Company, a corporation chartered in 1629 to govern an English colony on the shores of the Massachusetts Bay. Uniquely among English corporations of the time, the original investors in the corporation took their charter and corporate government with them to North America, becoming the first corporation to hold its board meetings and annual elections overseas. Under English law at the time, the crown could vacate any corporation by pointing to evidence that the corporation's officers were violating the charter's terms. When the company's leadership learned that English regulators were attempting to do just that, they began explicitly tying their governmental decisions to the written text of the charter. Thanks to the disruptions of the English Civil Wars, the company escaped regulation for almost sixty years, during which time officials, shareholders, and even non-shareholding residents of Massachusetts referred to the charter as the "constitution" of the colonial government. In the 1680s, when the crown took away the charter by force, Massachusetts residents staged a coup to demand a return of their "Constitution by Charter."

In contrast with most histories of written constitutionalism, which argue that the modern idea did not fully develop until the 1760s or later, this chapter argues that the American practice of writing down their constitutions and using those writings to build and bind their independent governments was actually as well developed by the 1690s as it would be seventy years later.[9] The chapter is not the first to highlight the similarities between corporate institutions of the seventeenth century and the institutions that followed in the eighteenth; J.S. Maloy, for example, locates the origins of audits, impeachment, and bicameralism in the internal politics of the Massachusetts Bay Colony between 1629 and 1644.[10] But this chapter does provide a novel origin story for perhaps the most important institutional innovation of American political history. The charter of the Massachusetts Bay Company was the oldest blueprint for government that people referred to as their "constitution," in contrast with the unwritten constitution of England. The "Constitution by Charter" of the seventeenth-century corporation did not merely function like a modern constitution—it was understood as one.

The second chapter discusses how Massachusetts residents in the 1760s recalled the history of the Massachusetts Bay Company's charter and used that history in debates over the meaning of the 1691 charter that replaced it. In 1764, the lieutenant governor of the Province of Massachusetts Bay, Thomas Hutchinson, published a popular history of the colony that described in detail how seventeenth-century colonists understood their

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[9] *See, e.g.*, BAILYN, *supra* note 7, at 175–98; WOOD, *supra* note 7, at 259–305.

[10] *See generally* MALOY, *supra* note 7; *see also* ROGER THOMPSON, DIVIDED WE STAND: WATERTOWN, MASSACHUSETTS, 1630–80 (2001); EMMETT WALL, MASSACHUSETTS BAY: THE CRUCIAL DECADE, 1640–1650 (1972); DONALD VEALL, THE POPULAR MOVEMENT FOR LAW REFORM, 1640-1660 (1970); ROBERT JOSEPH SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950); MARK DEWOLFE HOWE, READINGS IN AMERICAN LEGAL HISTORY (1949); FRANKLIN L. RILEY, COLONIAL ORIGINS OF NEW ENGLAND SENATES (1896); Kenneth Colegrove, *New England Town Mandates*, 21 PUBS. COLONIAL SOC'Y MASS. 411 (1919); Hendrik Hartog, *The Public Law of a County Court: Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282 (1976);

corporate charter. In the decade that followed the publication of Hutchinson's work, colonists used this history of "the Province Charter, which established [the colony's] Constitution," to support their rejection of parliamentary taxation, the presence of British soldiers, and the crown's power to regulate the colonial government.[11] In the six years from 1774 through 1780, a period during which Massachusetts had no "constitutional" government, Massachusetts revolutionaries constructed a shadow government as "consistent with the Charter and Constitution of the Government" as circumstances would allow.[12] In 1780, residents voted on a new "Constitution" after recognizing that "our former Constitution (the Charter) is at an End, and a New Constitution of Government, as soon as may be[,] is absolutely necessary."[13] By 1787, people in all thirteen colonies agreed that any new nation needed a constitution similar to the one possessed by Massachusetts: one written down and less alterable than ordinary legislation, just as their historical corporate charters had been.

Historians from Bernard Bailyn to Gordon Wood have suggested in their work that American revolutionaries studied their continent's history of corporate charters when developing aspects of republicanism like written constitutions.[14] As recent historians of revolution-era capitalism have also shown, corporations in the late eighteenth century were not only models but also contemporaries in the creation of the American republic.[15] There is

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[11] Answer of the Council of Mass. to Gov. Thomas Hutchinson (Jan. 25, 1773), *in* THE SPEECHES OF HIS EXCELLENCY THOMAS HUTCHINSON 20, 22 (Boston, Edes & Gill, 1773).

[12] 51 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 197 (Boston, Benjamin Edes, 1775) (Oct. 26, 1775).

[13] Return of the Town of Lexington (Oct. 21, 1778) (Mass. Archives, vol. 156, pp. 178–79).

[14] *See also* David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418 (2017).

[15] *See, e.g.*, ANDREW SCHOCKET, FOUNDING CORPORATE POWER IN EARLY NATIONAL PHILADELPHIA (2007); MASSACHUSETTS AND THE NEW NATION (Conrad Edick Wright, ed., 1992); JOYCE APPLEBY,

also much work on Revolution-era Massachusetts and corporations that suggests that corporations were largely seen as governmental entities. This chapter provides substance to the speculation that corporate charters influenced the revolutionaries. In conjunction with the first chapter, it provides evidence of how the framers and debaters of the constitution of Massachusetts actually looked at the corporate history of the Massachusetts Bay Company as a model for a future political society. Charters, and corporate statehood, are the reasons why several of the colonies' first constitutions were written down as "charters," a word borrowed from corporate precedent.[16] America's corporate past also explains why, like the British crown, the American people trusted corporations to provide public services.

The third chapter focuses on the Lawrence "Bread and Roses" strike of 1912. Business corporations began the century that preceded the strike not as "business bodies of enviable efficacy," but rather as agencies "of government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state."[17] The corporation and state were conflated, especially in Massachusetts. But judges in state court and in the U.S. Supreme Court eventually gave certain types of corporation increased autonomy from the state, converting them from "a means to effect the legitimate objects of the Government" into an "artificial being," legally indistinguishable from a human entrepreneur.[18] These corporations lost the ability to tax but kept other powers such

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LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992).

[16] Compare, for example, the 1629 Charter of the Massachusetts Bay Company with the 1776 Charter of New Jersey or the 1780 Constitution of the Commonwealth of Massachusetts Bay. *See generally* THE FEDERAL AND STATE CONSTITUTIONS (Francis Newton Thorpe, ed., 1909).

[17] Maier, *supra* note 7, at 55–56, 64, 73, 83; Handlin & Handlin, *supra* note 7, at 22; *see also* PETER WAY, COMMON LABOR: WORKERS AND THE DIGGING OF NORTH AMERICAN CANALS, 1780-1860 (1993).

[18] Trustees of Dartmouth College v. Woodward, 17 U.S. 636 (1819); *see, e.g.,* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923); ADOLF BERLE, STUDIES IN THE LAW OF CORPORATION FINANCE (1928); EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954); STANLEY CUTLER, PRIVILEGE AND CREATIVE DESTRUCTION (1971); LAWRENCE FRIEDMAN,

as eminent domain. [19] In the words of legal historian Morton Horwitz, judges successfully cast these corporations as "a convenient legal device for limiting risks and promoting continuity in the pursuit of private advantage."[20]

Although many corporations certainly "privatized" over the course of the nineteenth century, many people, particularly activists in the labor movement, continued to conceive of them as governmental institutions. During the late nineteenth century, "industrial unionists" such as the Knights of Labor, the Western Federation of Miners, and the Industrial Workers of the World began arguing that the disenfranchisement of workers from corporate governance decisions meant that corporations were "industrial autocracies," in contrast with the democracy that American nominally expected from their institutions.[21] These unionists demanded the creation of an "industrial democracy" in which workers could control corporate decisions just as citizens controlled municipal or legislative decisions. The 1912 strike in Lawrence, Massachusetts, was one of the first major strikes in which the Industrial Workers of the World could demonstrate to a national audience what it meant by "industrial democracy": a corporate institution in which all workers—even women, children, and immigrants—controlled policy. As newspapers across the country described the Industrial Workers' vision and translated it for a mass audience, many progressive

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A HISTORY OF AMERICAN LAW (1973); Steven J. Novak, *The College in the Dartmouth College Case: A Reinterpretation*, 47 NEW ENG. Q. 550 (1974).

[19] For this process in Massachusetts specifically, see LEONARD LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

[20] HORWITZ, *supra* note 7, at 109–36. For another, earlier description of "privatization" as a judge-made trend, *see* DODD, *supra* note 18, at 16–17 ("The fact is that the division of corporations into the two categories of public and private, with radically different legal relationships to the state, was a dichotomy which American judges . . . fashioned for themselves to fit what they deemed to be the needs of the situation.")

[21] *See generally* KIM VOSS, THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY (1993); LEON FINK, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS (1983).

reformers of the era watched carefully. In particular, after 1912, Louis Brandeis began using the term "industrial democracy" to describe his own vision in which workers did not control corporations but were at least allowed to participate in certain decisions through their labor unions. As an influential advocate and later a Supreme Court Justice, Brandeis helped make this understanding of industrial democracy into federal policy.

This chapter supplements the common historical narrative of the nineteenth century, which explains how corporations privatized and "democratized." The idea that corporations democratized by becoming more easily attainable comes from political and economic historians who focus on the general incorporation laws of the era.[22] All corporate charters originally required legislative approval, but not everyone had access to the ear of a legislator. As corporations began employing for business purposes their state-granted powers like eminent domain and bankruptcy protection, many entrepreneurs and artisans complained "that the favors of the government ought not to be 'partially bestowed, and the advantages of the laws unequally distributed.'"[23] States responded with laws that allowed citizens to create a corporation by simply signing a form. The thesis that these laws were seen as democratic responses to inequality is the argument of many historical works that have followed Oscar and Mary Handlin's history of the relationship between the antebellum state and economy, including Louis Hartz's 1948 *Economic Policy and Democratic Thought* and Ronald Seavoy's 1982 *The Origin of the American Business Corporation*.[24] As Hartz

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[22] This is especially true among historians writing about "Jacksonian Democracy." *See* LEE BENSON, THE CONCEPT OF JACKSONIAN DEMOCRACY (1961); ALAN DAWLEY, CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN (1976); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY (2005); Carl E. Prince & Seth Taylor, *Daniel Webster, The Boston Associates, and the U.S. Government's Role in the Industrializing Process, 1815-1830*, 2 J. EARLY REPUBLIC 283 (1982).

[23] HANDLIN & HANDLIN, *supra* note 7, at 132–33.

[24] The "Commonwealth School" is a broad term that originates from a New Deal-era Rockefeller Foundation grant to assess the relationship between various states and the economy before the Civil War. See MILTON HEATH, CONSTRUCTIVE LIBERALISM: THE ROLE OF THE STATE IN THE ECONOMIC

writes, proponents of the laws invoked "great democratic symbols" to further "the freedom of the business corporation from state interference."[25]

This chapter argues that while corporations may have "democratized" from the perspective of shareholders, they did not do so with respect to workers. Instead, workers between the 1870s and 1930s called their struggle to assert control over their companies "industrial democracy." Early unions passed "legislation" to guide collective action. By the 1880s, workers in the Knights of Labor sought to abolish workplace inequality with a "cooperative commonwealth" in which workers could participate equally with owners in corporate decision-making. And in the 1900s, the Industrial Workers of the World demanded that disenfranchised immigrant, black, female, and child workers be "enfranchised" in the workplace. This labor history parallels the approach of legal historians such as Morton Horwitz, who have written extensively on the development of the corporate legal "personality" during this period.[26] In his second *Transformation of American Law*, Horwitz argues that until the early twentieth century, most judges and lawyers conceived of corporations as analogous to subordinate government agencies or private business partnerships. It was not until lawyers borrowed ideas from intellectuals such as F.W. Maitland and John Dewey that they consciously articulated the idea of "corporate personhood," where corporations were to be treated no differently from individuals. This

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DEVELOPMENT OF GEORGIA TO 1860 (1954); JAMES PRIMM, ECONOMIC POLICY IN THE DEVELOPMENT OF A WESTERN STATE: MISSOURI: 1820–1860 (1954); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT (1948); HANDLIN & HANDLIN, *supra* note 7. For similar, later works, see SEAN ADAMS, OLD DOMINION, INDUSTRIAL COMMONWEALTH: COAL, POLITICS, AND ECONOMY IN ANTEBELLUM AMERICA (2004); HARRY SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861 (1969); CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960).

[25] HARTZ, *supra* note 24, at 317.

[26] *See generally* HORWITZ, *supra* note 8.

idea, which still resonates in American jurisprudence in the twenty-first century, changed the relationship of corporations to American constitutional law. It also gave judges reason to treat corporations as monolithic "entities" rather than the contested governments they were.[27]

The final chapter examines the consequence of this transformation in the twentieth century. In the early 1970s, the executives of the First National Bank of Boston, the descendant of an 1784 corporation, wanted to spend hundreds of thousands of the bank's dollars on ads opposing statewide efforts to raise their personal income taxes. When frustrated Massachusetts legislators banned this sort of corporate spending, the executives sued, arguing that "corporations have the same First Amendment rights as individuals." In *First National Bank of Boston v. Bellotti*, the Supreme Court held for the first time that the First Amendment protects all political speech, even ads paid for by a corporation. The Court explained that there was no reason for legislators to protect the bank's shareholders from the executives' self-interested spending, because if shareholders were angry, they could always use "corporate democracy" to vote the executives out of office.

Bellotti was a crucial step on the stairway to 2010's *Citizens United v. Federal Election Commission*, which cited the decision over thirty times and quoted its language on corporate democracy. But in 1978, no one was more interested in *Bellotti* than Kevin White, the mayor of Boston. Like most cities, Boston was a municipal corporation. And on the day the Court announced its decision, Mayor White argued that he had the same right as the bankers to spend his corporation's money in a new tax referendum that fall. That 1978 referendum became the most expensive in state history, pitting the "million-dollar mayor"

[27] This last idea comes from SCOTT BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY (1995).

against the millionaire bankers. It also left a bad taste in people's mouth. Taxpayers who had voted for Mayor White were wary about him spending their money in an election. And even his opponents had to admit that if corporate democracy was a sufficient check on the bankers' spending, surely the elections for Boston's chief executive were even more democratic.

This final chapter argues that the 1978 referendum made it intuitive for Bostonians that all corporations, banks and cities, are representative institutions. Corporations can "speak" only by spending money, and the leaders of Boston and the bank justified spending other people's money by pointing to the internal elections that put them in office. But voters were skeptical of the argument that "corporate democracy" alone could guarantee that elected executives spoke with the consent of the people they purported to represent. The chapter concludes that scholars of corporate speech today should ask not just whether corporations are analogous to rights-bearing individuals, but also whether the leaders of corporations have adequately solicited the consent of their constituents before "speaking" on their behalf. The chapter takes less from business historians like Alfred Chandler, whose work treated the evolution of postwar corporations as a matter of technological and administrative determinism, and more from business historians such as Kim McQuaid, Sanford Jacoby, and Kim Phillips-Fein, who focus on the ideas executives and workers advanced to justify forms of corporate governance.[28] It also advances scholarship by

[28] ALFRED CHANDLER, THE VISIBLE HAND (1977); SANFORD JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1997); JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE (2003); KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009); Kim McQuaid, *An American Owenite: Edward A. Filene and the Parameters of Industrial Reform, 1890-1937*, 35 AM. J. ECON. & SOCIOLOGY 77 (1976). For works on how businesses convinced workers to accept the mutuality of business needs and American domestic policy, see ELIZABETH FONES-WOLF, SELLING FREE ENTERPRISE (1994); SANFORD JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1997); MEG JACOBS, POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2005).

historians of municipal corporations, such as Hendrik Hartog and Gerald Frug, who have observed how cities during the nineteenth century lost autonomy when state legislatures amended their charters and destroyed their corporate rights to sue and invest in property.[29] After the 1820s, when business corporations became "privatized," Massachusetts's state legislature continued to successfully subordinate its municipal corporations to the state.[30] But this subordination became harder to justify when the Supreme Court began invoking the U.S. Constitution to protect all speakers, even corporations, from legislative regulation.

Ultimately, this dissertation attempts to rehabilitate the argument that private and municipal corporations should be understood similarly, as political units that represent constituencies and that have responsibilities to the general public. The main distinction between corporations and polities today is technically a legal one. But the first financial and business corporations were political entities, and for much of their early history on this continent, they held themselves accountable to people beyond property owners. In this sense, corporations originally functioned much like states did, and corporations and states developed side-by-side, taking innovations from one another and applying those innovations to themselves. In describing the history of corporations and states from 1629 to the present, the dissertation shows that the idea of corporate statehood is not new, but as old as the *Mayflower*.

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[29] HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983); GERALD FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999).

[30] *Id.* at 262–69.

Chapter One
The Constitutional Corporation, 1629–1689

A puzzling thing about the United States Constitution is that it is written down. Words might seem like an obvious feature of any constitution, but they are notably missing from the constitution of the United Kingdom, the country from which the United States seceded.[1] For one reason or another, people in Britain have long been fine with "constitutional arrangements" developed in part from unwritten "events" and "conventions," while a vocal group of Americans argued during the American Revolution that "in all free states the constitution is fixed" in some written document.[2]

This chapter offers a fittingly American origin story for this cultural difference: a lawsuit. The lawsuit 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.

The charter at issue belonged to the Massachusetts Bay Company, a trading corporation that governed most of New England from 1629 to 1686.[3] That first year, when

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[1] *See* R. (Miller) v. Secretary of State for Exiting the European 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.").

[2] *Id.*; *see* Slaughter-House Cases, 83 U.S. 36, 115 (1873) (Bradley, J., dissenting) ("England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people . . . ."); Circular Letter of the House of Representatives of Massachusetts Bay (Feb. 11, 1768), *reprinted in* SPEECHES OF THE GOVERNORS OF MASSACHUSETTS FROM 1765 TO 1775 . . . AND OTHER PUBLIC PAPERS 134, 134–136 (Alden Bradford ed., Boston, Russell & Gardner, 1818); *see also* [THOMAS PAINE], FOUR LETTERS ON INTERESTING SUBJECTS 15 (Philadelphia, Styner & Cist, 1776). As I discuss in the following chapter, much of the scholarly explanation of this cultural difference has focused on the 1760s. *See generally* sources cited *infra* note 16.

[3] 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 the Calendar (New Style) Act 1750, 24 Geo. 2 c. 23. This chapter treats January 1 as the first day of the new year but uses the Julian calendar.

King Charles of England signed the charter and gave it to the Company's founders, he essentially made a deal to leave the company alone so long as it abided by the charter's terms. Almost immediately, however, as boatloads of religious and political dissidents filled Boston Harbor, the king's advisors tried to break the deal by suing the company and arguing in court that it had taken actions inconsistent with the charter's words.[4] The crown finally succeeded in 1686, when a career bureaucrat named Edward Randolph accumulated enough evidence for the king to void the charter, dissolve the company, and replace its elected leadership with a governor he appointed.[5]

In Boston, that six-decade search for inconsistences produced an unanticipated result: it made even ordinary people pay very close attention to the charter's words. To a degree unusual for corporations of the era, the directors of the besieged Massachusetts Bay Company tried to tie each of their governing decisions to specific text in the charter, risking the dissolution of their government if they were unpersuasive. In 1686, when the king sent over a governor unbound by any similar document, the company's supporters seethed. Three years later, they revolted to restore what Increase Mather, their agent in London, called their "Ancient Constitution," a written check on "Arbitrary Government."[6]

Histories of early colonial New England are legion. It's perhaps difficult to meet an American today who hasn't read something about the Pilgrims, with their *Mayflower*, buckle hats, and first Thanksgiving, or the Puritans, with their "city upon a hill," scarlet

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[4] Quo Warranto Brought Against the Company of the Massachusetts Bay (1635), *in* 1 A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 114, 114–116 (Thomas Hutchinson ed., Boston, Thomas & John Fleet, 1769) [hereinafter HUTCHINSON PAPERS].

[5] *See* LONDON GAZETTE, Jul. 29, 1686, at 2.

[6] INCREASE MATHER, A BRIEF RELATION OF THE STATE OF NEW ENGLAND 4–7, 10 (London, Richard Baldwine, 1689); INCREASE MATHER, A NARRATIVE OF THE MISERIES OF NEW-ENGLAND BY REASON OF AN ARBITRARY GOVERNMENT ERECTED THERE UNDER SIR EDMUND ANDROS 2–3 (London, 1688).

letters, and fear of witchcraft.[7] Relatively few historians, by contrast, have focused on the corporate structure of New England's governments and the effect this structure has had on American legal and political culture.[8] This relative scarcity is more surprising than you might think when you consider that most of the thirteen colonies that revolted in 1776 were founded by corporations like the Massachusetts Bay Company.[9]

The meager attention New England's corporate governments have received is also a problem, particularly for students of U.S. constitutional law. Today more than ever before, judges and scholars 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."[10] But as Daniel Hulsebosch and

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[7] *See generally, e.g.*, JOHN DEMOS, ENTERTAINING SATAN (2004); LAUREL ULRICH, A MIDWIFE'S TALE (1990); DANIEL BOORSTEIN, THE AMERICANS (1964); PERRY MILLER, THE NEW ENGLAND MIND (1939). Despite these excellent histories, the colonists' grip on modern American culture probably stems from ARTHUR MILLER, THE CRUCIBLE (1953), HENRY WADSWORTH LONGFELLOW, THE COURTSHIP OF MILES STANDISH (1858), and NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850).

[8] *See generally*, *e.g.*, J.S. MALOY, THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT (2009); DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE (2005); MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION (2004); JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF THE AMERICAN CORPORATION (1917); Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545 (2016); Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, 79 GEO. WASH. L. REV. 1 (2010); David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987). For related histories of how seventeenth-century corporations contributed to *British* legal and political culture, see generally PHILIP J. STERN, THE COMPANY-STATE (2011); JENNIFER LEVIN, THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES (1969).

[9] *See generally* CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY (1936) (discussing the Virginia Companies of London and Plymouth, the Massachusetts Bay Company, the Company of Connecticut, and the Company of Rhode-Island and Providence Plantations); JAAP JACOBS, THE COLONY OF NEW NETHERLAND (2007) (the Dutch West India Company); NEW SWEDEN IN AMERICA (Carol E. Hoffecker et al. eds., 1995) (the New Sweden Company); PAUL M. PRESSLY, ON THE RIM OF THE CARIBBEAN (2011) (the Georgia Trustees).

[10] Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003); *accord* KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277 (2014).

others have written, these same judges and scholars often view the 1787 convention that produced the Constitution "as an exceptional break with the past,"[11] ignoring historians' observation that almost all early U.S. institutions "descend directly from Colonial institutions."[12] As a consequence, judges and scholars regularly interpret provisions of the U.S. Constitution missing decades of context about what "a document of this type" would have meant when it was written. Justice Anthony Kennedy is a prominent example of this phenomenon, writing that ideas embodied in the U.S. Constitution were the "discovery" of political tinkerers like James Madison.[13]

Recently, some legal historians have begun taking a closer look at the corporate origins of American constitutional institutions. Mary Bilder has written groundbreaking histories of constitutional interpretation and judicial review as variations on seventeenth-century practices of interpreting corporate charters and voiding corporate actions for being inconsistent with them.[14] Alison LaCroix has written a similar account of federalism, locating the origins of the relationship between states and the federal government in the earlier relationship between corporations and Parliament.[15]

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[11] HULSEBOSCH, *supra* note 8, at 4–6; *accord* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 4–5 (2010).

[12] ALLAN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789, at 1 (1924).

[13] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *see also, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 925–926 (2010) (Scalia, J., concurring); District of Columbia v. Heller, 128 S. Ct. 2783, 2788–2805 (2008).

[14] Bilder, *supra* note 8, at 1552; Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504–509 (2006); *see also* Philip A. Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 12–23 (2003); Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & POL'Y 1 (2001); Barbara Aronstein Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 U. PITT. L. REV. 691, 692–93 (1988).

[15] LACROIX, *supra* note 11, at 4–10; *see also* BILDER, *supra* note 8, at 10–11.

This chapter argues that the American practice of writing down their constitutions and using those writings to build and bind their independent governments has its origin in the earlier colonial practice of writing down corporate charters and using those writings to build and bind their corporate governments. This point—that charters changed into constitutions—has often been assumed by scholars of constitutionalism and the American Revolution,[16] but as Mary Bilder has written, "it is surprisingly difficult to explain the change with precision and persuasive power."[17] This chapter surveys pamphlets, legal documents, broadsides, and other literature to explain how a corporate charter in New England evolved into a "Constitution"—while in Old England the idea of a constitution remained intangible.[18]

The first part of this chapter begins the story of the litigation that culminated in the 1689 coup. It tells the perspective of an English knight and sea captain who persuaded the crown to sue the company for violating its charter.

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[16] *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 175–98 (1967); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 259–305 (1969); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 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." CHARLES H. MCILWAIN, CONSTITUTIONALISM AND THE CHANGING WORLD 241 (1939); *see also* Benjamin F. Wright, Jr., *The Early History of Written Constitutions in America*, *in* ESSAYS IN HISTORY AND POLITICAL THEORY 344, 348–49 (Carl Wittke ed., 1936); ANDREW C. MCLAUGHLIN, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 46 (1932). But even they have not asked how the Massachusetts charter developed constitutional characteristics when others did not, or how the meaning of "constitution" in England and America diverged.

[17] *See* Bilder, *supra* note 8, at 1550.

[18] To be more precise, by the end of this period New Englanders like Increase Mather would have said that the corporate charter illustrated or expressed the constitution of the colony—not that the charter *was* the constitution of the colony. As Daniel Hulsebosch has persuasively argued, as late as the 1770s, many political theorists in New England and elsewhere continued to define a constitution in the English sense, as a decentralized collection of privileges and structural norms that could be expressed in multiple documents (as in England) or largely in a single document (as in New England). *See* HULSEBOSCH, *supra* note 8,at 7–8, 40–41.

The second part tells the same events from the perspective of the company in New England. The lawsuit made the company's shareholders and leaders fear that any violation of their charter's terms would lead to the complete dissolution of the company, leading the company's leaders to explicitly tie their decisions to the written text of the charter.

The third part moves to the later half of the seventeenth century, when the English knight and sea captain's grandchildren finished the litigation their grandparents started. By then, ministers and shareholders in the Massachusetts Bay Company saw their charter as something analogous to a biblical covenant—a document whose text carried both civil and religious significance.

The fourth part finishes the story with the coup that demanded a return of the charter. Where contemporary English theorists described England's "constitution" as a collection of unwritten customs and traditions, New England pamphleteers described their "Charter Constitution" as a single, written document.

The story charts how corporate charters in New England adopted the characteristics of a modern, American-style constitution, defined by Thomas Paine as a document called a "*constitution* . . . , to which you can refer, and quote article by article," and which contains "the compleat organization of a civil government, and the principles on which it shall act, and by which it shall be bound."[19] In contrast to most histories of written constitutionalism, which generally date the origins of Paine's definition to the 1730s or later,[20] this origin

[19] THOMAS PAINE, RIGHTS OF MAN 56–57 (London, J.S. Jordon, 2d ed., 1791). As this chapter will illustrate, there are many alternative definitions of a "constitution." *See* BILDER, *supra* note 8, at 1–2; CHARLES H. MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 10–12 (rev. ed. 1947).

[20] *See, e.g.*, DIETER GRIMM, CONSTITUTIONALISM 91–92 (2016); GERALD STOURZH, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century*, *in* FROM VIENNA TO CHICAGO AND BACK 80, 94–99 (2010); MCILWAIN, *supra* note 19, at 11–12 (around 1764). *But see* Bilder, *supra* note 8, at 1550.

story begins and ends in the 1600s. The story reveals that people in seventeenth-century Boston were already quite familiar with constitutional governments in the modern sense.

They called them corporations.

I

The story of the lawsuit that produced a written constitution begins with a feud between a colorful cast. On one side was a knight named Ferdinando and a civilian who just about everyone called "Captain." On the other was a wealthy, well-educated, and well-connected group of religious fanatics.

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Had the author of *Don Quixote* been an English journalist instead of a Spanish satirist, Sir Ferdinando Gorges could have been his main character.[21] 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.[22] His ransom was paid for by friends in England, but only a few years later those same friends got Gorges in trouble with the queen, who sent him to London's Gatehouse Prison in 1601.[23] 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.[24]

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[21] Gorges and its author were contemporaries. *See* MIGUEL DE CERVANTES, EL INGENIOSO HIDALGO DON QUIXOTE DE LA MANCHA (Madrid, Juan de la Cuesta, 1605).

[22] 9 CALENDAR OF STATE PAPERS, COLONIAL SERIES 29 (W. Noel Sainsbury ed., London, Her Majesty's Stationery Office, 1893); 1 SIR FERDINANDO GORGES AND HIS PROVINCE OF MAINE 13–46 (James Phinney Baxter ed., Boston, Prince Society, 1890) [hereinafter BAXTER].

[23] SIR FERDINANDO GORGES, A BREEF ANSWER TO CERTAYNE FALSE, SLANDEROUS, AND IDLE OBJECTIONS (1601), *reprinted in* 2 BAXTER, *supra* note 22, at 83.

[24] SIR FERDINANDO GORGES, A BRIEFE NARRATION OF THE ORIGINALL UNDERTAKINGS OF THE ADVANCEMENT OF PLANTATIONS INTO THE PARTS OF AMERICA (London, E. Brudenell, 1658), *reprinted in* 2 BAXTER, *supra* note 22, at 1; *see* CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF

In this position, Gorges met an enterprising group of Plymouth financiers who were pooling their money to try and start a colony in North America.[25]

One of Gorges's wartime associates, Sir Walter Raleigh, had tried and failed to plant a colony by himself on the North American coast, which he'd renamed "Virginia" in honor of the queen who later locked both him and Gorges up.[26] But Raleigh talked up rumors that Virginia was full of gold, and the prevailing thought was that a "company" or a "corporation" could successfully finance an expedition to find 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 land that the crown claimed to own by conquest[27]—then the company needed the crown's written permission. Typically, this permission came in "letters patent," or a publicized charter.[28] A company that received such a charter was called a *corporation*.[29]

ELIZABETH, 1595–97, at 111 (Mary Anne Everett Green ed., London, Her Majesty's Stationery Office, 1869); CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF ELIZABETH, 1591–94, at 152–153 (Mary Anne Everett Green ed., London, Her Majesty's Stationery Office, 1867);

[25] GORGES, *supra* note 24, at 12–13.

[26] THOMAS HARIOT, A BRIEFE AND TRUE REPORT OF THE NEW FOUND LAND OF VIRGINIA 5 (London, 1588). For more on Raleigh, see generally MICHAEL G. MORAN, INVENTING VIRGINIA: SIR WALTER RALEIGH AND THE RHETORIC OF COLONIZATION, 1584–1590 (2007); WILLIAM STRACHEY, THE HISTORIE OF TRAVAILE INTO VIRGINIA BRITANNIA (R.H. Major ed., repr., London, Hakluyt Society, 1849) (1612).

[27] *Cf.* Calvin's Case (1608) 77 Eng. Rep. 377, 397–98 (KB).

[28] *See* Bilder, *supra* note 14, at 516–17. Historian Mary 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 implying "that current categories and boundaries existed in a world where they did not." Bilder, *supra* note 8, 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," *id.*

[29] SIR EDWARD COKE, THE FIRST PART OF INSTITUTES OF THE LAWES OF ENGLAND § 413 (London, Societie of Stationers, 1628); *see generally* ROBERT BRENNER, MERCHANTS AND REVOLUTION: COMMERCIAL CHANGE, POLITICAL CONFLICT, AND LONDON'S OVERSEAS TRADERS, 1550–1653 (1993); K.N. CHAUDHURI, THE ENGLISH EAST INDIA COMPANY (1965); SELECT CHARTERS OF TRADING

In 1606, Gorges's Plymouth company petitioned King James for one of these charters to colonize and "search for all Matters of Mines of Gold" in North America.[30] At the same time, a competing company from London did the same thing. King James ended up writing "Letters Patents" for both companies, incorporating a Virginia Company for Gorges's group and a Virginia Company for his London competitors.[31]

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.[32] 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."[33] They left after a year.[34] In 1614, Gorges hired famous explorer John Smith to lend his magic to the Plymouth company. But even Smith couldn't help. A storm destroyed his ship's mast, which he fixed only to be chased around the Atlantic by an English pirate, then two French pirates, then "foure French men of warre."[35]

COMPANIES (Cecil T. Carr ed., 1913); WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT STOCK COMPANIES, TO 1720 (1910).

[30] CHARTER OF THE VIRGINIA COMPANIES OF LONDON AND PLYMOUTH (Apr. 10, 1606) (class 5, no. 1354, p. 142, Records of the Colonial Office, The National Archives, London, U.K. [hereinafter TNA]).

[31] *Id.*

[32] GORGES, *supra* note 24, at 10–11; 9 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 22, at 52–53.

[33] GORGES, *supra* note 24, at 16.

[34] *Id.* at 17–18; STRACHEY, *supra* note 26, at 162–80.

[35] JOHN SMITH, A DESCRIPTION OF NEW ENGLAND 48–54 (London, Humfrey Lownes, 1616).

Even worse for Gorges, things seemed to be going well for his corporate competitors.[36] The Virginia Company of London founded Jamestown in 1607 and, with John Smith's help, made it the first permanent English colony in North America.[37] In 1615, a startup out of Bristol sent a thirty-year-old ship captain named John Mason to hunker down in Newfoundland.[38] Not only did Mason successfully survive six winters in the frigid north, but he also wrote a well-regarded memoir, *A Briefe Discourse of the New-Found-Land*.[39] In it he described a warmer-than-advertised place with 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."[40]

Mason's memoir earned him the sobriquet "Captain Mason" as well as a career as a consultant for British nobility interested in starting their own colonial corporations.[41] While working for one of these nobles, Captain Mason introduced himself to Gorges, who was in the middle of organizing a new corporation to replace his fallow Virginia Company.[42] Gorges liked Captain Mason; he called him a "man of action"[43] who must have confirmed Gorges's suspicion that cold winters make people "stronger of body and more abounding in

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[36] *Id.* at 58–59.

[37] *See generally* JOHN SMITH, THE GENERALL HISTORIE OF VIRGINIA (London, I.D. & H.D., 1624).

[38] CAPTAIN JOHN MASON, THE FOUNDER OF NEW HAMPSHIRE 11–13 (John Ward Dean & Charles Wesley Tuttle eds., Boston, The Prince Society, 1887) [hereinafter DEAN & TUTTLE].

[39] *Id.*

[40] John Mason, A BRIEFE DISCOURSE OF THE NEW-FOUND-LAND 4 (Edinburgh, Andro Hart, 1620).

[41] DEAN & TUTTLE, *supra* note 38, at 14–15.

[42] GORGES, *supra* note 24, at 30–31. The noble was William Alexander, Earl of Stirling.

[43] *Id.* at 55–56.

procreation."[44] Gorges ended up recruiting Captain Mason as a lifelong partner in his rebranded corporation.[45]

This corporation, chartered in 1620, was called the Council for New England—New England being the name John Smith gave to the northern part of North America between the Delaware River and the Gulf of Saint Lawrence.[46] The corporation's charter established a board of proprietors and gave them ownership of New England's land and a complete monopoly on fishing off its coast. These seemed like extravagant privileges to some members of Parliament.[47] But Gorges persuaded the king that investors would contribute to his corporation and settle the icy wilderness only if they had a guaranteed source of profits.[48]

Three of the Council for New England's first customers, in 1622, were none other than Captain Mason, Sir Ferdinando Gorges, and Gorges's son, Robert. Looking at a map of New England, the board of proprietors divided the area around the Merrimack River and the Massachusetts Bay into three imprecise, overlapping chunks. Captain Mason received a deed to Cape Ann, a promontory next to the Merrimack River.[49] Sir Ferdinando and Captain Mason jointly received a deed to the land between the Merrimack River and the

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[44] SIR FERDINANDO GORGES, A BRIEFE RELATION OF THE DISCOVERY AND PLANTATION OF NEW ENGLAND (London, John Haviland, 1622), *reprinted in* 1 BAXTER, *supra* note 22, at 203, 228–229.

[45] *See* Minutes of the Council for New Eng. (Jun. 21, 1632) (class 1/6, no. 29, p. 11, TNA) (admitting Capt. John Mason to the board of proprietors).

[46] CHARTER OF THE COUNCIL FOR NEW ENGLAND (Nov. 10, 1620) (class 5, no. 902, p. 128, TNA); *see* SMITH, *supra* note 35, at 7.

[47] GORGES, *supra* note 24, at 35–49. Sir Edward Coke led the opposition.

[48] According to historian Charles Andrews, Gorges also invited the king to participate in one of the Council's distributions of land. *See* 1 ANDREWS, *supra* note 9, at 346–47.

[49] Deed from the Council for New Eng. to Capt. John Mason (Mar. 9, 1622) (class 5, no. 902, p. 931, TNA).

Kennebec River, where Gorges's first colony had failed.[50] And Robert received a deed to the land between the Merrimack River and the northeast shore of the Massachusetts Bay.[51]

But much like the Virginia Company of Plymouth, the Council for New England had a hard time building planned settlements on its paper plots. Of the men just mentioned, only Robert ever traveled to New England, and even that was a brief excursion to remove some drunk sailors who were fishing there without licenses.[52] The board's backup plan for recruiting colonists—asking English cities to send the board their "poore children" for use as indentured servants—may have been better in theory than in practice.[53]

Instead, the board spent most of their time regulating the emigrants and fishermen who were moving to New England on their own. In 1620, a group of religious separatists sailing the *Mayflower* on their way to Jamestown accidentally landed in Cape Cod.[54] The board ended up giving these "Pilgrims" a deed to settle a colony on Cape Cod called New Plymouth.[55] A few years later, a different group of religious merchants asked the board if they could set up a colony on Cape Ann, in Captain Mason's territory, from which they

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[50] Deed from the Council for New Eng. to Sir Ferdinando Gorges and Capt. John Mason (Aug. 10, 1622) (class 5, no. 902, p. 101, TNA).

[51] Deed from the Council for New Eng. to Robert Gorges (Dec. 30, 1622) (class 1/2, no. 14, TNA).

[52] GORGES, *supra* note 24, at 49–50.

[53] Minutes of the Council for New England (Jul. 5, 1622) (class 1/2, no. 6, p. 3, TNA).

[54] WILLIAM BRADFORD, A RELATION OR JOURNAL OF THE BEGINNING AND PROCEEDINGS OF THE ENGLISH PLANTATION SETLED AT PLIMOTH IN NEW ENGLAND 3, 7–8 (London, John Bellamie, 1622).

[55] Minutes of the Council for New England (Jun. 1, 1621) (class 1/2, no. 6, pp. 39–41, TNA).

could supply fishermen and propagate religion.[56] The board gave them license to do so in 1623.[57]

This 1623 license turned out to be a major strategic error for the Council for New England, the beginning of a feud that obsessed Gorges and Captain Mason for the rest of their lives. In 1624, England declared war on Spain,[58] requiring Gorges and Captain Mason to take a leave of absence from the board to serve as master of the Plymouth fort and paymaster of the navy, respectively.[59] While they were gone, in 1627, the religious merchants on Cape Ann partnered with some wealthy, Cambridge-educated religious dissidents known as Puritans to help support their colony, which they later moved and renamed Salem.[60] In 1628, a Puritan board member of the Council for New England granted the Cape Ann coalition an enormous deed that clearly conflicted with Robert Gorges and Captain Mason's deeds.[61] And in 1629, on the strength of this dubiously procured deed, the Cape Ann coalition successfully petitioned the king for a corporate charter.[62] The charter incorporated them as the Massachusetts Bay Company, gave them ownership over all the land between three miles north of the Merrimack River and three

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[56] JOHN WHITE, THE PLANTER'S PLEA 68–69 (London, William Jones, 1630). This group, based in Dorchester, was informally known as the Dorchester Company.

[57] Minutes of the Council for New England (Mar. 18, 1623) (class 1/2, no. 6, pp. 32–35, TNA).

[58] *See* James, King of England, Speech to Parliament (Mar. 10, 1624), *in* 1 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE 115–17 (John Rushworth ed., London, J.A., 1682).

[59] GORGES, *supra* note 24, at 59–60; *see* 1 ANDREWS, *supra* note 9, at 401–03.

[60] WHITE, *supra* note 56, at 75–78; *see* 1 ANDREWS, *supra* note 9, at 346–47.

[61] Recital of a Deed from the Council for New England to Sir Henry Rosewell Dated Mar. 19, 1628 (class 1/4, no. 42, TNA); GORGES, *supra* note 24, at 59–60; *see* 1 ANDREWS, *supra* note 9, at 356–58. The board member was Robert Rich, Earl of Warwick.

[62] *See* Letter from the Mass. Bay Co. to John Endecott (Apr. 17, 1629), *reprinted* in 1 STATE PAPERS AND OTHER AUTHENTIC DOCUMENTS 256 (Ebenezer Hazard ed., Philadelphia, T. Dobson, 1792) [hereinafter HAZARD, STATE PAPERS].

miles south of the Massachusetts Bay, and made their claim to the area as good as the also-incorporated Council for New England's.[63]

As you might expect, when Gorges returned to the Council for New England and learned that there were Puritans building towns in territory that once belonged to his friend and son, he was miffed.[64] Suspecting fraud, the reconvened Council for New England issued an order that "all Pattents formerly granted should be called for, and perused, and afterwards confirmed if the Council shall see it fit."[65]

But the Puritans responded with surprising news: Not only had they received a charter from the king that allegedly confirmed their ownership of the territory, but they had taken the charter with them to New England.[66] Indeed, for the first time, a European corporation was holding board meetings in North America, and almost everyone who owned shares in the company had crossed the Atlantic to live there.[67] This was in stark (and, it turns out, purposeful[68]) contrast to corporations like the Virginia Company of London or the

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[63] CHARTER OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS-BAY IN NEW ENGLAND (Mar. 4, 1629) [hereinafter MBC CHARTER], *reprinted in* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1 (Nathaniel B. Shurtleff ed., Boston, William White, 1853) [hereinafter MBC RECORDS].

[64] GORGES, *supra* note 24, at 59–60. Gorges apparently learned what was happening when a shareholder of the Massachusetts Bay Company, John Humphries, complained that the Council for New England was violating the terms of "his patent" by restricting transportation to New England without a license. Minutes of the Council for New Eng. (Jun. 26, 1632) (class 1/6, no. 29, pp. 13–14, TNA).

[65] Minutes of the Council for New Eng. (Nov. 6, 1632) (class 1/6, no. 29, p. 16, TNA).

[66] *See* 1 ANDREWS, *supra* note 9, at 403–04.

[67] *See* 1 MBC RECORDS, *supra* note 63, at 50–67, 73 (Aug. 28, 1629, to Aug. 23, 1630).

[68] *See, infra*, notes 155–161 and accompanying text.

Council for New England, which both managed their overseas colonies from the comfort of their English boardrooms.[69]

In 1632, Gorges and Captain 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 Patent[s] for the said Plantation, have been granted, and how carried."[70] They interviewed Gorges and Captain Mason, representatives from the Massachusetts Bay Company, and witnesses from New England who reported that the company's board of directors was establishing a punitive theocracy there.[71] One witness claimed that he had been whipped, had his ears cut off, fined, and banished "for uttering mallitious & scandalous speeches against the government & the church of Salem."[72] Other witnesses had similar stories of being punished by a corporate government in which they had no vote because they weren't allowed to purchase shares.[73]

At first, the privy councilors reported favorably to the Massachusetts Bay Company. Notwithstanding the alleged "faults or fancies (if anie be) of some particular men upon the general Government," the councilors decided that it was better to have a puritanical colony in New England than no colony at all.[74]

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[69] *See generally* 1 RECORDS OF THE VIRGINIA COMPANY OF LONDON (Susan Myra Kingsbury ed., 1906).

[70] 1 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 183 (W.L. Grant & James Munro eds., 1908) (Dec. 19, 1632) [hereinafter ACTS OF THE PRIVY COUNCIL].

[71] *Id.* at 183–84.

[72] 1 MBC RECORDS, *supra* note 63, at 407 (Jun. 14, 1631); *see* Letter from Thomas Wiggin to Sir John Coke, Sec'y of State (Nov. 19, 1632) (class 1/6, no. 68, TNA). The witness was named Phillip Ratcliffe.

[73] *See, e.g.*, GORGES, *supra* note 24, at 63–64; Letter from Thomas Wiggin to Emanuel Downing (Nov. 19, 1632) (class 1/6, no. 65, TNA); Petition from Edward Winslow to the Privy Council (1632) (class 1/6, no. 69, TNA). The other witnesses were named Sir Christopher Gardiner and Thomas Morton.

[74] ACTS OF THE PRIVY COUNCIL, *supra* note 70, at 184–85 (Jan. 19, 1633).

But the following year, as "swarms" of migrants began leaving old England for New, the councilors reconsidered their position.[75] Witnesses reported that the migrant ships were full of well-to-do Puritans and other dissidents "know[n] to be ill affected, and discontented," with the government of the king and the Church of England.[76] The councilors began to fear that the corporate government meeting in New England might try to take advantage of its distance from London and "wholly shake off the Royall Jurisdiction of the Sovereaign Magistrate."[77] So, in 1634, the councilors ordered all ships bound for New England to certify that their passengers had taken oaths swearing allegiance to the king and the Anglican Church.[78] They also ordered the Massachusetts Bay Company to send its charter back to London for review.[79] And, as a hint of what they planned to do when they had the charter in their possession, they insulted the company's representatives as "a Couple of imposterous Knaves."[80]

Gorges and Captain 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

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[75] Letter from Henry Dade to William Laud, Archbishop of Canterbury (Feb. 4, 1634), *in* 1 CALENDAR OF STATE PAPERS, COLONIAL SERIES 174 (W. Noel Sainsbury ed., London, Her Majesty's Stationery Office, 1860). Technically, the privy council delegated its work to a committee on New England plantations. ACTS OF THE PRIVY COUNCIL, *supra* note 70, at 184. For simplicity's sake, I refer to the privy council as a whole.

[76] ACTS OF THE PRIVY COUNCIL, *supra* note 70, at 199 (Feb. 21, 1634).

[77] GORGES, *supra* note 24, at 60; *see* Letter from Emanuel Downing to Sir John Coke, Sec'y of State (Dec. 12, 1633), *paraphrased in* 9 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 22, at 74–75 ("The only considerable objection against this plantation is that in time they will revolt from their allegiance, and join in trade with strangers.").

[78] ACTS OF THE PRIVY COUNCIL, *supra* note 70, at 200–01 (Feb. 22, 1634).

[79] *See* JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 120–21, 123 (Richard S. Dunn, James Savage & Laetitia Yeandle eds., 1996) (July 9, 1634).

[80] Letter from Thomas Morton to William Jeffrey (May 1, 1634), *in* 1 HAZARD, STATE PAPERS, *supra* note 62, at 343.

the charter "to be void."[81] But under English law at the time, voiding a corporate charter was not so simple, even for the king. As mentioned earlier, 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.[82] Although a few charters stated that this grant was temporary,[83] most explicitly declared that the grant was "perpetual" and intended to last "for ever."[84] 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.[85] It would take more than royal displeasure to kill the Massachusetts Bay Company.

The king's silver bullet was a highly technical legal procedure called "an information in the nature of a *quo warranto*."[86] (This was often shortened to *quo warranto*—as in, the king just "Quo Warranto'd" that corporation.[87]) The procedure is easier to walk through than to define. First, the king's attorney general would bring an *information*, or criminal

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[81] *Id.* at 342. Morton wrote that the king had *already* voided the charter but, as will soon become apparent, that wasn't accurate.

[82] *See*, *supra*, note 29 and accompanying text.

[83] *See, e.g.*, CHARTER OF THE EAST INDIA COMPANY (Dec. 31, 1600), *reprinted in* CHARTERS RELATING TO THE EAST INDIA COMPANY FROM 1600 TO 1761, at 1, 7 (John Shaw ed., Madras, Madras Gov't Press, 1887) (imposing a fifteen-year expiration date).

[84] *See, e.g.*, CHARTER OF THE COUNCIL FOR NEW ENGLAND, *supra* note 46, at 128; *see* SELECT CHARTERS OF TRADING COMPANIES, *supra* note 29, at *xviii–xix*.

[85] The Case of Sutton's Hospital (1612) 77 Eng. Rep. 960, 973 (Ex. Ch.).

[86] 2 STEWARD KYD, A TREATISE ON THE LAW OF CORPORATIONS 395–410 (London, J. Butterworth, 1793) (citing Sir EDWARD COKE, A BOOKE OF ENTRIES 527–564 (London, Societie of Stationers, 1614)).

[87] *See, e.g.*, JOHN PALMER, AN IMPARTIAL ACCOUNT OF THE STATE OF NEW ENGLAND 39 (London, Edward Poole, 1690).

charge, against the shareholders of a corporation.[88] Then, in court, the attorney general would ask the shareholders "*quo warranto*," or, "by what warrant or authorization did you take actions that are illegal without the king's permission?"[89] If they could, the shareholders would reply by quoting specific terms of a charter that proved that the king had given them permission to take the challenged actions.[90] A panel of judges would then determine whether the actions had been warranted by the charter or whether they had been "usurped" and taken illegally.[91]

As so far described, this procedure had existed in one form or another since at least the thirteenth century.[92] It still exists in a modified form today; there is nothing odd about a civil or criminal lawsuit alleging that a government or corporate officer exceeded his or her authority to act.[93]

But in 1620, a decade before the Massachusetts Bay Company controversy, King James controversially modified this procedure into a deadly weapon against corporations. His attorney general began to argue 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

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[88] 2 KYD, *supra* note 86, at 403–04; *cf.* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *information* as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment").

[89] 2 KYD, *supra* note 86, at 395, 403–04.

[90] *Id.* at 405–06.

[91] *Id.* at 406–09.

[92] *See* Statute of Quo Warranto 1290, 18 Edw. 1, *stat. de quo. war.*; 2 KYD, *supra* note 86, at 395–403. *See generally* DONALD W. SUTHERLAND, QUO WARRANTO PROCEEDINGS IN THE REIGN OF EDWARD I (1963).

[93] *See* Bilder, *supra* note 14, at 541–544. Since the advent of the Federal Rules of Civil Procedure and its state equivalents, this sort of proceeding is rarely called a *quo warranto* anymore. *See* Fed. R. Civ. P. 81(b); Mass. R. Civ. P. 81(b).

half.[94] In 1624, the king successfully enforced this modified procedure against the Virginia Company of London after receiving complaints of "abuses and miscarriage in the plantation and government" of Jamestown.[95] Using a *quo warranto*, James and his son, the new King Charles, dissolved the Virginia Company and proclaimed that "the Government of the Collonie of *Virginia* shall immediately 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 be fitt or safe to communicate the ordering of State Affairs."[96]

Charles's insistence that "State Affairs" were better ordered by a hand-picked governor than by a corporation was short lived: he chartered the Massachusetts Bay Company only a few years later. But in 1635, after the company ignored his privy councilors' request to resign its charter,[97] the king ordered his attorney general to file a *quo warranto* against the Massachusetts Bay Company.[98]

The Atlantic Ocean made prosecuting this *quo warranto* more difficult than the *quo warranto* against the Virginia Company had been. Unlike the Virginia Company, whose board, shareholders, and charter were in England, the Massachusetts Bay Company was

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[94] Dublin Corporation Case (1620) 81 Eng. Rep. 949, 950–51 (KB); *see* 2 KYD, *supra* note 86, at 409–410.

[95] Letter from Thomas Coventry, Att'y Gen., and Robert L. Heath, Solicitor Gen., to James, King of England (Jul. 31, 1623) (class 1/2, no. 43, p. 1, TNA); *see* 4 RECORDS OF THE VIRGINIA COMPANY OF LONDON 358–69 (Susan Myra Kingsbury ed., 1935); Order of the Privy Council (June 26, 1624) (class 5, no. 1354, p. 277, TNA); Order of the Privy Council (June 24, 1624) (class 5, no. 1354, p. 210, TNA); Letter from the Virginia Company of London to the Privy Council (Oct. 20, 1623) (class 1/2, no. 47, TNA); Order in Council of James, King of England (Oct. 8, 1623) (class 1/2, no. 45, TNA).

[96] Charles, King of England, A Proclamation for Settlinge the Plantation of Virginia (May 13, 1625), *reprinted in* 18 FŒDERA 72–73 (Roberto Sanderson ed., London, J. Tonson, 1726); *see* R. v. Virginia Company (1624) 81 Eng. Rep. 913 (KB).

[97] *See* WINTHROP, *supra* note 79, at 120–23 (Jul. 1–9, 1634); *id.* at 129 (Sep. 18, 1634).

[98] *See* Quo Warranto Brought Against the Company of the Massachusetts Bay, *supra* note 4, at 114–16; Minutes of the Council for New England (May 5, 1635) (class 1/6, no. 29, p. 36, TNA).

overseas—and it took two or three months for a letter or legal document to travel by ship between London and Boston.[99] In the company's absence, the court of the King's Bench "outlawed" the missing shareholders and, in 1637, entered a default judgment ordering the charter to be "seized into the Kings hands."[100] Even then, the company in Boston either ignored or refused every order out of England announcing that its charter had been "called in and condemned."[101] In 1638, the privy councilors even learned that the company's government was preparing to "fortifie themselves" and "spend their blood" resisting any attempt to seize the charter by force.[102]

In the face of this shocking resistance, the councilors tasked Gorges and Captain Mason with reclaiming New England on behalf of the king.[103] Their Council for New England spent much of the decade preparing for this reclamation, distributing its remaining land north of the Merrimack River, sending agents to settle that land, and

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[99] *See* Letter from Emanuel Downing to Hugh Peter (Jul. 29, 1641), *in* 4 WINTHROP PAPERS 340–41 (Mass. Hist. Soc'y ed., 1944).

[100] Minutes of the Quo Warranto Against the Colony of Massachusetts (May 27, 1635 to May 3, 1637) (class 1/9, nos. 50–51, TNA).

[101] Letter to John Winthrop (May 1637), *reprinted in* 3 WINTHROP PAPERS 402, 402–03 (Mass. Hist. Soc'y ed., 1943). There were a few such orders. *See* WINTHROP, *supra* note 79, at 291–92 (May 6, 1639); Order of the Privy Council (Apr. 4, 1638), *reprinted in* 1 HAZARD, STATE PAPERS, *supra* note 62, at 432–33; Order of the Privy Council (May 3, 1637) (class 1/9, no. 49, TNA). The company responded once, in 1638, claiming they "were never called to make answer" to the *quo warranto*, there was "no cause known to us" to void the charter, and, 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." Petition from the Massachusetts Bay Company to the Lords Commissioners for Foreign Plantations (1638), *reprinted in* 1 HAZARD, STATE PAPERS, *supra* note 62, at 435–36; WINTHROP, *supra* note 79, at 262 (Sep. 7, 1638).

[102] Letter from George Burdett to William Laud, Archbishop of Canterbury (Nov. 29, 1638) (class 1/9, no. 129, TNA). This was an accurate description. *See, e.g.*, 1 MBC RECORDS, *supra* note 63, at 123–25 (Sep. 3, 1634). 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," WINTHROP, *supra* note 79, at 228 (Aug. 3, 1637).

[103] *See* WINTHROP, *supra* note 79, at 148, 177 (Jun. 16, 1635, and May 31, 1636).

asking for the crown to confirm its distributions.[104] (Gorges got the "Province of Maine," capital "Gorgeana,"[105] while Captain Mason got the "Province of New Hampshire," also called "Masonia").[106] Gorges and Captain 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.[107]

But as with all things in Gorges's life, these dreams were interrupted by circumstance. A "great ship" he and Captain Mason built to haul them across the ocean fell apart in 1635.[108] Later that year, Captain Mason unexpectedly died, leaving behind a wife, two grandchildren, and a sparsely populated settlement on the New Hampshire coast.[109]

Even worse for Gorges, a political crisis between the English Parliament and the king prevented them from offering him much help.[110] The crisis had many causes, but at its core was a long-simmering dispute about whether the unwritten laws and practices that "constituted" the English kingdom permitted the king to collect revenue without first

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[104] *See id.* at 42, 224 (Dec. 14, 1630; and Jun. 26, 1637).

[105] *See* CHARTER OF THE CITY OF GORGEANA (Mar. 1, 1642), *reprinted in* 1 HAZARD, STATE PAPERS, *supra* note 62, at 480; CHARTER OF THE PROVINCE OR COUNTY OF MAINE (Apr. 3, 1639) (class 5, no. 902, pp. 61–92, TNA); Extracts of Several Grants Concerning New England (Nov. 18, 1620 to Apr. 3, 1639) (class 1/1, no. 52, TNA).

[106] *See* Deeds from the Council for New England and John Wollaston to Capt. John Mason (Nov. 7, 1629, Nov. 17, 1629, Apr. 22, 1635, and Jun. 11, 1635) (class 5, no. 902, pp. 109–21, 127–30, 137–42).

[107] *See, e.g.*, Letter from Capt. John Mason to Robert Smith (Jun. 22, 1635) (class 1/8, no. 68, TNA); Council for New England, Declaration for the Resignation of the Great Charter (Apr. 25, 1634) (class 1/6, no. 29, pp. 27–32, TNA); Letter from Sir Ferdinando Gorges to Charles, King of England (May 12, 1634) (class 1/8, no. 14, TNA). King Charles accepted the resigned charter and appointed Gorges governor of New England in 1637. *See* COMMISSION TO SIR FERDINANDO GORGES (July 23, 1637) (class 1/9, no. 60, TNA).

[108] *See* WINTHROP, *supra* note 79, at 148 (Jun. 16, 1635).

[109] *See* Will of Captain John Mason, *reprinted in* 1 HAZARD, STATE PAPERS, *supra* note 62, at 397–400; 1 MBC RECORDS, *supra* note 63, at 276 (Nov. 5, 1639).

[110] *See* Objections Against the Massachusetts Charter, *supra* note 98, at 2 ("The Warrs immediately ensuing in Scotland and England . . . Stopped [Gorges from] going over . . . .").

getting Parliament's permission.[111] Members of Parliament argued that, under the "constitution of the policie of this kingdome," the king had no power to raise revenue without Parliament's consent.[112] 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,[113] including his diplomatic power to impose tariffs,[114] his military power to require local governments to pay for ships of war,[115] and his sovereign power to charter corporations for a fee.[116] As the philosopher Thomas Hobbes later explained in his work *Leviathan*, the king was the leader of a "Common-wealth," not the mere leader of a corporation who could take no actions "further than his Letters, or the Lawes limit."[117]

Gorges could only watch as this disagreement over the "Fundamental Constitutions" of England erupted into civil war in 1642 and Charles's beheading in 1649.[118] In the

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[111] *See generally* DIANE PURKISS, THE ENGLISH CIVIL WAR (2006); THE STUART CONSTITUTION 1603–1688 (J.P. Kenyon ed., 1986).

[112] TOUCHING THE FUNDAMENTALL LAWS, OR POLITIQUE CONSTITUTION OF THIS KINGDOM 3–5 (London, Thomas Underhill, 1643); Proceedings in Bates's Case, *supra* note 114, at 481 (statement of James Whitelocke); *see* PARLIAMENTARY DEBATES IN 1610, at 103 (Samuel Rawson Gardiner ed., Westminster, John Bowyer Nichols & Sons, 1862); The Petition Exhibited to His Majestie . . . Concerning Divers Rights and Liberties of the Subjects (Jun. 7, 1628), in 5 STATUTES OF THE REALM 23–24 (John Raithby ed., 1819); *see also* WILLIAM PRYNNE, THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMS 41–45 (London, Michael Sparke, Sr., 1643).

[113] CHARLES, KING OF ENGLAND, HIS MAJESTIES ANSWER TO THE XIX PROPOSITIONS OF BOTH HOUSES OF PARLIAMENT 17–18 (London, Robert Barker, 1642).

[114] *See* Proceedings in Bates's Case (Case of Impositions) (1606), *in* 2 A COMPLETE COLLECTION OF STATE TRIALS 371–533 (T.B. Howell ed., London, T.C. Hansard, 1816) [hereinafter HOWELL, STATE TRIALS].

[115] *See* Proceedings in R v. Hampden (Case of Ship-Money) (1637), *in* 3 HOWELL, STATE TRIALS, *supra* note 114, at 826–1314.

[116] *See* Darcy v. Allin (Case of Monopolies) (1602) 74 Eng. Rep. 1131 (KB).

[117] THOMAS HOBBES, LEVIATHAN 115–16 (London, Andrew Crooke, 1651).

[118] *See* Articles of Impeachment Against Charles Stuart (Jan. 20, 1649), *in* THE TRIAL OF CHARLES I 82–85 (Roger Lockyer ed., 1959). Archbishop Laud, the head of the commission overseeing the *quo*

meantime, he appointed commissioners to establish towns in his Province of Maine, but he died in 1647 having never set foot there.[119] The legal threat to the Massachusetts Bay Company was over—at least for now. But the existence of the threat for the company's first two decades had made its impact on New Englanders' views about their own constitution.

II

The first corporate board meeting in North America took place on August 23, 1630, in Charlestown, near the Charles River.[120] Both the town and the river were named after the king who gave the Massachusetts Bay Company its charter. As a member of the board later recalled, the charter originally contained a clause copied from the Virginia Company of London's charter that required the board to meet in England.[121] But, he remembered, "with much difficulty we gott [the clause] abscinded," allowing the board to govern its colony from New England with the charter providing "[t]he words of Constitution of this bodye politike."[122]

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warranto, was removed from the House of Lords in 1640 and eventually impeached, condemned by a bill of attainder, and executed. *See* Trial of Dr. William Laud (1640–1644), *in* 4 HOWELL, STATE TRIALS, *supra* note 114, at 315–625.

[119] *See* Sir Ferdinando Gorges, Commission Appointing Council for the Province of Maine (Mar. 10, 1640) (class 1/10, no. 58, TNA). The three towns his commissioners founded declared themselves independent after his death. *See* SOCIAL COMPACT TO SECURE INDEPENDENT GOVERNMENT BY WELLS, GORGEANA, AND PISCATQUA (July 1649), *reprinted in* 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE 265–66 (Mary Frances Farnham ed., 1901).

[120] 1 MBC RECORDS, *supra* note 63, at 73 (Aug. 23, 1630).

[121] John Winthrop, Arbitrary Government Described (1644), *reprinted in* 4 WINTHROP PAPERS, *supra* note 99, at 468, 470.

[122] *Id.* at 470.

This recollection may have been a little inaccurate[123]—the allegedly copied Virginia charter didn't contain any stay-in-England clause.[124] But Winthrop's sentiment—that the "words of the Patent" were also the "words of Constitution" of Massachusetts[125]—had, by 1644, become a local truism. Thanks in part to Sir Ferdinando Gorges and Captain John Mason, whose lawsuit threatened to dissolve the company if its government took actions that its charter didn't allow, the charter was evolving into a modern constitution for New England.

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The charter of the Massachusetts Bay Company is a beautiful document. It contains four enormous parchment pages, each measuring 34½ by 25¾ inches, and each showing the wear of a manuscript that has been scrutinized by hundreds of fingers and rolled to fit inside dozens of "safe & secret" places.[126] 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

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[123] See generally Ronald Dale Karr, *The Missing Clause: Myth and the Massachusetts Bay Charter of 1629*, 77 NEW ENG. Q. 89 (2004).

[124] *See* THIRD CHARTER OF THE VIRGINIA COMPANY OF LONDON (Mar. 12, 1612), *reprinted in* 1 THE STATUTES AT LARGE 98–110 (William Waller Hening ed., New York, R. & W. & G. Bartow, 1823).

[125] WINTHROP, *supra* note 121, at 468–69.

[126] 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* 1 MBC RECORDS, *supra* note 63, at 51 (Aug. 29, 1629); Letter from Mass. Bay Co. to John Endecott, *supra* note 62, at 256. (The duplicate is so called because it has "dupl" written on the bottom.) In 1664, soon after the restoration of King Charles II, the company decided to "keep safe & secret" its two copies by ordering both to be hidden. 4–II MBC RECORDS, *supra* note 63, at 102 (May 18, 1664). The copies were concealed in various places for the next few decades. *See* 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FOURTH SERIES 159–61 (Boston, Mass. Hist. Soc'y, 1865). Today, the duplicate is held at the Peabody-Essex Museum in Salem and the original at the Massachusetts Archives in Boston. Ironically, only in these final resting places have the documents been in danger; the first page of the original was briefly stolen in 1984. *See* Philip Bennett, *Stolen First Page of Bay Charter Found*, BOS. GLOBE, Mar. 9, 1985, at 21.

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—officially, "party-colored"—strings of braided silk.[127]

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 really stands out relative to the charters of other trading corporations of its time—not even the party-colored strings.[128] The same is true with 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.[129]

The text begins with a fifteen-hundred-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 "confirm," or formally approve, their ownership of the land.[130]

In the next fifteen hundred words, the king granted the associates' request, giving them all the land and coastal waters between the lines of latitude three miles north of "any and every parte" of the Merrimack River and three miles south of "any or every parte" of the Charles River.[131] The associates were to own the property as if they were tenants on a

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[127] MBC CHARTER, *supra* note 63, at 20.

[128] *See, e.g.*, HUDSON'S BAY CO., LORDS & PROPRIETORS: A READER'S GUIDE TO THE HUDSON'S BAY COMPANY CHARTER 23 (2004) (discussing the appearance of the company's 1670 charter).

[129] *See* SELECT CHARTERS OF TRADING COMPANIES, *supra* note 29, at *xii* ("The clauses contained in these grants reappear in later charters."); *see generally* sources cited *supra* note 29.

[130] MBC CHARTER, *supra* note 63, at 3–6.

[131] *Id.* at 6–9. The charter included the southernmost part of the Massachusetts Bay as an alternative southern boundary, *id.* at 7, but the Charles River extends further south.

manor the king owned near London.[132] 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.[133]

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.[134] 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 "bodie corporate and politique in fact and name, by the name of the Governor and Company of the Massachusetts Bay in Newe England."[135] 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.[136] 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 destruction, invasion, detriment, or annoyaunce to the said plantation or inhabitants."[137]

The charter dedicated about twenty-five hundred words to the corporation's organization. At its head was a board consisting of a "Governor," or chairman; a "Deputie

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[132] *See* Edward P. Cheyney, *The Manor of East Greenwich in the County of Kent*, 11 AM. HIST. REV. 29, 29 (1905).

[133] MBC CHARTER, *supra* note 63, at 8.

[134] *Id.* at 9.

[135] *Id.* at 10.

[136] *Id.* at 17.

[137] *Id.* at 10–12, 18.

Governor," or vice-chairman; and sixteen "Assistants," or directors.[138] This board was subject to annual election by shareholders on the last Wednesday of "Easter tearme," which usually fell in May.[139] The board was also authorized to call a monthly "Courte," or board meeting, at which it could handle "all such buysinesses and occurrents as shall, from tyme to tyme, happen."[140] A quorum consisted of eight people: seven directors and the chairman or vice-chairman.[141]

The board was also authorized to call quarterly "Generall Courts," or general meetings, at which shareholders could participate.[142] 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.[143] A clause later in the charter authorized other general meetings to do various other things, such as impose "lawfull correction" on a prisoner, impeach or set "lymytts" on an officer, or figure out how to convert "the natives" to Christianity.[144]

This last point, about conversion, was labeled "the principall ende of this plantacion."[145] But the charter dedicated vastly more space, over two thousand words, to

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[138] *Id.* at 11.

[139] *Id.* at 12; *see* JOHN COWELL, THE INTERPRETER 515 (Cambridge, John Legate, 1607) ("Easter terme . . . beginneth 18. daies after Easter and endeth the munday next after Ascension day.").

[140] MBC CHARTER, *supra* note 63, at 11.

[141] *Id.*

[142] *Id.* at 11–12.

[143] *Id.*

[144] *Id.* at 16–17.

[145] *Id.*

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.[146]

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[e]s of this our realme of England."[147] Relatedly, all oaths had to be "warrantable" by the laws of England,[148] all punishments had to be "according to the Course of other corporacions in this our realme of England,"[149] and Brits living under the corporation's jurisdiction were entitled to "all liberties and immunities of free and naturall subjects . . . as if they and everie of them were borne within the realme of England."[150] These sorts of clauses were common in charters and were supposed to reassure potential emigrants that living overseas wouldn't make their family's legal status any worse than if they stayed at home.[151]

The first shareholders in the Massachusetts Bay Company began looking for emigrants almost as soon as the company received its charter in March 1629. Many of the shareholders were graduates of the University of Cambridge, and they were particularly interested in recruiting former classmates who shared their "Puritan" values, so-called because they believed that the Church of England's governing structure had too many

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[146] *Id.* at 13–16.

[147] *Id.* at 12.

[148] *Id.* at 16.

[149] *Id.* at 17.

[150] *Id.* at 16; *see also* Calvin's Case (1608) 77 Eng. Rep. 377, 407 (KB) (holding that a Scot born after King James's ascension was "no alien" to England).

[151] *See* Bilder, *supra* note 8, at 1577–84.

impure, Catholic traditions.[152] That July, at Cambridge's commencement, a couple of them began talking with a fellow alum named John Winthrop.[153] Winthrop was probably not looking his best—he was a little 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.[154]

In thinking about whether to join the Massachusetts Bay Company, Winthrop thought about the recently publicized "abuses and miscarriage in the plantation and government" of Jamestown that had led the king to *quo warranto* the Virginia Company.[155] He blamed that company's failure in part on its mission, which was "aymed chiefly a profit and not the propagation of religion."[156] More fundamentally, Winthrop also thought the company "did not establysh a right forme of government."[157] 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."[158]

After Winthrop discussed these concerns with the Massachusetts Bay Company's shareholders, the company's chairman invited Winthrop to speak about whether the board

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[152] FRANCIS J. BREMER, JOHN WINTHROP: AMERICA'S FORGOTTEN FOUNDING FATHER 147–57 (2003).

[153] Letter from Isaac Johnson to Emanuel Downing (Jul. 8, 1629), *reprinted in* 2 WINTHROP PAPERS 102, 103 (Mass. Hist. Soc'y ed. 1931); *see also* 1 MBC RECORDS, *supra* note 63, at 49 (Jul. 28, 1629).

[154] BREMER, *supra* note 152, at 80–135, 146. He had been an attorney for the Court of Wards and Liveries.

[155] *See* Coventry, *supra* note 95, at 1.

[156] John Winthrop, General Observations for the Plantation of New England (Aug. 12, 1629), *reprinted in* 2 WINTHROP PAPERS, *supra* note 153, at 114, 114.

[157] *Id.*

[158] *Id.*

should "transferr the government of the plantacion to those that shall inhabite there, and not to continue the same in subordinacion to the Company heer, as now it is."[159] From July through August, the company debated the idea.[160] 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 & quality" would "transplant themselves and famylyes" to New England only if they could govern themselves as a "Commonwealth."[161]

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 government together with the Patent," or charter, to New England.[162] Later that month, the company passed the order.[163] 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 of seven years.[164] In the future, the only people who could become shareholders had to live in New England—specifically, they had to become "members of [one] of the churches" established there.[165]

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[159] 1 MBC RECORDS, *supra* note 63, at 49 (Jul. 28, 1629).

[160] *Id.* at 49–51 (Jul. 28 to Aug. 29, 1629).

[161] John Winthrop, Address to the Mass. Bay Co. (1629), *reprinted in* 2 WINTHROP PAPERS, *supra* note 153, at 174, 175; *see also* Winthrop, *supra* note 156, at 114.

[162] The Agreement at Cambridge (Aug. 26, 1629), *reprinted in* 2 WINTHROP PAPERS, *supra* note 153, at 151, 152.

[163] *Id.* at 51 (Aug. 29, 1629).

[164] *Id.* at 52–67 (Sep. 29 to Dec. 15, 1629).

[165] *Id.* at 81 (May 18, 1631).

Almost as soon as the company decided that its charter was no bar to relocation, however, the charter became something of an afterthought.[166] At least once a year, the board disregarded its 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.[167] In 1630, after the company established its headquarters in the new town of Boston, the company restricted shareholders from electing the chairman, allowing them only to elect directors.[168] 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.[169] 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 "Deputies," or shareholder representatives, to vote on taxes "by proxie."[170]

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

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[166] *See generally* 1 ANDREWS, *supra* note 9, at 431–44.

[167] *Id.* at 59 (Oct. 20, 1629).

[168] *Id.* at 79 (Oct. 19, 1630).

[169] *Id.* at 84, 87 (Mar. 8 and May 18, 1631).

[170] *Id.* at 95 (May 9, 1632); *see also* WINTHROP, *supra* note 79, at 63, 66, 68 (Feb. 17, May 1, and May 9, 1632). The term "proxie" first appears in 1636, when the company began authorizing shareholders to vote in elections by proxy as well. 1 MBC RECORDS, *supra* note 63, at 166, 188 (Mar. 3, 1636, and Mar. 9, 1637).

to seek out restrictions on their own authority.[171] Leaders like Winthrop certainly didn't interpret their charters with the textualist approach of a modern judge.[172] Here's an example of Winthrop's initial interpretive philosophy: In 1632, when someone asked Winthrop whether the charter, or "Patent," imposed any "limittes o[n] his Authoritye," he answered that "the Patent making him a Governor gave him whatsoever power belonged to a Governor by Common Lawe or the statutes."[173]

This all began to change in 1633 with news that Sir Ferdinando Gorges, Captain John Mason, and dissident New Englanders were petitioning the king's privy council to *quo warranto* the company.[174] As discussed above, using a *quo warranto* to seize a charter was a relatively new innovation, one that dramatically increased the penalty for taking actions that the charter didn't allow.[175] Winthrop and other company leaders responded to this news in several ways. They adopted a legal strategy of "avoid[ance]" and protract[ion]," refusing to answer letters from England until they received a formal summons.[176] They ordered the construction of fortifications to repulse any unlawful attempts "to compell us by

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[171] *See* PETER CLARK & PAUL SLACK, ENGLISH TOWNS IN TRANSITION 1500–1700, at 29–30, 55–56, 63–79, 126–30 (1976); CHAUDHURI, *supra* note 29, at 27–33; BEATRICE WEBB & SIDNEY WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT 271–76 (1908).

[172] WEBB & WEBB, *supra* note 171, at 274; Bilder, *supra* note 8, at 1549, 1590–91.

[173] WINTHROP, *supra* note 79, at 74 (Feb. 17, 1632).

[174] *See id.* at 87–88, 124 (Feb. 22, 1633 & Aug. 12, 1634); *see also, supra*, notes 70–73 and accompanying text.

[175] There is no reason to think the company couldn't understand the nature of the threat; as one critic of the company complained of the chairman and directors, the "best of them was but an atturney." 1 MBC RECORDS, *supra* note 63, at 103 (Mar. 4, 1633).

[176] WINTHROP, *supra* note 79, at 140 (Jan. 13, 1635); *see also id.* at 120–23, 129 (Jul. 1–9 & Sep. 18, 1634).

force, to receive a new Governor."[177] And, most importantly, they began changing their laws and conduct to conform to the charter's text.

Winthrop resisted this final 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."[178] 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.[179] 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."[180] But the shareholders rejected this excuse, voting to institute their reforms and also to demote Winthrop from the chairmanship he had held since 1629.[181]

By July, however, when the company received its first order from the privy council demanding to see its charter,[182] even Winthrop could see the need to pacify the crown and strictly comply with the charter's terms. Through the end of 1635, he began arguing that all laws passed by a majority of shareholders also required the approval of at least six

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[177] *Id.*, at 129 (Sep. 18, 1634).

[178] *Id.* at 113–14 (Apr. 1, 1634).

[179] 1 MBC RECORDS, *supra* note 63, at 117–31 (May 14, 1634); *see generally* MALOY, *supra* note 8, at 114–39; ROGER THOMPSON, DIVIDED WE STAND: WATERTOWN, MASSACHUSETTS, 1630–1680, at 37–51 (2001).

[180] WINTHROP, *supra* note 79, at 113.

[181] *Id.* at 116 (May 14, 1634); Letter from Israel Stoughton to John Stoughton (May 1634) (class 1/8, no. 15, TNA).

[182] WINTHROP, *supra* note 79, at 120–23 (Jul. 1–9, 1634).

directors, "as the Patent requires."[183] He dragged his feet when the company appointed him to a committee to "frame a body 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 laws of England."[184] He and the board banished Roger Williams from Massachusetts to what later became Rhode Island principally because Williams wrote and lectured "against the kings Patente."[185] And when a militia captain in Salem defaced a copy of the king's official flag for religious reasons, Winthrop "fear[ed] it would be taken as an Acte of rebellion" and wrote a letter of apology to his brother-in-law who happened to be the company's representative in London.[186] The captain was later censured for "giving occasion to the state of England to think ill of us."[187]

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 a chairman or member of the company's board, and the charter occasionally provided a convenient argument for enhancing the board's powers at the expense of shareholders—and vice versa.

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[183] *Id.* at 127 (Sep. 4, 1634).

[184] WINTHROP, *supra* note 79, at 146, 314–315 (May 6, 1635 & Nov. 5, 1639); *see also* 1 MBC RECORDS, *supra* note 63, at 147 (May 6, 1635).

[185] WINTHROP, *supra* note 79, at 107–09, 137, 163–64 (Dec. 27, 1633; Jan. 3–24 & Nov. 27, 1634; Jan. 1636); 1 MBC RECORDS, *supra* note 63, at 160–61 (Sep. 3, 1635).

[186] WINTHROP, *supra* note 79, at 131–32 (Nov. 5, 1634).

[187] 1 MBC RECORDS, *supra* note 63, at 158 (May 6, 1635). The company evidently agreed with the captain's religious logic, however, because in 1636 it struck the cross out of the king's official flag everywhere in the colony except for where ships could see it from Boston Harbor. WINTHROP, *supra* note 79, at 170 (Feb. 1, 1636).

Winthrop even recognized as much. Between 1636 and 1639, he lost a battle over whether the charter permitted the company to appoint him to a new and powerful "standing counsell for the tearme of his life."[188] 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 officers (chairman, vice-chairman, and director) and required each to be "chosen in the annual elections . . . established by the patent."[189] 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 where it will not warrant such liberties as they have taken up without warrant from thence."[190] 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, &c.," yet the shareholders didn't subject themselves to the same strict standard to which they held Winthrop.[191]

But in a more general sense, the reason that 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 sword of Damocles.[192] This shared concern

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[188] 1 MBC RECORDS, *supra* note 63, at 167, 174 (Mar. 3 & May 25, 1636); WINTHROP, *supra* note 79, at 174 (Apr. 7, 1636).

[189] WINTHROP, *supra* note 79, at 294–95 (May 22, 1639). The council formally survived but councilors could only exercise the powers they already possessed as directors. 1 MBC RECORDS, *supra* note 63, at 264 (Jun. 6, 1639). In 1642, one of the directors anonymously wrote that even this compromise was "a sinful innovation" because the chartered offices were "commanded and ordained of God." 2 MBC RECORDS, *supra* note 63, at 5, 20–21 (May 20 and Jun. 14, 1642); WINTHROP, *supra* note 79, at 390–91 (May 1642).

[190] WINTHROP, *supra* note 79, at 295–96.

[191] *Id.* at 296.

[192] *See, e.g.*, Letter from Sir Henry Vane to Sir Henry Vane the Elder (Jul. 28, 1636) (class 1/9, no. 19, TNA) (discussing the "great discouragement to the plantation" if the charter were "damned").

was powerfully illustrated in a debate over whether the company had the power to restrict immigration.[193] 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."[194] He maintained that all "commonwealths" had the power to "keep out all such persons as might be dangerous to the commonwealth," and that the Massachusetts Bay Company, a "corporation established by free consent," was no different.[195]

On the con side, one-time chairman Henry Vane opposed a restrictive immigration law because he believed "the King's Christian subjects [had the] right by his majesties patent, to come over and plante" in New England.[196] He responded to Winthrop by arguing that all commonwealths, corporate and otherwise, could protect themselves only "according to the charter they hold by . . . God or the King or from both."[197] Any immigration law had to be "regulated by the worde . . . [of] our patent" and enforced in the "manner and forme as it prescribes" or else "we shall exceed the limits of his majesties grante, and forfeite the privileges, government and lands which we challenge to be our owne."[198]

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[193] The debate centered on a law passed in the wake of a major religious controversy involving a recent immigrant, Anne Hutchinson. *See generally* JANICE KNIGHT, ORTHODOXIES IN MASSACHUSETTS (1994); EDMUND MORGAN, THE PURITAN DILEMMA (1958); PERRY MILLER, ORTHODOXY IN MASSACHUSETTS (1933). The law prohibited any new immigrants from remaining in New England unless they received the approval of at least two directors. 1 MBC RECORDS, *supra* note 63, at 196 (May 17, 1637).

[194] John Winthrop, A Reply in Further Defense of an Order of Court Made in May, 1637 (Aug. 1637), *reprinted in* 3 WINTHROP PAPERS, *supra* note 101, at 463, 468–69.

[195] WINTHROP, *supra* note 79, at 219 (May 24, 1637); John Winthrop, A Declaration in Defense of an Order of Court Dated May, 1637 (Jun. 1637), *reprinted in* 3 WINTHROP PAPERS, *supra* note 101, at 422, 423.

[196] Henry Vane, A Brief Answer to a Certain Declaration (1637), *reprinted in* 1 HUTCHINSON PAPERS, *supra* note 4, at 88.

[197] *Id.* at 84, 85.

[198] *Id.* at 84, 86, 88.

As it happened, the *quo warranto* proceedings in England turned out to be a paper tiger—one easily tamed by Winthrop's strategy of avoidance and protraction.[199] But even as England broke down in a civil war between royalists and parliamentarians, the threat remained 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.[200] A mob, offended at 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."[201] Under the terms of that patent, the company had "consented to hold [its] land" as if it were on one of the manors the king owned near London.[202] In 1644, Parliament and its military generals

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[199] As discussed earlier, the company responded to the privy council once, in 1638, explaining that the *quo warranto* was invalid because the company had never been properly served with a summons. *See supra* note 101. According to Winthrop, the privy council's response, in 1639, "did now again peremptorily require the governour to send them our patent by the first ship; and that, in the mean time, they did give us, by that order, full power to go on in the government of the people until we had a new patent sent us; and, withal, they added threats of further course to be taken with us, if we failed." WINTHROP, *supra* note 79, at 291 (May 6, 1639). This response was delivered "in a private letter"; the company decided not to respond to it because the privy council "could not have any proof that it was delivered to the governour." *Id.* The company also asked the person who delivered it to "make no mention of the letters he delivered to the governour, seeing his master had not laid any charge upon him to that end." *Id.* at 291–92. The deliveryman complied. *See* Letter from Matthew Craddock to John Winthrop (Feb. 27, 1640), *reprinted in* 4 WINTHROP PAPERS, *supra* note 99, at 207, 207. The next year, in 1640, parliamentarians began impeaching the privy councilors overseeing the *quo warranto*. *See supra* note 118.

[200] *See* WINTHROP, *supra* note 79, at 524–25 (Aug. 1644). The captain was named Thomas Stagg.

[201] *Id.* at 526.

[202] *Id.* at 527; MBC CHARTER, *supra* note 63, at 8.

controlled that manor.[203] The company therefore allowed Parliament to seize ships in New England waters rather than "renounce our patent and England's protection."[204]

A more troublesome threat emerged in 1646, when a group of political dissidents wrote a lengthy petition to Parliament complaining that the corporation had erected an "Arbitrary Government" that violated specific provisions of its "Generall Charter."[205] 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 didn't own shares.[206] 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

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

[204] WINTHROP, *supra* note 79, at 527. 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, the year before the Stagg Affair, it even immunized New England from all taxation, calling it a "Kingdom" of its own. *See* 2 JOURNAL OF THE HOUSE OF COMMONS 997–98 (London, His Majesty's Stationery Office, 1802) (Mar. 10, 1643). Also in 1643, Parliament appointed Robert Rich, Earl of Warwick, to head a committee to oversee New England affairs. *See* An Ordinance for the Government of the Plantations in the West Indies, (1643) I ACTS & ORDS. INTERREGNUM 331 (Eng.). Rich was the same person who, as a member of the Council for New England, had given the Cape Ann coalition their controversial deed in 1628. *See*, *supra*, note 61.

[205] Robert Child et al., Remonstrance and Humble Petition (1646), *reprinted in* JOHN CHILD, NEW ENGLAND'S JONAS CAST UP AT LONDON 6, 8–9 (London, T.R. & E.M., 1647); *see* WINTHROP, *supra* note 79, at 624–25 (May 6, 1646). This was one of a few petitions to England at the time; a group of Anabaptists led by Samuel Gorton also petitioned Parliament for an appeal from judgments of blasphemy and sedition entered against them by the company for denying "all magistracy and churches" and for resisting its exercise of jurisdiction in what is now Pawtucket and Warwick, Rhode Island. *See* WINTHROP, *supra* note 79, at 383, 458, 481–88 (Jan. 1642; Sep.–Oct. 13, 1643); 2 MBC RECORDS, *supra* note 63, at 41–44, 51–52 (Sep. 7, Oct. 17–Nov. 3, 1643); SAMUEL GORTON, SIMPLICITIES DEFENCE AGAINST SEVEN-HEADED POLICY (London, John Macock, 1646). The Earl of Warwick ordered Gorton released in May 1646 because he was living outside the boundaries specified in the charter. *See* Letter from Robert Rich, Earl of Warwick, to the Mass. Bay Co. (May 15, 1646), *reprinted in* WINTHROP, *supra* note 79, at 639–40.

[206] Child et al., *supra* note 205, at 8–10.

government.[207] More alarmingly, they complained that when they submitted this grievance to the company's board, it filed criminal charges against them. Most alarmingly, they complained that the charges accused them of "treason," which the company defined as "conspir[ing] or attempt[ing] any invasion, insurrection, or publike rebellion against our Common-wealth" or "perfidiously attempt[ing] the alteration and subversion of our frame of Polity or Government fundamentall," both of which were punishable by "death."[208]

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 government and administrations to the fundamentall rules" of the charter.[209] As evidence, the company even drafted a chart of all the "lawes and customs as are in force and use in this jurisdiction, shewing withall (where occasion serves) how they are warranted by our charter."[210] For example, the laws taxing non-shareholders and punishing traitors were both warranted by the clause in the charter that gave the company "full and absolute power & authority to punish, pardon, rule, governe, &c." anyone

[207] *Id.* at 9–11.

[208] *Id.* at 9; *see* Nathaniel Ward, The Liberties of the Massachusetts Colonie in New England 233 (1641) (defining treason), *reprinted in* 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES 216 (Boston, Charles C. Little & James Brown, 1843). The board in fact charged them with defaming the government and charter by "insinuat[ing] into the minds of the people that those now in authority doe intend to exercise an unwarranted dominion & an arbitrary government." 3 MBC Records, *supra* note 63, at 90–94 (Nov. 4, 1636). The dissidents refused to accept the board's criminal jurisdiction and they were sentenced with £10 and £50 fines. *Id.*; *see* Winthrop, *supra* note 79, at 655–80 (Nov.–Dec. 1646); Edward Winslow, New England's Salamander, Discovered 1–9 (London, Richard Cotes, 1647).

[209] 3 MBC RECORDS, *supra* note 63, at 95–97; WINTHROP, *supra* note 79, at 647–80 (Nov.–Dec. 1646).

[210] Mass. Bay Co., A Declaration of the General Court Holden at Boston (Nov. 4, 1646), *reprinted in* 1 HUTCHINSON PAPERS, *supra* note 4, at 223, 227.

living in New England. This clause necessarily applied to people who had "no vote in election of the members of the [government]."[211]

The company sent these petitions with an agent, Edward Winslow, whose instructions were to assure Parliament that the company's compliance with the charter proved that its government was neither "Arbitrary" nor "Independen[t]."[212] He was instructed to elaborate that the charter required the government to give England its "Allegeance," its "fidelitye," and one-fifth of any gold or silver it mined.[213] But one thing the charter did not allow was appeals from the company's justice—which the dissidents were pursuing with its petition. He was to explain that "it would be destructive to all government" if "delinquents [could] evade the sentence of justice, & force us, by appeales, to follow them into England, where the evidences and circumstances of facts cannot be so cleerely held forth as in their proper place."[214]

The parliamentary commission that evaluated these petitions was so satisfied by the company's explanation that it wrote back that it would not "incourage any Appeales from your Justice, [or] restraine the boundes of your Jurisdiction, to a narrower Composse, then is helde forthe by your Lettres Patentes."[215] With this friendly letter, sent in 1647, the

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[211] *Id.* at 231 (citing MBC CHARTER, *supra* note 63, at 17).

[212] WINTHROP, *supra* note 79, at 677–79 (Dec. 1646).

[213] *Id.* at 678 (citing MBC CHARTER, *supra* note 63, at 8).

[214] 3 MBC RECORDS, *supra* note 63, at 97.

[215] Letter from Robert Rich, Earl of Warwick, to the Mass. Bay Co. (May 25, 1647), *reprinted in* WINTHROP, *supra* note 79, at 702, 703. The committee also wrote a letter announcing that it wouldn't adjudicate boundary disputes between Massachusetts and its neighboring colonies of New Plymouth and Connecticut, but that Massachusetts shouldn't scatter or reduce its neighbors "by an hande of power." Letter from Robert Rich, Earl of Warwick, to the Mass. Bay Co. (Jul. 22, 1647), *reprinted in* WINTHROP, *supra* note 79, at 701, 702.

commission essentially told the company that it had nothing further to worry about from England so long as Parliament was in charge there.

But two decades of paying close attention to the charter had already done its 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."[216] Shareholders continued to demand "transcripts" of records, the power to instruct their representatives "in writeing," and "written" laws to limit the board's exercise of discretion.[217] In 1641, the company published a *Book of Liberties* that protected, among other things, inhabitants' right to a trial by jury, right to counsel, and freedom from excessive bail or cruel and inhumane punishment.[218] Meanwhile, 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.[219]

Even New England's 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

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[216] WINTHROP, *supra* note 79, at 589 (Jul. 3, 1645).

[217] 1 MBC RECORDS, *supra* note 63, at 344–46 (Dec. 10, 1641); WARD, *supra* note 208, at 224, 228; *see generally* MALOY, *supra* note 8, at 134.

[218] *See generally* WARD, *supra* note 208.

[219] John Winthrop, Reply to the Answer Made to the Discourse About the Negative Voice (Jun. 5, 1643), *reprinted in* 4 WINTHROP PAPERS, *supra* note 99, at 380, 382. The biggest debate during this period was over the charter's requirement that all laws and orders, including in judicial cases, needed the approval of at least six directors plus the chairman or vice-chairman. The shareholders, who vastly outnumbered the directors by the 1640s, thought this "negative voice" was absurd. Eventually, after a civil lawsuit involving a woman's missing sow, the directors and shareholders began meeting in two separate rooms—what later became the Senate and House of Representatives of the Massachusetts General Court, a name the state legislature still bears. *See generally* MALOY, *supra* note 8, at 125–32; BREMER, *supra* note 152, at 352–57; MARK DEWOLFE HOWE, READINGS IN AMERICAN LEGAL HISTORY 110–39 (1949); F.L. RILEY, COLONIAL ORIGINS OF NEW ENGLAND SENATES 9–27 (Baltimore, John Hopkins Univ. Press, 1896).

the churches' use of "covenants," or "solemne and publick promise[s]" that new congregations agreed upon when forming themselves[220]—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."[221] A covenant is "the Constituting forme of a Church."[222] And while a covenant did not have to be written down, Mather and other ministers agreed that "the more expresse and plain it is, the more fully it puts us in minde of our mutuall duty, and sirreth us up to it, and leaveth lesse roome for the questioning" of the church's beliefs, its organization, or its membership.[223]

By 1647, shareholders, board members, and ministers alike "All Agreed that our Charter was the foundation of our Government."[224] While parliamentarians and royalists in England decided that the "Constitutione" of that "Kingdome" did not need to be written down, New Englanders like Winthrop maintained that "[t]he words of Constitution of this bodye politike" are "sett downe [in] the verye words of the Patent."[225] The charter not only

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[220] RICHARD MATHER, AN APOLOGIE OF THE CHURCHES IN NEW ENGLAND FOR CHURCH-COVENANT 3 (London, T.P. & M.S., 1643). Mather, a minister, had been a resident of New England since 1635, was the pastor of the church in Dorchester by 1637, and was an "elder" by 1646. *See* JOURNAL AND LIFE OF RICHARD MATHER 1596–1669 30 (Boston, David Clapp, 1850); WINTHROP, *supra* note 79, at 173, 632 (Apr. 1, 1636 and Jul. 1646).

[221] RICHARD MATHER, CHURCH-GOVERNMENT AND CHURCH-COVENANT DISCUSSED 20–22 (London, R.O. & G.D., 1643); *see also* JOHN COTTON, THE WAY OF CONGREGATIONAL CHURCHES CLEARED 14 (London, Mathew Simmons, 1648); THOMAS HOOKER, A SURVEY OF THE SUMME OF CHURCH DISCIPLINE 50 (London, A.M., 1648).

[222] Mather, *supra* note 220, at 5; *see also*

[223] RICHARD MATHER, A PLATFORM OF CHURCH DISCIPLINE GATHERED OUT OF THE WORD OF GOD 5–6 (Cambridge, Mass., S.G., 1649); *see* PERRY MILLER, *The Cambridge Platform in 1648*, *in* THE RESPONSIBILITY OF MIND IN A CIVILIZATION OF MACHINES 45, 45 (1971).

[224] WINTHROP, *supra* note 79, at 468, 648 (Nov. 1646).

[225] *Compare id.* at 469, *with* TOUCHING THE FUNDAMENTALL LAWS, *supra* note 112, at 3–5.

constituted the government by giving it its "Forme, and beinge," but it also "regulate[d its] power and motions, as might best conduce to the preservation, and good of the wholl bodye."[226] In the words of Mather and the other "Reverend Elders," the Massachusetts Bay Company was a "common wealth now constituted by the patent," whose leaders could take any action "so farr as . . . is by the patent . . . , reserved to them & seated in them."[227]

III

As 1654 dawned, the Massachusetts Bay Company looked like proof positive of Sir Edward Coke's words that corporations were "immortal." 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—leading to a second *quo warranto* and an even closer connection between the charter, biblical covenants, and the company's political identity.

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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 east for another forty miles until it reaches its mouth at the Atlantic Ocean.

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[226] WINTHROP, *supra* note 79, at 468.

[227] Answers of the Reverend Elders to Certaine Questions Propounded to Them (Nov. 13, 1646), *reprinted in* 2 MBC RECORDS, *supra* note 63, at 90, 91, 94–95.

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. Captain John Mason and others mapped the river as a straight line perpendicular to the coast.[228] When Captain Mason received his deed to what he called the Province of New Hampshire and Sir Ferdinando Gorges received the Province of Maine to its north, the two men treated this straight-lined river as New Hampshire's southern boundary.[229] Toward the end of their lives, as Puritans settled on the south side of the river's mouth, Captain Mason and Gorges's agents founded a handful of small towns on the north side.[230]

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.[231] The surveyors followed the river west from its mouth and north all the way up to Lake Winnipesaukee where they declared—quite reasonably—that "the true interpretation of the termes of the lymmits northward granted in the patent" was a "streyght line east & west" at the top of the "L."[232] Extended to the coast, this boundary line incorporated everything south of what is now Portland, Maine—including the towns Captain Mason and Gorges had commissioned. So, in the years leading up to 1654, the company annexed each of these

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[228] *See* Map of New England, *in* WILLIAM ALEXANDER, AN ENCOURAGEMENT TO COLONIES (London, William Stansby, 1624). Alexander was Mason's first client after Mason returned from Newfoundland. *See*, *supra*, note 42.

[229] *See*, *supra*, notes 104–106 and accompanying text. New Hampshire extended from the Merrimack River to the Kennebec River and Maine extended north of the Kennebec River.

[230] *See*, *supra*, notes 104, 109, 119, and accompanying text.

[231] MBC CHARTER, *supra* note 63, at 6–9.

[232] 3 MBC RECORDS, *supra* note 63, at 274–78, 288 (May 31 and Oct. 19, 1652). This was later elevated to forty-three degrees, forty-three minutes, and twenty seconds. *Id.* at 361–62 (Oct. 18, 1654).

towns, declaring that, "by the extent of the line, (according to our patent,)"[233] the company had a "just right and interest to, and jurisdiccion over, the tract of land where [they] inhabit, requiring theire subjection thereunto."[234]

Not everyone was pleased with this hostile takeover. Although Gorges's grandson (also named Ferdinando) had "taken no order for [the] Regement" of his family's towns in Maine,[235] his agent there initially refused to acknowledge himself "subject to the government of the Massachusetts."[236] But with few allies in sight, the agent eventually "expresse[d] his consent" and used the company's court system to complain of the "unkind, if not unjust dealing he hath mett."[237]

The same thing happened in New Hampshire. Captain Mason's will left the province to his grandson, Robert Tufton, on the petty condition that Robert "alter his surname" to Mason as an adult.[238] But in 1654, Robert was still a teenager, and his attorney in New Hampshire "acknowledge[d]" that "the lands in question" were part of the company's "jurisdiccon."[239]

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[233] 1 MBC RECORDS, *supra* note 63, at 324, 332, 342–43 (Jun. 2 and Oct. 7, 1641). The New Hampshire towns actually invited this annexation in 1641 after they "complained of the want of good government amongst them, & desired some help in this particular from the jurisdiction of the Massachusets Bay." *Id.* at 324.

[234] 4–I *id.* at 124–29, 157–65, 357–59 (Oct. 28 to Nov. 22, 1652; Jun. 7 to Jul. 6, 1653; and May 20 to Jul. 13, 1658).

[235] Petition to Parliament by the General Court of the Province of Maine (Dec. 5, 1651), *reprinted in* 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE*, supra* note 119, at 267. This was the impetus for the Massachusetts survey. 3 MBC RECORDS, *supra* note 63, at 250–51 (Oct. 14, 1651).

[236] *Id.* at 128–29 (Nov. 22, 1652).

[237] *Id.* at 208 (Oct. 19, 1654).

[238] Will of Captain John Mason, *supra* note 109, at 398–99.

[239] 4–I MBC RECORDS, *supra* note 63, at 94, 156 (May 31, 1652, and Aug. 30, 1653); *see also* Petition of Joseph Mason to the Mass. Bay Co. (May 6, 1653) (class 1/12, no. 3, TNA); Letter from John Endecott to Ann Mason (Jul. 19, 1652) (class 1/11, no. 62, TNA); Protest of Joseph Mason on Behalf of Ann (Jul. 4, 1651) (class 1/11, no. 35, TNA).

This submission by Gorges and Captain 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.[240] Oliver Cromwell was Lord Protector of the "Commonwealth and Free-State" of England.[241] And Cromwell was a big supporter of the Massachusetts Bay Company.[242] 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.[243] But the company saw Cromwell more as an ally than as an overseer, complying with his requests only when it "freely consent[ed]."[244] It declined his invitation to relocate, writing that its charter in New England was doing just fine as "the frame of our government," which let them live under leaders "of our owne chusing, and under laws of our owne making."[245]

Ferdinando and Robert could also see that, now that England was king-free, the company was assuming for itself sovereign powers that the king had once wielded. In 1650,

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[240] An Act Prohibiting the Proclaiming Any Person to Be King of England or Ireland, or the Dominions Thereof, (1649) I ACTS & ORDS. INTERREGNUM 1263 (Eng.).

[241] The Government of the Commonwealth of England, Scotland and Ireland, and the Dominions Thereunto Belonging (Instrument of State) (1653) II ACTS & ORDS. INTERREGNUM 813; An Act Declaring and Constituting the People of England to Be a Commonwealth and Free State (1649) II ACTS & ORDS. INTERREGNUM 122 (Eng.).

[242] *See, e.g.*, Letter from Oliver Cromwell to John Cotton (Oct. 2, 1651), *reprinted in* 1 HUTCHINSON PAPERS, *supra* note 4, at 266.

[243] *See* Petition of the Mass. Bay Co. to Parliament (1652), *reprinted in* 1 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSET'S BAY 516 (London, M. Richardson, 1765); Letter from the Mass. Bay Co. to Oliver Cromwell (1652), *reprinted in* 1 HUTCHINSON, *supra*, at 520; 4–I MBC RECORDS, *supra* note 63, at 110 (Oct. 23, 1652).

[244] Address of the Mass. Bay Co. to Oliver Cromwell, *in* 4–I MBC RECORDS, *supra* note 63, at 195 (Jun. 9, 1654).

[245] Petition of the Mass. Bay Co. to Parliament (1652), *supra* note 243, at 517–18.

the company issued a corporate charter to Harvard College[246]—even though English law books declared that "incorporation cannot be created without the King."[247] In 1652, the company established a mint and began coining its own currency"[248]—even though earlier lawyers would have considered this "treason" because only the king "could make or coin Money within his dominions."[249] 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 England.[250] 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."[251]

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[246] CHARTER OF THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE (May 31, 1650) (class 1/11, no. 16, TNA). Harvard had been an unincorporated college, funded by the company, since 1636. *See* 1 MBC RECORDS, *supra* note 63, at 183 (Oct. 28, 1636). It was named after John Harvard after he died and left the college books and an estate worth "about £800." WINTHROP, *supra* note 79, at 743; 1 MBC RECORDS, *supra* note 63, at 253 (Mar. 13, 1639).

[247] Case of Sutton's Hospital (1612), 77 Eng. Rep. 960, 964–65 (Ex. Ch.).

[248] 4–I MBC RECORDS, *supra* note 63, at 261–62, 283, (May 27 and Oct. 17, 1652).

[249] The Case of Mixed Money in Ireland (1605), *in* 2 HOWELL, STATE TRIALS, *supra* note 114, at 114, 116; *see generally* CHRISTINE DESAN, MAKING MONEY 266–94 (2014).

[250] *See, e.g.*, 3 MBC RECORDS, *supra* note 63, at 263, 269–70 (May 27, 1652).

[251] 4–I MBC RECORDS, *supra* note 63, at 383–89, 419 (Oct. 18–27, 1659, and May 30, 1660). The company recognized that other people might call them "bloody persecutors" for these executions, but emphasized that it was hanging Quakers not for their religious beliefs but because their "actions tend to undermine the authority of civil government." *Id.* at 345–46, 385–86. In a rehash of earlier arguments about the company's right to keep out dangerous immigrants, the company noted that it had threatened Quakers with lesser punishments, but the Quakers kept coming back. *Id.* at 385–86; *see* 3 *id.* at 415–16 (Oct. 17, 1656); 4–I *id.* at 308–09, 320–21, 345–49 (Oct. 14, 1657; May 19 and Oct. 19, 1658).

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."[252] 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 & 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.[253]

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, Charles II issued a "free and general pardon" for prior offenses committed by individuals or "Bodyes corporate,"[254] and he assented to a law declaring that "no Charter of any Corporation" would be "[v]oided" for something the corporation did before his restoration.[255] The Massachusetts Bay Company, unsure of whether the king even knew about the 1637 *quo warranto* against it, immediately petitioned the king "to ratify & confirme" the charter

[252] GEORGE FOX, SOMETHING IN ANSWER TO A LETTER . . . OF JOHN LEVERAT, GOVERNOUR OF BOSTON (1677); GEORGE BISHOP, NEW-ENGLAND JUDGED 30–31 (London, Robert Wilson, 1661).

[253] 4–I MBC RECORDS, *supra* note 63, at 366 (May 7, 1659). 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. INCREASE MATHER, A TESTIMONY AGAINST SEVERAL PROPHANE AND SUPERSTITIOUS CUSTOMS NOW PRACTICED BY SOME IN NEW-ENGLAND 18–19 (London, 1687).

[254] An Act of Free and Generall Pardon, Indempnity, and Oblivion 1660, 12 Car. 2 c. 11, § 5; Charles II, King-in-Exile of England, Declaration of Breda (Apr. 4, 1660), *reprinted in* 11 JOURNAL OF THE HOUSE OF LORDS, 1660–1666, at 7–8 (London, His Majesty's Stationery Office, 1767–1830).

[255] An Act for the Well Governing and Regulating of Corporations 1661, 13 Car. 2 st. 2 c. 1, § 2.

granted to it by "his royall father."[256] The king responded affirmatively, asking in return only that the company stop hanging Quakers.[257]

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.[258] 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.[259] Gorges and Mason said the company violated the first clause when it sent "armed forces" to Maine and New Hampshire and "compelled them to submitt to their usurped & arbitrary Government."[260] And they said the company 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."[261]

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[256] 4–I MBC RECORDS, *supra* note 63, at 450–56 (Dec. 19, 1660).

[257] Letter from Charles II, King of England, to the Mass. Bay Co. (Jun. 28, 1662), *reprinted in* 4–II MBC RECORDS, *supra* note 63, at 164, 165; Letter from Charles II, King of England, to the Mass. Bay Co. (Sep. 9, 1661) (class 1/15, no. 85, TNA); Letter from Charles II, King of England, to the Mass. Bay Co. (Feb. 15, 1661) (class 5, no. 903, p. 18, TNA).

[258] Petition of Robert Mason et al. to Charles II, King of England (Feb. 15, 1662) (class 1/16, no. 18, TNA); Letter and Information of Edward Godfrey (Mar. 14, 1661) (class 1/15, no. 32); Petition of Edward Godfrey et al. to the Council for Foreign Plantations (1660 or 1661) (class 1/15, no. 31, TNA); Petition of Edward Godfrey & Robert Mason et al. to Parliament (1659 or 1660) (class 1/13, no. 79, TNA).

[259] Petition of Robert Mason et al., *supra* note 258, at 1.

[260] *Id.* at 2.

[261] *Id.*; *see also* Testimony of Capt. Thomas Breedon to the Council for Foreign Plantations 6 (Mar. 11, 1660) (class 1/15, no. 31, TNA).

In light of these petitions, Charles II and his privy councilors agreed that he should probably remind the company that it was, still, an "English Collonie."[262] 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."[263] 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.[264] And, in 1664, he dispatched four commissioners to New England to ensure compliance.[265] The king hoped the commissioners would "suppress & utterly extinguish" any idea that the company was "independent [from] us & our lawes" by examining its legal code, hearing "all Complaints and appeals" against the company, and resolving its boundaries.[266]

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 charter in a "safe & secret" place before the commissioners arrived.[267] In his sixties, Bradstreet had been a member of the board since 1630, and he was all too familiar with the threat of a *quo*

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[262] Council for Foreign Plantations, Report to Charles II, King of England (Apr. 1662) (class 1/15, no. 47, TNA); Letter from Charles II (Jun. 28, 1662), *supra* note 257. Privy Council of Charles II, King of England, Considerations in Order to the Establishing His Majesties Interests in New England (Apr. 1664) (class 1/18, no. 46, TNA)..

[263] Letter from Charles II, King of England, to the Mass. Bay Co., *reprinted in* 4–II MBC RECORDS, *supra* note 63, at 164, 165 (Jun. 28, 1662).

[264] *Id.* at 165–66.

[265] Charles II, King of England, Commission and Instructions to Richard Nicolls et al. (Apr. 23, 1664) (class 1/18, nos. 48–52, TNA). The commissioners were also instructed to capture New Amsterdam, which they did and renamed the City of New York.

[266] *Id.*; Letter from Charles II, King of England, to the Mass. Bay Co. (Apr. 23, 1664), *reprinted in* 4–II MBC RECORDS, *supra* note 63, at 158–60; Letter from Charles II, King of England, to the Mass. Bay Co. (Jun. 11, 1664) (class 1/18, no. 72, TNA).

[267] *See*, *supra*, note 126.

warranto.[268] That said, he and the rest of the board were already resolved "to adhere to their pattent," which they "conceive[d] (under God) to be the first and mayne foundation of our civil polity here."[269] Even before the commissioners arrived, the company rescinded a law that set the number of directors at fewer than the number prescribed in the charter, ordered that all oaths be administered in the name of the king, and allowed anyone whose estate was taxed at a "country rate" of at least ten shillings—about three percent of the population—to apply to become a shareholder.[270]

Nevertheless, Bradstreet and the commissioners didn't get along. Their interactions started off tense when the commissioners read through the company's laws and demanded that it remove all uses of the word "commonwealth" and its ban on Christmas.[271] But the tension escalated to "violen[t]" opposition when the commissioners resolved to hear a complaint against the company from a man named John Porter, who the company had recently banished.[272] Porter was a charming young man. With his parents' consent, a jury had convicted him of a number of crimes, including "threaten[ing] to burn his fathers house" and drunkenly calling his mother "G[randma] Shithouse," the "rankest sow in the town."[273] 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 our privileges granted us by his majesty's royal charter."[274] He argued

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[268] 1 *id.*, *supra* note 63, at 69 (Mar. 18, 1630).

[269] 4–II *id.*, *supra* note 63, at 25–26, 117–18 (Jun. 10, 1661, and Aug. 3, 1664).

[270] *Id.* at 32, 58–62 (Aug. 7 and Oct. 8, 1662).

[271] *Id.* at 212 (May 24, 1665).

[272] Letter from Joseph Mason to Robert Mason (Jul. 16, 1665) (class 1/19, no. 80, TNA).

[273] 4–II MBC RECORDS, *supra* note 63, at 137, 216–17 (Oct. 19, 1664; and May 30, 1665).

[274] *Id.* at 177, 195–209 (Apr. 8 and May 9–24 1665).

that the charter gave the company "full & absolute power & authority" to punish whoever a jury convicted, and that there could be no complaint against or appeal from "the highest authority here established by our constitution, according to his majesties royal charter."[275]

Bradstreet was not alone. For two decades, shareholders and board members had defined "their present constitution, granted to this colony by his majesties royal charter," as one that required judges and legislators to make decisions on the basis of some written text.[276] Now, the commissioners were proposing to hear an appeal based on nothing more than their own discretion. Accordingly, shareholders in Boston instructed their representatives to defend "our just privileges according to Pattent,"[277] and the entire company protested that, "instead of being governed by rulers of our owne choosing, (which is the fundamental privilege of our patent) and by lawes of our owne," the appeal would subject them "to the arbitrary power of strangers, proceeding not by any established law, but by their own directions."[278]

The commissioners were amazed by this "obstruction," and they warned the company "that the Charter which you so much Idolize may be forfeited."[279] But while they accused the company of acting "contrary to their allegiance, and derogatory to his majesty's

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[275] *Id.* at 196 (May 11, 1665).

[276] *Id.* at 168 (Aug. 4, 1664); *see also id.* at 209–14, 231–32, 236, 276–78 (May 24–30 and Aug. 1, 1665); Letter from Mass. Bay Co. to Sir Robert Carr (Jul. 12, 1665) (class 1/19, no. 79, TNA).

[277] Boston Records from 1660 to 1701, *in* A Report of the Record Commissioners of the City of Boston (Boston, Rockwell & Churchill, 1881), at 26 (May 4, 1665) [hereinafter Boston Records].

[278] Letter from the Mass. Bay Co. to Charles II, King of England (Oct. 25, 1664), *reprinted in* 4–II MBC RECORDS, *supra* note 63, at 129–33; Address of the Mass. Bay. Co. to Charles II, King of England (Aug. 1, 1665), *in* 4–II MBC RECORDS, *supra* note 63, at 274.

[279] Letter from Sir Robert Carr to Mass. Bay Co. (Jul. 16, 1665) (class 1/19, no. 79, TNA); Letter from Col. George Cartwright to Col. Richard Nicolls (Feb. 4, 1665) (class 1/19, no. 20, TNA); *see also* THE MASSACHUSETTS PATENT (1665), *reprinted in* 46 PROC. MASS. HIST. SOC'Y, SERIES 3, at 287, 290–97 (1913).

sovereignty," they had trouble pointing to a clause in the charter that the company was definitively violating.[280] When the king recalled the commissioners in 1666, all he could say was that it was "very evident" that the company believed the commissioners represented "an apparent violation of their Charter and tending to the dissolution of it."[281] The king requested that the company send agents 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."[282]

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.[283] Ministers called the charter "the wall of Government," a "hedge" or "Venice-glasse" that protected the "vineyard" of New England from all threats, including the king.[284] God would

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[280] Letter from Col. Richard Nicolls to Lord Arlington, Sec'y of State (Apr. 9, 1666) (class 1/20, no. 42, TNA); Report of the Commissioners in New England (Dec. 14, 1665) (class 1/19, no. 143, TNA); *see also* THE MASSACHUSETTS PATENT (1665), *reprinted in* 46 PROC. MASS. HIST. SOC'Y, SERIES 3, at 287, 290–97 (1913).

[281] Letter from Charles II, King of England, to the Colonies of New England 1 (Apr. 10, 1666) (class 1/20, no. 44, TNA).

[282] *Id.* at 2.

[283] *Genesis* 12–17 (King James); *see, e.g.*, JAMES ALLEN, NEW-ENGLANDS CHOICEST BLESSING 7 (Boston, John Foster, 1679); SAMUEL WILLARD, A SERMON UPON THE DEATH OF JOHN LEVERETT 3 (BOSTON, 1679); JOHN DAVENPORT, A SERMON PREACH'D AT THE ELECTION . . . 1669, at 15–16 (Boston, 1670); WILLIAM STOUGHTON, NEW-ENGLANDS TRUE INTEREST NOT TO LIE 33–34 (Cambridge, Mass., S.G. & M.J., 1670).

[284] INCREASE MATHER, A SERMON . . . PREACHED AT A PUBLIC FAST 18–19 (Boston, Samuel Sewall, 1682); Letter from Samuel Nadhorth to William Morice, Sec'y of State (Oct. 26, 1666) (class 1/20, no. 155, TNA); 4–II MBC RECORDS, *supra* note 63, at 196 (May 11, 1665).

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 we are incorporated into a body politique."[285] 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."[286] Shareholders responded complementarily, instructing their representatives to "assume noe arbitrarie power" but "have respect to the Charter or Patent & . . . make noe lawe or order repugnant thereto."[287]

Back in England, however, Gorges and Mason remained unsatisfied. 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.[288] For eight years, Gorges 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*.[289] It took until

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[285] Elders' Advice to the General Court (May 1672), *reprinted in* 2 HUTCHINSON PAPERS, *supra* note 4, at 166–67.

[286] JOHN OXENBRIDGE, NEW-ENGLAND FREEMEN WARNED AND WARMED . . . 28–29 (Boston, 1673); SAMUEL TORREY, AN EXHORTATION UNTO REFORMATION 23 (Cambridge, Mass., Marmaduke Johnson, 1674).

[287] BOSTON RECORDS, *supra* note 277, at 110, 113 (May 14, 1677; and May 26, 1679).

[288] Petition of Ferdinando Gorges to Charles II, King of England (Jan. 13, 1675) (class 1/34, no. 3, TNA); Petition of Robert Gorges (Jan. 13, 1675) (class 1/34, no. 2, TNA); Petition of Ferdinando Gorges (Dec. 25, 1674) (class 1/31, no. 93, TNA); Petition of Robert Mason and Ferdinando Gorges to Charles II, King of England (Mar. 20, 1674) (class 1/31, no. 22, TNA); Petition of Ferdinando Gorges to Charles II, King of England (Jan. 26, 1670) (class 1/25, no. 5, TNA); Petition of Robert Mason to Charles II, King of England (Jul. 24, 1671) (class 1/27, no. 12, TNA).

[289] 1 JOURNAL OF THE LORDS OF TRADE 70 (Feb. 4, 1676) (class 391, TNA); Lords of Trade, Robert Mason's Title to New Hampshire (Mar. 1676) (class 1/34, nos. 46–47, TNA); New England Affairs

1676 for Mason 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."[290]

The king decided to send someone to deliver to Boston a copy of Gorges 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.[291] As will soon become clear, this selection had a profound effect on the rest of this story, because Randolph did not like the company even a little bit. Randolph was an Oxford-educated lawyer and a former civil servant for the navy whose diplomacy skills were as empty as his wallet. He got this job, which paid reasonably well, after recently fleeing from his "home & a wife very big with child" to escape creditors "whom [his] delayes . . . [had] made deaffe to all entreaties of forbearance."[292]

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 general

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Before the Council of Plantations (Apr. 27, 1671, to May 10, 1672) (class 1/26, nos. 55–56, TNA). Beginning soon after the restoration in 1660, the committee of privy councilors responsible for New England underwent a series of reorganizations until 1675, when King Charles II commissioned the Committee for Matters Relating to Trade and Foreign Plantations, commonly known as the Lords of Trade. *See generally* CHARLES M. ANDREWS, BRITISH COMMITTEES, COMMISSIONS, AND COUNCILS OF TRADE AND PLANTATIONS, 1622–1675, at 93–112 (1908).

[290] 1 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 92–93 (Mar. 20, 1676).

[291] Letter from Charles II, King of England, to Edward Randolph (Mar. 20, 1676) (class 5, no. 903, pp. 100–05). Randolph was married to Jane Gibbon, whose brother Richard married Ann Tufton, who was Robert Mason's sister and Captain John Mason's grandchild. *See* 1 EDWARD RANDOLPH, INCLUDING HIS LETTERS AND OFFICIAL PAPERS 1–6 (Robert Noxon Toppan ed., Boston, Prince Society, 1898) [hereinafter RANDOLPH PAPERS]; Will of Captain John Mason, *supra* note 109, at 398–99.

[292] Letter from Edward Randolph to the Commissioners of the Navy (Feb. 12, 1666), *reprinted in* 2 RANDOLPH PAPERS, *supra* note 290, at 188.

meeting in September.[293] Randolph concluded that the company was merely applying "their usual methods of discountenancing all affairs that come to them from the King."[294]

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 merchant from shipping goods to English colonies or foreign countries without first going through England.[295] When Randolph asked the company chairman about the Navigation Acts, the chairman responded point blank that "their charter" immunized them from any act of Parliament that "retrench[ed] their liberties."[296] This answer stunned Randolph. He immediately reported that "3 frigates of 40 Guns, with 3 Ketches well manned, lying a League or two below Boston with his Majesty's express orders to seize all Shipping and perform other Acts of hostility against these revolters" would do "more in one Week's time than all the orders of king and Council to them in Seven years."[297]

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 terms" of their charter gave the company jurisdiction over New Hampshire and Maine.[298] After a brief hearing, the king's privy councilors rejected the agents' reading of

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[293] Letter from John Leverett, Gov. of the Mass. Bay Co., to Charles II, King of England (Jun. 13, 1676) (class 1/37 no. 3, TNA).

[294] Letter from Edward Randolph to Henry Coventry, Sec'y of State (Jun. 17, 1676) (class 1/37, no. 7, TNA).

[295] *Id.* at 2; *see* Act for the Encouragement of Trade 1663, 15 Car. 2 c. 7; Act for the Encourageing and Increasing of Shipping and Navigation 1660, 12 Car. 2 c. 18.

[296] Letter from Edward Randolph, *supra* note 294, at 2.

[297] *Id.*

[298] 4–II MBC RECORDS, *supra* note 63, at 99–100, 106–08 (Aug. 9 and Sep. 6, 1676); *see* Petition of the Mass. Bay Co. to Charles II, King of England (Dec. 13, 1676) (class 1/38, no. 93, TNA).

the charter as based on "imaginary lines."[299] They ultimately confirmed Mason's title to New Hampshire and Gorges's title to Maine.[300]

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.[301] And Gorges sold Maine back to the Massachusetts Bay Company for £1,250.[302] (To put that in perspective, John Harvard left the college that bears his name a gift worth "about £800."[303]) 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[304]—preferably someone who had recently been there and could use the £175 salary plus commissions.[305]

The king acceded, and for three-quarters of the time between December 1679 and March 1683, Randolph lived in Boston as Collector of His Majesty's Customs in New

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[299] Report of the Lords Chief Justices (Jul. 17, 1677) (class 1/41, no. 22, TNA); 2 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 89–90, 101–04 (Jul. 19 and Aug. 2, 1677); *see* Order in Council of Charles II, King of England 221 (Jul. 20, 1677) (class 5, no. 903, TNA); Order in Council of Charles II, King of England (Feb. 7, 1677) (class 1/39, no. 27, TNA).

[300] Report of Sir William Jones, Att'y Gen., and Sir Francis Winnington, Solicitor Gen., to the Lords of Trade (May 17, 1674) (class 1/34, nos. 77–78, TNA); Report of Sir William Jones, Att'y Gen., and Sir Francis Winnington, Solicitor Gen., to the Lords of Trade (May 14, 1674) (class 1/34, no. 76, TNA).

[301] Order in Council of Charles II, King of England (Jul. 5, 1679) (class 5, no. 903, pp. 360–66, TNA); *see* 5 MBC RECORDS, *supra* note 63, at 263 (Feb. 4, 1680).

[302] Deed from Ferdinando Gorges to John Usher (Mar. 13, 1678) and Deed from John Usher to the Mass. Bay Co. (Mar. 15, 1678), *reprinted in* 7 DOCUMENTARY HISTORY OF THE STATE OF MAINE, *supra* note 119, at 343–356.

[303] WINTHROP, *supra* note 79, at 743.

[304] Report of Edward Randolph on the Massachusetts Government (Apr. 18, 1678) (class 1/42, no. 58, TNA).

[305] Edward Randolph, The Humble Representation of Edward Randolph (May 6, 1677) (class 1/40, no. 67, TNA); *see* Order in Council on a Report from the Lords of Trade about a Reward for Edward Randolph (Jun. 19, 1679) (class 5, no. 903, p. 357).

England.[306] He made enemies with virtually everyone he met. Randolph reported that biased harbormasters refused to arrest ships that he suspected were violating the Navigation Acts.[307] Biased judges made Randolph "repay the charges of the court" every time he tried to prosecute a suspected violator.[308] Biased juries acquitted the people he prosecuted.[309] And biased legislators erected a naval office of their own to conduct their own prosecutions and collect fines due to the king.[310] After a few months of what was supposed to be a goldmine, Randolph reported that he was broke.[311]

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 "sought the ruin of the Colony by incensing his Majesty and their Honours against it."[312]

Bradstreet's letter spoke to Randolph's barely concealed secondary agenda in New England, which was to collect evidence that the king's attorney general might be able to use

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[306] 2 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 256–58 (May 16, 1678); Instructions to Randolph from Commissioners for Manageing, Leavying, and Causeing to be Collected His Majesties Customes, Subsidies, and Other Duties in England (Jul. 9, 1678), *reprinted in* 3 RANDOLPH PAPERS, *supra* note 291, at 19.

[307] Letter from Edward Randolph to the Commissioners of Customs (Jun. 7, 1680) (class 1/45, no. 4, TNA).

[308] Protest of Edward Randolph Against the Proceedings of the Mass. Bay Co. (Apr. 3, 1682) (class 1/48, no. 52, TNA); Letter from Edward Randolph to the Commissioners of Customs (Oct. 1, 1680) (class 1/46, no. 15, TNA).

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[310] *See* Articles of Prosecution Exhibited by Edward Randolph (May 28, 1682) (class 1/48, no. 83, TNA).

[311] Letter from Edward Randolph to the Commissioners of Customs (Jun. 9, 1680) (class 1/45, no. 10, TNA).

[312] Letter from Simon Bradstreet, Gov. of the Mass. Bay Co., to the Lords of Trade (May 18, 1680) (class 1/44, no. 61, TNA).

in a *quo warranto* against the company.[313] There wasn't much—the company repealed its ban on Christmas and most of the other laws objected to by the 1664 commissioners[314]—but Randolph resurrected complaints that had been made against the company since 1629. He alleged that the company illegally taxed non-shareholders "like slaves in Algiers." It illegally coined money while "humbly [begging] his majesty's pardon." It illegally denied appeals to England. It illegally interfered with his attempts to enforce the Navigation Acts. And it illegally "assume[d] other Powers not warranted by their Charter."[315]

Randolph also claimed that nothing short of a *quo warranto* could "save my life and reform this Government."[316] 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."[317]

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[313] Letter from Sir William Jones, Att'y Gen., and Sir Francis Winnington, Solicitor Gen., to the Lords of Trade (May 16, 1678) (class 5, no. 903, pp. 265–266, TNA).

[314] 2 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 313–14 (Feb. 24, 1679); 5 MBC RECORDS, *supra* note 63, at 339 (Mar. 17, 1682).

[315] Edward Randolph, Articles of High Crimes and Misdemeanors Exhibited Against the Governor and Company of the Massachusetts Bay in New England (Jun. 12, 1683) (class 1/52, no. 14, TNA); Edward Randolph, Articles of High Crimes and Misdemeanors Exhibited Against the Governor and Company of the Massachusetts Bay in New England (Apr. 6, 1681 (class 1/46, no. 124, TNA); 5 MBC RECORDS, *supra* note 63, at 347 (Feb. 15, 1682); Abstract of Letters from Edward Randolph to the Lords of Trade (Feb. 25, 1680) (class 1/44, no. 31, TNA).

[316] Letter from Edward Randolph to Sir Leoline Jenkins, Sec'y of State (Apr. 11, 1682) (class 1/48, no. 58, TNA).

[317] Letter from Edward Randolph to Sir Leoline Jenkins, Sec'y of State (Jun. 14, 1682) (class 1/48, no. 104, TNA); Letter from Edward Randolph to Sir Leoline Jenkins, Sec'y of State (May 29, 1682) (class 1/48, no. 84, TNA); Letter from Edward Randolph to the Commissioners of Customs (Jun. 4, 1680) (class 1/45, no. 4, TNA).

The king eventually agreed to pursue this *quo warranto* in 1681, authorizing his attorney general, a "dull hot man" named Sir Robert Sawyer,[318] to begin the paperwork.[319] 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 with a nearly identical structure—only its chairman was called the "mayor" and its shareholders, "citizens."[320] Indeed, most cities and universities in England were corporations.[321] At the time, one of the privileges that charters often gave corporations was to elect members of Parliament. And in the 1660s, when 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.[322]

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 decided to defend itself. One witness called the resulting case "the greatest concern to the nation ever contested in any court of Westminster Hall."[323] The city's lawyers, "some of the

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[318] 1 BURNET, *supra* note 322, at 532.

[319] Order in Council of Charles II, King of England (Oct. 21, 1681) (class 1/47, no. 77, TNA); 3 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 266–67 (Jun. 21, 1681).

[320] *See* Charter of the Mayor and Citizens of the City of London (Oct. 18, 1638), *reprinted in* The Historical Charters and Constitutional Documents of the City of London 159 (Walter de Gray Birch ed., London, Whiting & Co., 1884).

[321] *See*, *supra*, sources cited in note 171.

[322] ROGER NORTH, EXAMEN 624–45 (London, Fletcher Gyles, 1740) (defending the practice); *see* 1 GILBERT BURNET, BISHOP BURNET'S HISTORY OF HIS OWN TIME 527–35 (London, Thomas Ward, 1724) (criticizing the practice); Act for the Well Governing and Regulating of Corporations 1661, 13 Car. 2 st. 2 c. 1 (authorizing the practice). *See generally* LEVIN, *supra* note 8, at 13–14.

[323] 8 HOWELL, STATE TRIALS, *supra* note 114, at 1357–58; *see* Proceedings Between the King and the City of London on an Information in the Nature of a Quo Warranto (*The City of London Case*) (1681–

greatest men that ever appeared at the bar,"[324] each gave oral arguments for about "three hours apiece."[325] 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.[326]

This argument was so undeniably attractive that it looked like the Court of the King's Bench might side with the city. 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.[327] The new judges were very receptive when Attorney General Sawyer responded with a five-hour-long argument of his own that clearly had the Massachusetts Bay Company in mind.[328] 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 independent commonwealth within a kingdom, and unaccountable

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83), *in* 8 HOWELL, STATE TRIALS, *supra* note 114, at 1039. The king also accused the corporation of libel for issuing a petition that protested the king's frequent "prorogations," or postponements of meetings of Parliament. *Id.* at 1062–70, 1327–29. Both of these complaints were pretextual because what the king really opposed was sheriff-appointed juries in London that routinely acquitted his political opponents—particularly Anthony Ashley-Cooper, Earl of Shaftesbury, who led a fight to prohibit the king's Catholic brother from ever inheriting the throne. *See* Proceedings at the Old Bailey, upon a Bill of Indictment for High Treason against Anthony Earl of Shaftesbury (1681), *in* 8 HOWELL, STATE TRIALS, *supra* note 114, at 759, 821; Queries to Prevent the Great Mischiefs from the Misuse of the Privileges that the Mayor and Corporation of London Pretend To (Nov. 1681), *paraphrased in* CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1680–1681, at 682–83 (F.H. Blackburne Daniell ed., 1921); A Bill to Disable the Duke of Yorke to Inherit the Imperial Crown of this Realm, *in* 7 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 204, at 622, 650, 712 (May 15, 1679; Nov. 11, 1680; and Mar. 28, 1681).

[324] 10 HOWELL, STATE TRIALS, *supra* note 114, at 373.

[325] 1 BURNET, *supra* note 322, at 533.

[326] *See The City of London Case*, *supra* note 323, at 1101–17 (argument of Sir George Treby); *id.* at 1240–41 (argument of Henry Pollexfen); 1 BURNET, *supra* note 322, at 530–35.

[327] 8 HOWELL, STATE TRIALS, *supra* note 114, at 1086 n.*; 1 BURNET, *supra* note 322, at 535.

[328] Letter from Francis Gwyn to the Earl of Conway (May 1, 1683), *paraphrased in* CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, JANUARY–JUNE 1683, at 222 (F.H. Blackburne Daniell ed., 1933).

to the king."[329] 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 are supposed to be "subordinate governments," he added, mere "inferior jurisdictions" delegated from the crown.[330] If the king had the authority to fire one of his officers for insubordination, surely he had at least the same authority to dissolve a group of officers who considered "themselves independent o[f] the Crown and in defiance to it."[331]

Observers called the attorney general's performance "beyond the expectation of all mankind,"[332] and the king was "very well pleased."[333] The court's unanimous opinion, issued a month later, agreed with the attorney general that *quo warrantos* were necessary to prevent "so many independent commonwealths as there are now corporations in England."[334]

The day the opinion came down, on June 12, 1683, the king ordered Sawyer to file a *quo warranto* against the self-described commonwealth in New England.[335] He also sent Edward Randolph to serve the *quo warranto* on the Massachusetts Bay Company along with two-hundred copies of the London decision.[336] But if the king hoped Randolph could

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[329] *The City of London Case*, *supra* note 323, at 1155–58 (argument of Attorney General Robert Sawyer).

[330] *Id.* at 1178.

[331] Letter from Francis Gwyn, *supra* note 328, at 222.

[332] *Id.*

[333] Letter from the Earl of Sunderland to Lionel Jenkins, Sec'y of State (May 2, 1683), *paraphrased in* CALENDAR OF STATE PAPERS, *supra* note 328, at 227–28.

[334] R v. Mayor & Commonalty of the City of London (1683) 89 Eng. Rep. 930, 938 (KB).

[335] Order in Council of Charles II, King of England (Jun. 12, 1683) (class 5, no. 904, p. 178); *see* Writ of Quo Warranto Against the Charter of the Massachusetts Bay Company (Jun. 27, 1683) (class 5, no. 904, p. 179).

[336] Orders in Council of Charles II, King of England (Jul. 20, 1683) (class 5, no. 904, pp. 185–86).

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, 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."[337] 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.[338] The charter was as much a covenant with God as Mosaic law, Mather explained. So long as "we still keep ourselves in the Hands of GOD[,] we trust ourselves with his Providence."[339]

After weeks of contentious shareholder meetings about the charter in which Mather and other ministers "excited them to arms to defend it," the company voted to "spinn out the case to the uttermost."[340] It hired a lawyer "to prevent a judgment against us" and petitioned the king to keep "the security of the charter granted by your royal father."[341]

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

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[337] Arguments Against Relinquishing the Charter (1683), *reprinted in* 1 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES 74, 76–79 (Boston, Freeman & Bolles, 1825).

[338] INCREASE MATHER, THE AUTOBIOGRAPHY OF INCREASE MATHER (Michael G. Hall ed.), *in* 71 AM. ANTIQUARIAN SOC'Y 271, 308 (1961); *see* 1 Kings 21; Lev. 25:23 (King James).

[339] *Id.*; *see* BOSTON RECORDS, *supra* note 277, at 164 (Jan. 21, 1684).

[340] Letter from Edward Cranfield, Gov. of N.H., to Lords of Trade (May 14, 1684) (class 5, no. 940, p. 111); 5 MBC RECORDS, *supra* note 63, at 421–40 (Nov. 7, 1683, to May 17, 1684); *see* Edward Randolph, A Short Narrative Touching the Delivery of the Writt of Quo Warranto (Feb. 29, 1684) (class 1/54, no. 43 I, TNA); Letter from Simon Bradstreet, Gov. of the Mass. Bay Co., to Sir Leoline Jenkins, Sec'y of State (Dec. 7, 1683) (class 1/53, no. 85, TNA).

[341] 5 MBC RECORDS, *supra* note 63, at 440 (May 17, 1684).

it expired.[342] 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.[343] Instead, the writ put the onus on the company to show up and "make known" why its charter shouldn't be vacated.[344]

This wouldn't have been a big deal if the company were still in England, but it was devastating to a company three thousand 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."[345] When that day arrived four months later, the Court of Chancery vacated the charter with no company in sight.[346] Meanwhile, in Boston, the board of directors wrote back to England "ama[z]ed" by rumors of what was happening.[347] "Wee are . . . a litle surprised to understand the procedure against us," they wrote.[348]

When the company heard in early 1685 that its charter had been vacated before it could defend itself, life nevertheless went on much as it had after the first *quo warranto* in 1637.[349] In August, a victorious Edward Randolph complained that "[m]ore than 9 months

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[342] Memorandum of Robert Sawyer, Att'y Gen. (May 3, 1684) (class 1/54, no. 86, TNA).

[343] Letter from Robert Sawyer, Att'y Gen., to Owen Wynne (May 13, 1684) (class 1/54, no. 95, TNA).

[344] *See* SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 88 (London, M. Flesher, 1644); COWELL, *supra* note 139, at 469.

[345] Rule in Chancery for Judgment Against the Charter of Massachusetts (Jun. 18, 1684) (class 1/54, no. 131, TNA).

[346] Rule in Chancery Confirming the Judgment Against the Charter of Massachusetts (Oct. 23, 1684) (class 1/55, no. 55, TNA).

[347] 5 MBC RECORDS, *supra* note 63, at 449 (Sep. 10, 1684)

[348] *Id.* at 457–58 (Sep. 15, 1684).

[349] *See* 5 MBC RECORDS, *supra* note 63, at 468 (Jan. 31, 1685).

are passed since Judgment was entered up for his late Majesty against the charter of Boston, . . . yet to this day, some disaffected persons, under colour of their vacated charter, pretend to exercise a Government there."[350] 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."[351]

At the same time, it was clear to everyone in New England that the government in Boston had begun "palpably to dye."[352] The company's death even became the legal basis for a criminal prosecution. In 1686, soon after the company passed a new law on wills, a shareholder found his inheritance challenged under the new law.[353] Fuming, he declared in court that there was "no Governour and Company of this Place [since] the Dissolution of the Charter of this Colony," and he was "not willing to Submit to laws made since that day."[354] After a long debate about whether the shareholder was correct, the board of directors voted to charge him with criminal contempt, scheduling a trial for May 14, 1686.[355]

Fortunately for the shareholder, on the morning of the scheduled trial, Edward Randolph arrived in Boston Harbor on a frigate—ten years after Randolph had asked for

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[350] Letter from Edward Randolph to the Lords of Trade (Aug. 18, 1685) (class 1/58, no. 33, TNA).

[351] SAMUEL SEWALL, DIARY OF SAMUEL SEWALL, *reprinted in* 5 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, FIFTH SERIES 1, 82 (Boston, Mass. Hist. Soc'y, 1878) (Jun. 20, 1685); *see* 5 MBC RECORDS, *supra* note 63, at 475–77, 513–14 (May. 27, 1685; May 12, 1686).

[352] SEWALL, *supra* note 351, at 110 (Dec. 4, 1685).

[353] 5 MBC RECORDS, *supra* note 63, at 508 (Feb. 19, 1686).

[354] 1 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 297–98 (1901) (Apr. 1, 1686); *see* SEWALL, *supra* note 351, at 128–31 (Mar. 23 to Apr. 1, 1686).

[355] SEWALL, *supra* note 351, at 137 (May 14, 1686).

three such frigates to crush "these revolters."[356] 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.[357] Members of the new government addressed Simon Bradstreet and the outgoing directors "not as a Governor and Company, but [as] some of the principal gentlemen and chief of the inhabitants of the several towns of the Massachusetts."[358] In other words, the company was no more.

In one of its final actions, members of the company's board responded the same way they had in 1664, the last time unchartered commissioners tried to govern them. They called the new government "arbitrary."[359] And, in a letter to members of Randolph's new government, they wrote that with no charter, there could be "no certain determinate rule for your administration of justice."[360]

IV

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

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[356] *See* LONDON GAZETTE, Jul. 29, 1686, at 2.

[357] *Id.*; James II, King of England, Exemplification of the Judgment for Vacating the Charter of the Massachusetts Bay in New England (Oct. 13, 1685), *reprinted in* 2 Collections of the Massachusetts Historical Society, Fourth Series 246 (Boston, Crosby, Nichols & Co., 1854); Commission of the Territory and Dominion of New England (Oct. 8, 1685), *reprinted in* 2 MASSACHUSETTS ROYAL COMMISSIONS 37 (Albert Matthews ed., 1913).

[358] 5 MBC RECORDS, *supra* note 63, at 508 (May 17, 1686).

[359] *Id.* at 515–17 (May 20, 1686).

[360] *Id.*

"agreeable to our Charter Constitution."[361] 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."[362] Although these two revolutions looked pretty similar, the two constitutions that guided them could not have been more different. In England, the "constitution" was an intangible idea tied to unwritten tradition, while in New England, the "Constitution" was identified with a single, written document.

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The person who was best prepared to link constitutional developments in old England and new was a man named Increase Mather, the minister mentioned at the end of the previous section. 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.[363] 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.[364] When he returned home to Massachusetts, his recently remarried father introduced him to a new stepsister, Maria, whose late father had

[361] The Humble Address, and Petition of the Governour, and Council, and Convention of Representatives of the People of Your Majesties Colony of the Massachusets in New England (Jun. 6, 1689) (class 5, no. 905, pp. 114–17, TNA).

[362] Declaration of William III, Prince of Orange (Sep. 30, 1688), *reprinted in* 5 THE PARLIAMENTARY HISTORY OF ENGLAND 1–5 (William Cobbett ed., London, T.C. Hansard, 1809).

[363] MATHER, *supra* note 338, at 277–80.

[364] *Id.* at 281–86.

been Boston's most eminent minister, John Cotton.[365] Increase ended up marrying Maria and naming their first child Cotton after his famous father-in-law.[366]

Increase Mather returned to New England in 1661, just as Charles II returned to the throne and began investigating whether the Massachusetts Bay Company was adhering to its charter. In sermons, Mather described these investigations as evidence of God's "Controversy with his New-England People," blaming them on a new generation of churchgoing shareholders who were insufficiently attentive to the "Ecclesiastical and civil Constitution" they inherited from their parents.[367] He joined other ministers in calling the "Charter" analogous to the "Covenant of God," both of which were "mainly made up of precepts and promises" that were enforced by the penalty of "forfeiture."[368] 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.[369]

Mather considered Edward Randolph "a mortal enemy to our country," someone whose name "will stink in New England to the worlds end."[370] In letters to friends in the

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[365] *Id.* at 286.

[366] *Id.*

[367] INCREASE MATHER, THE NECESSITY OF REFORMATION WITH THE EXPEDIENTS SUBSERVIENT THEREUNTO 1 (Boston, John Foster, 1679); INCREASE MATHER, A CALL FROM HEAVEN TO THE PRESENT AND SUCCEEDING GENERATIONS 56 (Boston, 1679) [hereinafter MATHER, CALL FROM HEAVEN]; *see* Letter from Thomas Cobbet to Increase Mather (Nov. 12, 1678), *in* 8 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, SERIES FOUR 289 (Boston, Wiggin & Lunt, 1868) [hereinafter MHS COLLECTIONS].

[368] Increase Mather, *Introduction*, in SAMUEL WILLARD, COVENANT-KEEPING THE WAY TO BLESSEDNESS 8–9 (Boston, James Glen, 1682).

[369] MATHER, CALL FROM HEAVEN, *supra* note 367, at 75; SAMUEL WILLARD, THE ONLY SURE WAY TO PREVENT THREATENED CALAMITY, IN THE CHILD'S PORTION 191–96 (Boston, Samuel Green, 1684).

[370] MATHER, *supra* note 338, at 322; Letters from Increase Mather to Thomas Gouge and Friends in Amsterdam (Nov. 21 and Dec. 3, 1683) (class 1/65, nos. 73 I–V, TNA).

early 1680s, Mather wrote that Randolph was pursuing the *quo warranto* as mere "pretext" for his real goal of replacing New England's Puritans in favor of adherents to the Church of England.[371] 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.[372] And in 1684, Mather offered a number of scriptural objections to surrendering the charter,[373] earning a reputation among the king's privy councilors as a treasonous "star-gazer: that halfe distracted man."[374]

After 1686, Mather became one of many New Englanders who criticized the "arbitrary" nature of the commission Randolph brought with him.[375] The short document, signed by the new King James II after his brother Charles II died in 1685, offered little textual guidance for the government it established. It appointed a "President & Councell" to temporarily oversee a "Territory & Dominion of New England," which consisted of the now-former colonies of Massachusetts, New Hampshire, Maine, and New Plymouth.[376] It named Randolph, Robert Mason, and a dozen other people to the council.[377] And it gave a majority of the council authority to act as a court, "levy & distribute" taxes, protect the "liberty of Conscience," and "countenanc[e] and encourag[e]" the Church of England.[378]

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[371] *See generally* Letters from Increase Mather, *supra* note 370.

[372] INCREASE MATHER, A BRIEF DISCOURSE CONCERNING THE UNLAWFULNESS OF THE COMMON PRAYER WORSHIP 13–14 (Cambridge, New Eng., 1686).

[373] *See*, *supra*, note 338–341 and accompanying text.

[374] Letter from Edward Randolph to Simon Bradstreet (Sep. 4, 1684), *reprinted in* 8 MHS COLLECTIONS, *supra* note 367, at 527–30.

[375] 5 MBC RECORDS, *supra* note 63, at 515–17 (May 20, 1686).

[376] COMMISSION OF THE TERRITORY AND DOMINION OF NEW ENGLAND, *supra* note 357, at 37–38.

[377] *Id.*

[378] *Id.* at 38–40.

Mather had little to complain about during the first eight months of this new government, which didn't do very much. Ironically—given Randolph and Mason's participation—the government mainly petitioned the crown for authority to continue the mint, tax rates, and other laws that the Massachusetts Bay Company had once passed, explaining that "our Trade for want of money is much perplexed and decayed."[379] It also ordered the former secretary of the company to deliver its old records.[380] Even then, the secretary simply refused, insisting that he had taken an oath to the company to maintain its records and he could not "satisfy his conscience that he ought to resign them."[381]

But the complaints began rolling in after a man named Edmund Andros arrived in December 1686 with a new commission that named him "Generall and Governor in Chiefe" of a far more powerful council.[382] Randolph 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.[383] 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 their land and began

[379] Letter from the President and Council of New England to the Lords of Trade (Jun. 3, 1686) (class 1/60, no. 80, TNA); *see* RECORDS OF THE TERRITORY AND DOMINION OF NEW ENGLAND UNDER DUDLEY [hereinafter 1 DNE RECORDS], *reprinted in* 13 PROC. MASS. HIST. SOC'Y 222, 241–45 (1899) (Jun. 2, 1686). The privy council denied the request for the mint. 6 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 19–27 (Oct. 23, 1686).

[380] 1 DNE RECORDS, *supra* note 379, at 250, 271, 273 (Jun. 13, Sep. 24, and Dec. 8, 1686); *see also* RECORDS OF THE TERRITORY AND DOMINION OF NEW ENGLAND UNDER ANDROS [hereinafter 2 DNE RECORDS], *reprinted in* 13 AM. ANTIQUARIAN SOC'Y, NEW SERIES 237, 249–50, 487 (1901) (Feb. 4, 1687; and Feb. 3 and Mar. 6, 1688).

[381] Letter from Benjamin Bullivant to Edward Randolph (Sep. 11, 1686) (class 1/60, no. 48, TNA).

[382] 2 DNE RECORDS, *supra* note 380, at 240 (Dec. 20, 1686).

[383] COMMISSION OF THE TERRITORY AND DOMINION OF NEW ENGLAND, *supra* note 380, at 44, 46–47. The government had to send certain laws for the privy council in England to approve or reject.

making landowners pay for the government to confirm their titles.[384] Second, the government levied a new tax on landowners without first calling for an elected assembly.[385] Third, the government required a Puritan church building to open its doors part time "for the service of the Church of England, without obstructing them in their own use of it."[386]

These three issues enraged Puritan ministers and former members of the company's board of directors. Mather interpreted the land-confirmation issue as a declaration "that the King's subjects in N.E. have no property belonging to them, but that all is gone with their charter."[387] A group of landowners interpreted the tax issue as a violation of Magna Charta's promise of no taxation without the consent of landowners,[388] refusing to appoint a tax collector until Andros's government criminally prosecuted their leaders and held them on £1,000 bonds.[389] And ministers interpreted the church issue as a gross violation of the "liberty of Conscience" that the government was commissioned to protect.

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[384] *See, e.g.*, 2 DNE RECORDS, *supra* note 380, at 468, 471, 487 (Jun. 22, Jul. 20, and Dec. 19, 1687; and Feb. 3, 1688); Julius Herbert Tuttle, *Land Warrants Issued Under Andros, 1687–1688*, *in* 21 PUBS. COLONIAL SOC'Y MASS. 292 (1920). This assumption made sense. Under English law at the time, when a corporation ceased to exist, all the unsold land the corporation still possessed at the time of its dissolution "escheated," or reverted back to the ownership of the crown. *See The City of London Case*, *supra* note 323, at 1162 (argument of Attorney General Robert Sawyer). Absent reliable records, it was therefore impossible to know which "Large tracts of Land" [members of the company had] bestowed upon each other" and which tracts now belonged to the king. Letter from Edward Randolph to Robert Spencer, Earl of Sunderland (Mar. 25, 1687) (class 1/62, no. 14, TNA); Letter from Edward Randolph to Lords of Trade (Aug. 23, 1686) (class 1/60, no. 32, TNA). *See generally* SAMUEL SEWALL, LETTER-BOOK OF SAMUEL SEWALL, *reprinted in* 1 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, SIXTH SERIES, 1, 68–73 (Boston, Mass. Hist. Soc'y, 1886).

[385] 2 DNE RECORDS, *supra* note 380,, at 256 (Mar. 1, 1687).

[386] SEWALL, *supra* note 351, at 159–62 (Dec. 20–21, 1686); Letter from Edward Randolph to the Lords of Trade (Mar. 25, 1687) (class 5, no. 904, pp. 342–43).

[387] Increase Mather, Memorial of Grievances (Jun. 1, 1688), *reprinted in* 8 MHS COLLECTIONS, *supra* note 367, at 114–15.

[388] Affidavit of John Wise et al. (1687), *reprinted in* EDWARD RAWSON & SAMUEL SEWALL, THE REVOLUTION IN NEW ENGLAND JUSTIFIED 9–10 (Boston, Joseph Brunning, 1691).

[389] 2 DNE RECORDS, *supra* note 380, at 481–82 (Oct. 19, 1687); *see also id.* at 477–82, 485–87 (Sep. 21–Oct. 19 and Nov. 19–30, 1687).

In light of this last complaint, Mather was relieved to hear it when King James II issued a "Gracious Declaration to All His Loving Subjects for Liberty of Conscience."[390] This was a controversial declaration for the Catholic king to make in Protestant England—in part because it purported to suspend an act 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 good will with the king.[391] The following spring, Mather even traveled to England with the ostensible goal of thanking the king in person.[392] Mather's real goal was to badmouth 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."[393]

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,[394] post–civil war debates about whether the king could, say, suspend an act of Parliament rhetorically centered on whether the action was compatible with the "Constitution of *England*."[395] The main difference between the 1640s and the 1680s was a metaphorical shift, illustrated by the frontispiece to Thomas Hobbes's 1651 *Leviathan*. The picture at the front of that book represented

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[390] James II, King of England, His Majesties Gracious Declaration to All His Loving Subjects for Liberty of Conscience (Apr. 4, 1687), *reprinted in* London Gazette, Apr. 7, 1687, at 1–2.

[391] MATHER, *supra* note 338, at 320; *see* LONDON GAZETTE, Dec. 5, 1687, at 2.

[392] MATHER, *supra* note 338, at 320–23. In his diary, Mather wrote that Edward Randolph tried to prevent him from leaving by arresting him for writing allegedly defamatory letters about Randolph. *Id.*; *see* Letters from Increase Mather, *supra* note 370.

[393] COTTON MATHER, PARENTATOR 109–110 (Boston, B. Green, 1724).

[394] *See*, *supra*, notes 111–118 and accompanying text.

[395] NORTH, *supra* note 322, at 332.

England as an enormous king whose body, or physical constitution, was made up of hundreds of tiny people.[396] Later works, such as Henry Care's 1680 *English Liberties*, similarly described England as a "Politick Body" whose metaphorical "Constitution" kept it "knit and preserv'd together, as the Natural Body [is] by the Bones and Sinews."[397]

For a "Whig" like Care, who opposed many of Charles II and 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[398]; unwritten traditions such as when Parliament asserted its power to veto crown appointments in 1641[399]; and agreements such as *Magna Charta* in 1215 or the Petition of Right in 1628, which required Parliament's consent before levying new taxes.[400] By contrast, for a "Tory" like Roger North, "the true Constitution of *England*, is the Monarchy as established by Law."[401] 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

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[396] HOBBES, *supra* note 129, at *tit.*

[397] HENRY CARE, ENGLISH LIBERTIES 1–2, 4, 19–20 (London, G. Larkin, 1680).

[398] *See* An Act for the Better Secureing the Liberty of the Subject and for Prevention of Imprisonments Beyond the Seas 1679, 31 Car. 2 c. 2.

[399] *See* A Remonstrance of the State of the Kingdom (Dec. 1, 1641), *in* 4 HISTORICAL COLLECTIONS OF PRIVATE PASSAGES OF STATE, *supra* note 58, at 436–71.

[400] *See* The Peticion Exhibited to His Majestie by the Lords Spirituall and Temporall and Com[m]ons in this P[re]sent Parliament Assembled Conc[er]ning Divers Rights and Liberties of the Subjects (Jun. 7, 1628), *in* 5 STATUTES OF THE REALM 23–24 (John Raithby ed., 1819); Magna Charta 1225, 9 Hen. 3.

[401] NORTH, *supra* note 322, at 332.

laws that punished religious dissidents, and a prominent group of Anglican bishops were calling this suspension "illegal" because, by the "constitution of the government of England," the "legislative power" did not "reside in the king alone, but in the king, Lords, and Commons."[402] When Mather came to praise the king for the declaration, the king warmed to him immediately.[403] In four meetings between June and October, the king told Mather that he would "take care" of his concerns in New England "with expedition."[404]

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 III of Orange, the leader of the Netherlands, announced that he planned to lead an army across the English Channel to defend "the constitution of the English government."[405] The prince argued that the king had arbitrarily "seize[d] on the Charters of most of those Towns that have a right to be represented by their burgesses in parliament,"[406] and that he wanted to give these "ancient Prescriptions and Charters" back to the corporations that lost them.[407] A terrified James II tried to preempt William III'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

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[402] Petition of William Sancroft, Archbishop of Canterbury, to James II, King of England (May 18, 1688), *reprinted in* 1 GILBERT BURNET, A COMPLEAT COLLECTION OF PAPERS IN TWELVE PARTS 1–2 (London, J.D., 1689); The Trial of the Seven Bishops (1689), *in* 12 HOWELL, STATE TRIALS, *supra* note 114, at 183, 193–94; 367 (argument of Sir Heneage Finch).

[403] MATHER, *supra* note 338, at 328–30, 341; *see, e.g.*, Petition of Increase Mather to James II, King of England (Aug. 10, 1688) (class 1/65, no. 39, 39 I, TNA); Petition of Increase Mather et al. (Jul. 2, 1688) (class 1/65, no. 52–52 I, TNA); Mather, *supra* note 387, at 115.

[404] MATHER, *supra* note 338, at 330–31; *see, e.g.*, Order of the Lords of Trade (class 5, no. 905, pp. 76–77, TNA); Memorandum of James II, King of England (Jul. 2, 1688) (class 1/65, no. 53, TNA).

[405] Declaration of William III (Sep. 30, 1688), *supra* note 362, at 8.

[406] *Id.* at 5–6.

[407] *Id.* at 10.

Warranto."[408] 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."[409] The prince demanded "a Declaration of the Rights of the subjects" and a Parliament untainted by the crown's *quo warranto* proceedings.[410]

Even though Mather had a good relationship with James II, he quickly concluded that William III 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 Antient Rights and Liberties," he wrote, "it cannot be consistent with Justice and Equity to deal so with those that are afar off."[411] Using language from the prince's public declarations, Mather also emphasized that with "their Charter being gone," New Englanders were being governed by a "Dispotick and Absolute Power."[412]

Soon after Mather published this pamphlet in late 1688, William III invaded England. By December 1688, James II had escaped to France and William III had become the *de facto* leader of England.[413] 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[,]

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[408] LONDON GAZETTE, Oct. 8, 1688, at 1; *see also* LONDON GAZETTE, Nov. 6, 1688, at 1.

[409] Declaration of William III, Prince of Orange (Sep. 30, 1688), *reprinted in* 5 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 362, at 12.

[410] *Id.*

[411] [INCREASE MATHER], A NARRATIVE OF THE MISERIES OF NEW-ENGLAND BY REASON OF AN ARBITRARY GOVERNMENT ERECTED THERE UNDER SIR EDMOND ANDROS 5–6 (1688).

[412] *Id.* at 2–3.

[413] 5 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 362, at 23–26.

Priviledges[,] and Originall Rights and Constitutions."[414] Mather also intervened when the prince drafted a letter instructing the crown's governors in North America to stay in their positions, convincing William III that the letter "should not be sent to New England"[415] and that Andros should be replaced.[416]

In February 1689, Parliament formally offered the crown to William III and his wife, Mary II, 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.[417] 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.[418] After hearing about some of the "irregularities in government there," William III told Mather that he had no interest in reestablishing an independent commonwealth in

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[414] MATHER, *supra* note 338, at 331–32; Petition from Sir William Phips and Increase Mather to William III & Mary II, King and Queen of England (Feb. 18, 1689); *see* Letter from Abraham Kick to William III, Prince of Orange (Feb. 1, 1689) (class 5/855, no. 1, TNA).

[415] *Id.* at 331–32, 338; *see* William III, Prince of Orange, Circular Letter to the Governors of Colonies (class 5, no. 905, pp. 41–42, TNA) ("Upon the Application of Sir William Phipps & Mr Mather this Letter was stopped & ordered not to be sent.")

[416] 6 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 200–01 (Feb. 20, 1689).

[417] *Id.*; [MATHER], *supra* note 411, at 1.

[418] 6 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 201–03 (Feb. 22, 1689).

Massachusetts.[419] But he 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."[420]

As the crown worked on this project, Mather turned to Parliament, which looked even more promising.[421] When Parliament offered the crown to William and Mary, it conditioned the offer on a "Declaration of Right," 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 Warrantos, and Surrenders, and Mandates; and restored to their ancient Rights."[422]

The final draft of the Bill of Rights omitted this section,[423] but the House of Commons took the deleted section and separately declared in March "That the Judgment given upon the Quo Warranto against the City of London . . . [and] the other Cities . . . and Plantations . . . are illegal, and Grievances."[424] (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.[425] Mather became a fierce advocate of this

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[419] MATHER, *supra* note 338, at 332.

[420] 6 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 201–03.

[421] *See, e.g.*, SEWALL, *supra* note 351, at 251 (Apr. 26, 1689). Samuel Sewall, Mather's friend and confidant, arrived in London to help Mather in January.

[422] 10 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 204, at 16–18, 20–22, 24–26, 29–30 (Feb. 2–13, 1689).

[423] It did allude to *quo warrantos*, however, criticizing King James II for his "prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses." An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne 1689, 1 W. & M. sess. 2 c. 2.

[424] 10 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 204, at 41–42 (Mar. 5, 1689).

[425] *Id.* at 50–51, 112–13, 117–20, 196–98, 231–34, 276–77, 284, 312–13, 321–23, 328–30 (Mar. 16 and 30, May 2, Jun. 25, Jul. 23, Oct. 30, Nov. 12, and Dec. 19, 1689; and Jan. 2 and 10, 1690).

bill, which promised to "revers[e] the Judgment against the old charter" of the company[426] while also declaring generally "that Corporations could not be forfeited, nor their Charters surrendered."[427]

This was basically where things stood at the end of June 1689, when Mather and the rest of England received some startling news from Boston. According to sources there, the royal government had just been violently overturned by a coup.[428] Governor Edmund Andros was under arrest, Edward Randolph was in jail, and former chairman Simon Bradstreet, "tho' he be well towards Ninety Years of Age," was in control.[429] Mather was "surpris'd with joy" by this news.[430] 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 disapprove their designs."[431] None of the letters seemed sure of where these men came from; Simon Bradstreet, for example, wrote on behalf of a group of "merchants, inhabitants, and gentlemen of Boston" that they were "Surprised with the Peoples Sudden taking to Arms," a "motion whereof we

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[426] MATHER, *supra* note 338, at 327; SEWALL, *supra* note 351, at 257 (May 31, 1689).

[427] 2 BURNET, *supra* note 322, at 22–23.

[428] *See, e.g.*, Letter from Nathaniel Byfield to [Increase Mather] (Apr. 29, 1689), *in* NATHANIEL BYFIELD, AN ACCOUNT OF THE LATE REVOLUTIONS IN NEW-ENGLAND IN A LETTER 3, 4–5 (London, Ric. Chiswell, 1689); Letter from a Merchant in Boston to a Merchant in London (May 16, 1689) (class 5/855, no. 3).

[429] Letter from Nathaniel Byfield to [Increase Mather] (Jun. 6., 1689), *in* NATHANIEL BYFIELD, AN ACCOUNT OF THE LATE REVOLUTIONS IN NEW-ENGLAND IN A LETTER 6 (London, 1689).

[430] SEWALL, *supra* note 351, at 261 (Jun. 30, 1689).

[431] Narrative of the Proceedings at Boston upon the Inhabitants Seizing the Government 1 (1689) (class 5/855, no. 17).

were wholly Ignorant."[432] But there were already hints that Bradstreet was being disingenuous. In the months before April 18, Mather and other people in London had sent home letters describing William III's successful invasion and his express goal of restoring corporate charters.[433] Mather also stopped William III from letting Andros know what was happening in England, later writing in his diary that "[t]his (if there had bin nothing else) was worth my voyage for England."[434] And in the days leading up to April 18, Mather's son, Cotton, was about to be arrested for "a most scandalous Pamphlet" criticizing the Church of England.[435] In other words, in the weeks leading up to April 18, Mather was keeping allies in Boston informed that the pro-charter William III was in charge of England, while no one was telling Andros or Randolph that anything was different.[436]

In any event, even if Bradstreet truly knew nothing about the armed men's origins, he immediately knew how to capitalize on their "Alacrity."[437] By noon, the militia had grown to 5,000 people and had captured most of Boston.[438] Among their prisoners were Edward Randolph and the crew of the frigate Randolph had parked in Boston Harbor after

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[432] Letter from Simon Bradstreet et al. to Edmund Andros, Gov. of the Dominion of New Eng. (Apr. 18, 1689), *in* 6 COURT RECORDS 1 (rec. no. GC3-1701x, Felt Collection, Massachusetts Archives, Boston, Mass.).

[433] Affidavit of John Winslow (Feb. 4, 1690), *in* RAWSON & SEWALL, *supra* note 388, at 5–6. For more on the immediate lead-up to the coup, see generally MARY LOU LUSTIG, THE IMPERIAL EXECUTIVE IN AMERICA: SIR EDMUND ANDROS, 1637–1714 (2002).

[434] MATHER, *supra* note 338, at 331–32.

[435] [JOSEPH DUDLEY], NEW-ENGLAND'S FACTION DISCOVERED 4 (London, J. Hindmarsh, 1690). The pamphlet in question had actually been written by Increase Mather. *See*, *supra*, note 372 and accompanying text.

[436] Sir Edmund Andros, The State of New England 1 (May 27, 1690) (class 5/855, no. 97, TNA).

[437] BYFIELD, *supra* note 429, at 4.

[438] Narrative of the Proceedings at Boston upon the Inhabitants Seizing the Government, *supra* note 431, at 1.

announcing the new government in 1686.[439] 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.[440] Procedurally, Bradstreet's junta declared that the commission was made possible only because "Our Charter," the "hedge which kept us from the wild Beasts of the field, [was] effectively broken down . . . with a most injurious pretence (and scarce that) of law."[441] 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."[442] 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, including the land-confirmation issue, the tax issue, and the church issue.[443] Even though King James II had promised Mather "a certain *Magna Charta* for a speedy Redress of many things which we were groaning under," this new charter never arrived.[444]

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

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[439] *Id.*

[440] The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston, and the Country Adjacent (Apr. 18, 1689), *in* BYFIELD, *supra* note 428, at 7.

[441] *Id.* at 8.

[442] *Id.*

[443] *Id.* at 9–13, 16.

[444] *Id.* at 16.

Authors of our Miseries."[445] In seizing people, the group 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."[446] The junta's plan was similarly to hold Randolph and Andros and await "what Justice, Orders from his Highness, with the English Parliament shall direct."[447] Immediately after finishing this declaration, the junta wrote Andros and his soldiers a letter saying: "For your own Safety, We judge it necessary, That you forthwith Surrender, and deliver up the Government, and Fortifications . . . to be disposed according to Order and direction from the Crown of England; which is Suddenly expected may arrive."[448]

It didn't take long for Andros to surrender. His fortified soldiers surrendered too after someone took Randolph, "clapp[ed] a Pistoll to his Breast, [and] threaten[ed] 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."[449] For the next ten months, Governor Andros and about two dozen other officials—Randolph excepted—were held in one of the forts.[450] Randolph was kept by himself 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."[451]

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[445] *Id.* at 19.

[446] *Id.* at 18.

[447] *Id.* at 19.

[448] Letter from Simon Bradstreet et al., *supra* note 432, at 1.

[449] Narrative of the Proceedings at Boston upon the Inhabitants Seizing the Government, *supra* note 431, at 2.

[450] 3 THE ANDROS TRACTS 3–10 (William H. Whitmore ed., Boston, T.R. Marvin & Son, 1868).

[451] BYFIELD, *supra* note 429, at 5.

Although this coup was motivated by dozens of untold reasons, the reason mentioned by "the greatest part of the People" was the return of their "ancient Charter Government."[452] 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."[453]

This relative unanimity lasted until May 1, when former shareholders of the Massachusetts Bay Company began agitating for "the Necessity of Settling some forms of Government."[454] The text of the company's charter set elections on a particular day in May,[455] and a split emerged between "[a] great part of the Country" who wanted elections "according to our Charter rules"[456] 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.[457] To both groups, there also seemed something uncomfortable about elections in which the only people who could participate were Puritan church members and the wealthiest three percent of everyone else. A member of the wait-and-see camp wrote an anonymous pamphlet, *From a Gentleman of Boston to a Friend in*

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[452] ROBERT CALEF, MORE WONDERS OF THE INVISIBLE WORLD 149 (London, Nath. Hillar, 1700); Letter from Simon Bradstreet to John Hampden, Jr. (Jun. 8, 1689), *reprinted in* 8 MHS COLLECTIONS, *supra* note 367, at 538–59.

[453] 6 COURT RECORDS, *supra* note 432, at 2 (Apr. 20, 1689).

[454] *Id.* at 11 (May 1, 1689).

[455] *See*, *supra*, note 139 and accompanying text.

[456] 6 COURT RECORDS, *supra* note 432, at 15; BYFIELD, *supra* note 429, at 5–6.

[457] BYFIELD, *supra* note 429, at 5–6; CALEF, *supra* note 452, at 149; Letter from Edward Randolph to the Governor of Barbados (May 16, 1689), *reprinted in* 2 HUTCHINSON PAPERS, *supra* note 4, at 314, 315–16.

the Countrey, which argued "[w]e are not in a fit frame nor posture for a present Choice."[458] 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.[459] 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*.[460]

By contrast, members of the hold-elections camp argued that the only legal path forward was following the text of the charter. In *The Countrey-Man's Answer to a Gentleman in Boston*, an anonymous pamphleteer responded to the first one with: "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."[461] 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 Warrant to pitch upon any other day till a Twelve moneth be roll'd round."[462] A third pamphlet, *The Case of Massachusetts Colony Considered, in a Letter to a Friend at Boston*, agreed with the second one. "[T]he Charter of this Countrey is deservedly accounted our Magna Charta," its author wrote.[463] "[W]ithout it, we are wholly without Law."[464]

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[458] FROM A GENTLEMAN OF BOSTON TO A FRIEND IN THE COUNTREY (May 1689) (class 5/855, no. 5, TNA).

[459] *Id.*

[460] GERSHOM BULKELEY, THE PEOPLES RIGHT TO ELECTION OR ALTERATION OF GOVERMENT IN CONNECTICUTT 4–8 (Philadelphia, William Bradford, 1689).

[461] THE COUNTREY-MAN'S ANSWER TO A GENTLEMAN IN BOSTON (May 1689) (class 5/855, no. 6, TNA).

[462] *Id.*

[463] THE CASE OF MASSACHUSETTS COLONY CONSIDERED (May 18, 1689) (class 5/855, no. 4, TNA).

[464] *Id.*

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.[465] 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.[466] 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.[467] At first, members of the old government refused, calling for a new convention with even more representatives on May 22.[468] But when these representatives of fifty-four towns and villages met again, they again voted "to settle a Government according to our ancient Patent" with Bradstreet back in the chairman position.[469] 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."[470]

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 written down. The first address,

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[465] 6 COURT RECORDS, *supra* note 432, at 12 (May 2, 1689).

[466] BYFIELD, *supra* note 429, at 6.

[467] 6 COURT RECORDS, *supra* note 432, at 16–18 (May 10, 1689).

[468] *Id.*

[469] *Id.* at 25–27 (May 22–24, 1689).

[470] *Id.* at 26–27 (May 24, 1689).

written on May 20, painted the coup as the direct result of Prince William's invasion, which encouraged "the *English* Nation to cast off the Yoak of a Tyrannical and Arbitrary Power."[471] The people in Boston were so "excited to imitate so Noble and Heroick an Example," the government declared, that they "arose as one Man," seized the members of the government, and "secured them for what Justice, Order from Your Majesty shall direct."[472] The second address, written after the decision to resume the 1686 board, found it a little harder to explain how governing themselves by the rules of a vacated corporate charter continued to imitate William and Mary's example of reestablishing the Constitution of the English government. Bradstreet explained that they didn't think it safe "to fall under the full Exercise of Charter-Government," but that governing themselves "according to the Rule of the Charter, for the conservation of the Peace and Common Safety," was most "agreeable to our Charter Constitution."[473]

These two addresses were shipped to England, published in a single volume, and read to William and Mary in August 1689.[474] 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.[475] The revolutionaries in Boston were fighting for "their

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[471] The Humble Address of the President and Council for Safety of the People, and Conservation of the Peace, to William III and Mary II, King and Queen of England (May 20, 1689), *in* 6 COURT RECORDS, *supra* note 432, at 22–24.

[472] *Id.*

[473] The Humble Address, and Petition of the Governour, and Council, and Convention of Representatives of the People of Your Majesties Colony of the Massachusets in New England (Jun. 6, 1689), *in* 6 COURT RECORDS, *supra* note 432, at 32–34.

[474] SIR HENRY ASHURST, TWO ADDRESSES FROM THE GOVERNOUR, COUNCIL, AND CONVENTION OF THE MASSACHUSETTS COLONY ASSEMBLED AT BOSTON IN NEW-ENGLAND (London, Richard Baldwin, 1689).

[475] *See generally, e.g.*, BYFIELD, *supra* note 428; BYFIELD, *supra* note 429; RAWSON & SEWALL, *supra* note 388.

Ancient Constitution," and against "arbitrary" government, Mather wrote.[476] 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."[477] In a letter, Simon Bradstreet cited Parliament's declaration that the king's *quo warranto* proceedings were "illegal and a grievance."[478] He hoped "that in this day of General Restoration of Charters and English Liberties we shall not be forgoten, nor left without our Share therein, but be again fixt and setled in our former Charter Government."[479]

But friends of the company were not the only ones writing about it.[480] One of the officials imprisoned with Andros urged the crown and Parliament not to return New England to its former "Tyrannical and Arbitrary Constitution, deprived of the Laws and Liberties of English-men, forced in their Consciences, suffered death for Religion, and denied Appeals to the King."[481] 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 . . .

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[476] INCREASE MATHER, A BRIEF RELATION OF THE STATE OF NEW ENGLAND 10 (London, Richard Baldwine, 1689).

[477] THE HUMBLE ADDRESS OF THE PUBLICANS OF NEW-ENGLAND 21–24 (London, 1691).

[478] Letter from Simon Bradstreet, *supra* note 452, at 538–39.

[479] *Id.*

[480] *See generally, e.g.*, AN ANSWER TO THE ACCOUNT OF THE REVOLUTION AT BOSTON (1689) (class 5/855, no. 11, TNA).

[481] JOHN PALMER, AN IMPARTIAL ACCOUNT OF THE STATE OF NEW ENGLAND 21 (London, Edward Poole, 1690).

under Colour and pretence of a Charter (wherein no part thereof but the name was ever made use of or regarded.)"[482] Finally, letters complaining that Bradstreet's government brought with it high taxes, a temporary government that "is nearly anarchy," and a developing war with the Abenaki people in Maine added to the sense that Andros's government hadn't been so bad.[483]

Perhaps the most effective arguments against the charter—per usual—came from Edward Randolph. Writing letters from a Boston jail that he snarkily named "New Algiers" (in reference to the Barbary Coast slave trade), Randolph wrote that the coup was the result of a "cabal" led by Increase Mather, the "Mahomett" of New England.[484] He wrote that Mather and the other ministers liked the old charter because the only people who could become shareholders were church members; therefore Mather had "absolute power to elect all their officers," who in turn deferred to people like Mather when it came to interpreting the charter's terms.[485] And, in a repetition of his fear from when he was the commissioner for customs a decade earlier, he wrote that the new government under

[482] A SHORT DISCOURSE SHEWING THE GREAT INCONVENIENCE OF JOYNING THE PLANTATION CHARTERS WITH THOSE OF ENGLAND IN THE GENERAL ACT OF RESTORATION 1 (London, 1689); CONSIDERATIONS HUMBLY OFFERED TO THE PARLIAMENT 6 (London, 1689); Petition of Members of the Church of England in Boston to William III, King of England (Jan. 25, 1690) (class 5, no. 905, p. 177–78, TNA).

[483] *See, e.g.*, Extracts from Letters (May 28, 1690) (class 5/855, no. 103, TNA); Extracts from Divers Letters (Aug. 14, 1689) (class 5/855, no. 29, TNA); Extract from a Letter (July 31, 1689) (class 5/855, no. 26, TNA); Letter from Boston (Oct. 24, 1689) (class 5/855, no. 41, TNA); Letter from Edward Randolph to the Lords of Trade (Oct. 15, 1689) (class 5/855, no. 38, TNA); Address of Sundry Inhabitants of Charlestown to William III, King of England (Jan. 1690) (class 5/855, no. 59, TNA).

[484] Letter from Edward Randolph, *supra* note 457, at 315.

[485] Letter from Edward Randolph to the Bishop of London (class 5/855, no. 42, TNA); *see also* A SHORT ACCOUNT OF THE PRESENT STATE OF NEW-ENGLAND 8–9 (London, 1690).

Bradstreet was formally charging him and Andros with treason for their role in undermining the charter and passing orders under the commission that replaced it.[486]

King William III's perception of Massachusetts changed with each of these back-and-forth missives. At the beginning of July, when Increase Mather first asked William III in if the king had been "informed of the great service which your subjects in New England have done for your Majestry," the king responded favorably and agreed to "doe what is in His power towards restoring [their] Liberties."[487] By the end of July, however, as the king received letters from Edmund Andros and Edward Randolph, the king ordered Massachusetts to send "by the first ship" everyone it was imprisoning to be tried in England.[488] In August, after the king received the addresses from the Council for Safety, the king 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."[489] But the following April, when Randolph and Andros finally arrived back in England on charges of treason, his perception hardened against the colony for good.

Andros and Randolph's treason trial in England was a disaster for Massachusetts; Mather later wrote that the Massachusetts agents prosecuting the charges "cutt the throat of their Countrey" with their conduct.[490] When the prosecutors arrived with Andros and

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[486] Letter from Edward Randolph to the Lords of Trade (Jul. 23, 1689) (class 5/855, no. 21, TNA); *see* Charges against Sir Edmund Andros, Edward Randolph, and Others (Jun. 28, 1689) (class 5/855, nos. 21 I–IX, TNA).

[487] MATHER, *supra* note 338, at 332–33.

[488] Order in Council of William III, King of England (class 5, no. 905, p. 107, TNA).

[489] MATHER, *supra* note 338, at 339; Commission to the Magistrates Administering the Government of Massachusetts (Aug. 12, 1689) (class 5, no. 905, p. 127, TNA).

[490] MATHER, *supra* note 338, at 340–41.

Randolph for a preliminary hearing on April 10, 1690, they didn't bring with them any written, formal charges—much to the annoyance of the privy councilors conducting the trial.[491] 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.[492]

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.[493] Second of all, Sawyer was ready to explain not only why Andros and Randolph's commission was necessary to replace their charter, but also why the company "deserved far greater punishment than merely the loss of their Charter Priviledges."[494] And most importantly of all, 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.[495] 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

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[491] Letter from Elisha Cooke to Simon Bradstreet (Oct. 16, 1690), *reprinted in* 45 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, THIRD SERIES 644, 646–49 (1912); Letter from Thomas Brinley to Francis Brinley (May 28, 1690), *reprinted in* 83 PROCEEDINGS OF THE AMERICAN HISTORICAL SOCIETY 244, 246–47 (Theodore B. Lewis ed., 1974).

[492] Letter from Elisha Cooke, *supra* note 491, at 646–47; Charges (Apr. 16, 1690) (class 5/855, no. 82, TNA).

[493] Letter from Elisha Cooke, *supra* note 491, at 646–47.

[494] *Id.* at 647; Letter from Thomas Brinley, *supra* note 491, at 247–48.

[495] Letter from Elisha Cooke, *supra* note 491, at 648–49.

People."[496] The privy council rejected this form of pleading, dismissing the charges for being "from nobody."[497] After being held captive for almost a year, Andros and Randolph were released a week after the hearing.[498]

This hearing "extremely Scandalized" all the people who Mather had recruited "to concern themselves for New England."[499] The colony's treatment of Andros and Randolph suggested that Massachusetts needed far more 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.[500] 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.[501]

Somewhat surprisingly given the circumstances, the crown and Attorney General Treby consulted with Mather throughout the entire process.[502] Mather wanted the new charter to "re-establish the old Corporation" while explicitly codifying powers that the old

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[496] Letter from Thomas Brinley, *supra* note 491, at 248–49.

[497] *Id.*

[498] Order in Council of William III, King of England (Apr. 24, 1690) (class 5, no. 905, pp. 188–89, TNA).

[499] MATHER, *supra* note 338, at 340–41.

[500] An Act for Reversing the Judgment in a Quo Warranto Against the City of London and for Restoreing the City of London to Its Antient Rights and Priviledges 1690, 2 W. & M. c. 8; *see* Letter from Thomas Brinley, *supra* note 491, at 246; 10 JOURNAL OF THE HOUSE OF COMMONS, *supra* note 204, at 423–24 (May 23, 1690).

[501] Order in Council of William III, King of England (Apr. 30, 1690) (class 5, no. 905, pp. 270–71, TNA).

[502] *See, e.g.*, MATHER, *supra* note 338, at 335–36.

corporation had read into its charter, including clear title to Maine, an admiralty court, the power to tax all inhabitants, and a powerful "General Assembly" of representatives elected by shareholders.[503] 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," and an assembly chosen by anyone who owned £40 worth of property.[504] At first, Mather balked at losing the colony's corporate status. But the privy council rebuked him, telling him that his "Consent was not expected nor desired: For they did not think the Agents of New-England were Plenipotentiaries from another Sovereign State, . . . and we must take what would follow."[505]

Nevertheless, 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-England," he wrote.[506] 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."[507] 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."[508]

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[503] Proposals of Agents of Massachusetts (Apr. 28, 1690) (class 5/855, no. 130, TNA).

[504] INCREASE MATHER, A BRIEF ACCOUNT CONCERNING SEVERAL OF THE AGENTS IN NEW ENGLAND 8–9 (London, 1691); Attorney General Sir George Treby, Report on the Minutes for the Charter of Massachusetts (Jul. 29, 1691) (class 5/856, no. 176, TNA).

[505] MATHER, *supra* note 504, at 9–10.

[506] *Id.* at 15.

[507] *Id.* at 15–16.

[508] CHARTER OF THE PROVINCE OF THE MASSACHUSETTS BAY IN NEW ENGLAND (Oct. 7, 1691) (class 5/940, no. 298, TNA); MATHER, *supra* note 504, at 15–16. One of the new legislature's first acts was

But the most important attribute of the charter was that it once again provided "the People" with a written "Negative" on the power of the government.[509] Because ordinary people could point to a document that clearly articulated the government's powers, "New-England is by this Charter more priviledged" than even people "that live in England it self are."[510] William and Mary had given Mather the courtesy of nominating the colony's first governor and councilors,[511] but the written charter protected the colony even from "a Person as bad as Andross."[512] 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."[513]

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Years later, in 1765, the lieutenant-governor of the Province of Massachusetts Bay, Thomas Hutchinson, published a project he had been working on for years: *The History of the Colony of Massachuset's Bay*.[514] In it he told the story of the colony from Sir Ferdinando Gorges to Edward Randolph, from the 1629 corporate charter to the "new charter, in many respects to be preferred to the old."[515] He too shared Increase Mather's enthusiasm for all that the new charter offered, writing that "[m]any of the most sensible men in [other]

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to incorporate Harvard. *See* Minutes of the General Assembly (Jun. 27, 1692) (class 5, no. 785, pp. 337–39, TNA).

[509] MATHER, *supra* note 504, at 17.

[510] *Id.*

[511] 7 JOURNAL OF THE LORDS OF TRADE, *supra* note 289, at 53–55; MATHER, *supra* note 504, at 20.

[512] MATHER, *supra* note 504, at 17.

[513] *Id.*

[514] 1 HUTCHINSON, *supra* note 243.

[515] *Id.* at 415.

governments, would be glad to be under the same constitution that the Massachusetts province happily enjoys."[516]

This was not the only lesson people could take away from Hutchinson's history. In 1767, the Massachusetts House of Representatives circulated a letter to other colonies explaining its view that "that in all free states the constitution is fixed"; that a legislature "cannot overleap the bounds of it without destroying its own foundation"; and "that the constitution ascertains and limits both sovereignty and allegiance."[517] In 1773, the same House cited Randolph's efforts to enforce the Navigation Acts—efforts, it told Hutchinson, "recited from your Excellency's History"—as evidence that Massachusetts had long resisted Parliament's authority to legislate for North America.[518] And in 1775, John Adams called parliamentary efforts to tax North America "servile copyers of the designs of Andross, Randolph, . . . and other champions of their cause towards the close of the last century."[519]

What was becoming clear to Hutchinson and Adams—and what was already clear to the revolutionaries of 1689—was that colonial charters were revered, foundational documents. They had become "constitutions"—documents "to which you [could] 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."[520] But charters didn't become modern constitutions simply because time passed. What gave

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[516] *Id.*

[517] Circular Letter of the House of Representatives of Massachusetts Bay, *supra* note 2, at 134–36.

[518] Reply of the House to Hutchinson's First Message (Jan. 26, 1773), *reprinted in* 1 PAPERS OF JOHN ADAMS 315, 315–31 (Robert J. Taylor ed., 1977).

[519] John Adams, Circular Letter to the Inhabitants of the Colony of Massachusetts-Bay (Jan. 30, 1775), *reprinted in* 2 PAPERS OF JOHN ADAMS, *supra* note 518, at 233, 233–42.

[520] PAINE, *supra* note 19, at 56–57.

charters their constitutional force—something whose "bounds" a government could transgress only by "destroying its own foundation"—was the threat of enforcement.

In the Massachusetts Bay Company, the threat that converted the charter into a constitution came from English litigants like Edward Randolph. Randolph's relentless enforcement of corporate and colonial charters perhaps perfectly embodies the driving spirit behind American-style constitutionalism. Randolph's career as a colonial administrator didn't end when he was released from Massachusetts 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.[521] 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 the board of the Massachusetts Bay Company. The governor of Maryland wrote in 1692 of Randolph's "insolent tone," his "scurrilous haughty deportment," and that "he has done here what he has done elsewhere [that] made the country weary of him. He boasts that he has lived five and twenty years on the curses of the people, and I am sure that he never wants them."[522] The governor of Pennsylvania accused Randolph in 1697 of "huffing and bouncing" and badmouthing people behind their backs.[523] William Penn accused Randolph of perjury in 1698.[524] And multiple governors had

[521] *See, e.g.*, Letter from Edward Randolph to Lionel Copley, Gov. of Md. (Apr. 13, 1692) (class 5/713, no. 72, TNA); Minutes of the Council of Maryland (May 20, 1695) (class 5, no. 740, pp. 146–51, TNA); Francis Nicholson, Lieut.-Gov. of Va. to the Board of Trade (Apr. 1703), *paraphrased in* 21 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 22, at 589–93.

[522] Letter of Lionel Copley, Gov. of Md., to Board of Trade (Jul. 29, 1692) (class 5/713, no. 80, TNA).

[523] Letter from William Markham, Gov. of Pa., to William Penn (Apr. 24, 1697) (class 5/1257, no. 6 I–XX, TNA).

[524] Letter from William Penn to Board of Trade (Dec. 19, 1698) (class 5/1257, nos. 41, 41 I, TNA).

Randolph imprisoned—including the governor of Bermuda in 1699 for "pretending great power and 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."[525]

As much as these governors didn't like Randolph, he played an important role in North American colonial governance: he forced governors to be "accountable" to someone other than themselves despite the thousands of miles of ocean separating them from their superiors.[526] This was particularly true with a corporate colony like in Massachusetts—or Connecticut and Rhode Island, which remained corporations into the nineteenth century despite Edward Randolph's best efforts to serve them with *quo warrantos*[527]—where one wrong move meant not just personal embarrassment but the loss of an entire colonial government.

This sort of threat existed in a completely different form 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."[528] For Locke, every government legitimately continued to exist only so long as its officers abided by the terms of the "original Constitution" that created it, and the threat

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[525] Letter from Samuel Day, Gov. of Bermuda, to Board of Trade (May 18, 1699), *paraphrased in* 17 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 22, at 231–34.

[526] *See, e.g.*, Order of Lords Justice in Council (Jul. 14, 1699), *paraphrased in* 17 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 22, at 344; Memorandum from Edward Randolph to Commissioners of Customs (Dec. 7, 1695), *paraphrased in* 14 CALENDAR OF STATE PAPERS, COLONIAL SERIES, *supra* note 22, at 625–26.

[527] Letter from Robert Treat, Gov. of Conn., to the Lords of Trade (Jul. 6, 1686) (class 1/59, no. 128, TNA); Letter from Walter Clark, Gov. of R.I., to the Lords of Trade (Jul. 3, 1686) (class 1/59, no. 116, TNA).

[528] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 319, 432–39 (London, Awnsham Churchill, 1690).

that forced legislators to pay attention to these terms was the fear of "Revolution."[529] 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 in a corporate government like the Massachusetts Bay Company, the threat of "Revolution" was less significant than the threat of a *quo warranto* brought by someone like Randolph—or, for that matter, someone like Sir Ferdinando Gorges, Captain John Mason, a Quaker dissenter, or anyone else who had the capacity to file a petition. As soon as King James I began using *quo warrantos* to dissolve entire corporations for neglecting their charters, each term of a charter became a candidate for something much more dangerous to the corporate government than a revolution by the people who signed its "compact" of incorporation. The *quo warranto* turned the charter into something resembling a modern, American-style constitution: something that not only brought the government into existence but also delineated the boundaries of its power—boundaries that everyone had a powerful incentive to pay attention to.

The history of the Massachusetts Bay Company illustrates how the threat of outside litigation turned a corporate charter into a constitution. 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 government they established—particularly before the Virginia Company was made the test

[529] *Id.* at 441–47.

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.[530]

But as soon as the company learned of Gorges and Captain 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 governed 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.[531]

The threat of a *quo warranto* never went away for 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 had a reasonable textual basis for each of these decisions. And even where the company may have stretched the text of the charter, in the

[530] *See*, *supra*, notes 152–172 and accompanying text.

[531] *See*, *supra*, notes 174–227 and accompanying text.

1650s it stretched it to intrude only on traditional privileges of the crown, not the privileges of a Parliament that still possessed the ability to intervene.[532]

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."[533]

For all of these reasons, the term "constitution" in New England evolved differently than 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. And, due to circumstance, 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. But where the rules that constituted a "commonwealth" like England were theoretical and the subject of debate, the origin of the Massachusetts Bay Company was relatively easy to identify and easy to return the company to. Although its charter referenced many unwritten traditions, particularly through its clause that cited the "laws of England," the four pieces of parchment that composed the charter took on many of the attributes of English constitutionalism. Where "arbitrary government" in England was

[532] *See*, *supra*, notes 174–227 and accompanying text.

[533] *See*, *supra*, notes 225–360.

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.

In January 1776, after the battles of Lexington, Concord, and Bunker Hill, the Massachusetts legislature proclaimed that a state of war existed between the colony and the British government that "intended to subvert our Constitution by Charter."[534] Later that year, the Declaration of Independence listed "taking away our Charters . . . and altering fundamentally the Forms of our Governments," as one of the reasons the colonies chose to leave the British Empire.[535] In fact, several of the reasons listed in the Declaration of Independence imitated those of a revolution eighty years earlier. In the 1680s, Massachusetts had been governed for almost a century by a single, written document that outlined and limited what the government could do. Their leaders too thought that their "Charter Constitution" was worth defending.[536]

[534] Proclamation of the Great and General Court of the Colony of Massachusetts-Bay, Jan. 23, 1776 (vol. 138, pp. 281–82, Massachusetts Archives, Boston, Mass.).

[535] The Declaration of Independence para. 23 (U.S. 1776).

[536] The Humble Address, and Petition of the Governour, and Council, and Convention of Representatives of the People of Your Majesties Colony of the Massachusets in New England, *supra* note 361 at 114–17.

Chapter Two
The Corporate Constitution, 1689–1822

In 1783, as American and British negotiators drew the American Revolution to a close in the drawing rooms of Paris, a French journalist named Antoine Marie Cerisier asked one of the negotiators what materials he should read in order to write a history of the conflict. The negotiator, a lawyer from Massachusetts named John Adams, was an excellent person for the journalist to ask. In 1765, Adams had helped to initiate the revolution by arguing that the British government was violating the "British Constitution," an uncodified arrangement of documents and customs that prohibited, in his view, any tax on any person who "has not given his own Consent in Person or by Proxy."[1] And in 1779, days before sailing for Paris, Adams had helped to culminate the revolution by drafting a "Constitution or Form of Government for the Commonwealth of Massachusetts," one that differed from the British constitution in that it was written in one document to ensure that "the powers of Rulers [w]ould be accurately defined and properly limited."[2]

Despite his lived experience in "the History of the American War," Adams initially dismissed Cerisier's question about it. It is "too Soon to write Such a History," Adams explained, and "there is no Man living, neither in Europe nor in America, who is qualified for it and furnished with the necessary Materials."[3]

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[1] John Adams, *Instructions Adopted by the Braintree Town Meeting* (Sep. 24, 1765), *in* 1 PAPERS OF JOHN ADAMS 137–40 (Robert J. Taylor ed., 1977).

[2] CONSTITUTION OR FORM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS (Mar. 2, 1780) (vol. 276, p. 30, Felt Collection, Massachusetts Archives, Boston, Mass. [hereinafter Mass. Archives], vol. 276, p. 30); Return of the Town of Brookline (May 21, 1778) (Mass. Archives, vol. 156, p. 395).

[3] Letter from John Adams to Antoine Marie Cerisier (Jan. 14, 1783), *in* 14 PAPERS OF JOHN ADAMS 169–72 (Gregg L. Lint et al. eds., 2008).

But Adams did offer the journalist a "Clue to the whole Mistery." The "Controversy and the War begain in the Massachusetts Bay," Adams wrote, a place whose "Charters" and "Institutions . . . were made by our Ancestors in the first Settlement of the Country, And have been uninterruptedly preserved to this day, and have produced the merveillous Events with which the last 20 years have been crouded." So if the journalist really wanted to "comprehend" the conflict, he needed to begin his research long "before the War broke out, even from the Year 1620." Adams suggested that the journalist read Thomas Hutchinson's 1764 *The History of the Colony of Massachusets Bay* and other histories of the province "previous to the present Dispute."[4] Only these could explain a controversy that began with Britain's unwritten constitution and was ending with the ratification of written constitutions across America.

To modern historians of constitutionalism, Adams's answer to the French journalist might seem a little surprising. The most celebrated histories of the American Revolution, from Bernard Bailyn's *The Ideological Origins of the American Revolution* to Gordon Wood's *The Creation of the American Republic*, begin their narratives around 1765, not 1620. 1765 is an appropriate starting point, Bailyn and Wood write, because the twenty years following saw tremendous changes in American legal and political thought, particularly with respect to the term "constitution." "Americans began traditionally," Bailyn writes, with the term "'constitution' not as a written document," but rather as "the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them."[5] But by 1780, Bailyn and Wood conclude, the

[4] *Id.*

[5] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 67, 175–98 (1967).

term had evolved in American thought to refer to a fixed, written document "which says to the legislative powers 'Thus far shalt thou go, and no farther.'"[6]

Bailyn and Wood accurately capture two competing understandings of what the term "constitution" meant in the eighteenth century: an arrangement of government, on one hand, and a written document, on the other. But what they miss—and what Adams's answer to the French journalist reveals—is that many of the "merveillous Events" of the revolutionary decades were not departures from the past but rather the blossoming of ideas first sown in the 1620s. As discussed in the previous chapter, revolutionaries in 1689 Massachusetts initiated a coup to defend their "Constitution by Charter," by which they meant an arrangement of government that they had long identified with the written, corporate charter of the Massachusetts Bay Company. A "constitution," in other words, referred to both an arrangement of government *and* a written document. Even after this "Charter Constitution" was permanently replaced by a new charter in 1691, Massachusetts residents continued to use both senses of the term to refer to the colonial government. In 1764, for example, the preeminent historian of the Massachusetts Bay Company, Thomas Hutchinson, published his widely read *History of the Colony* that detailed the colonists' fervent devotion to both their "original constitution" and their "new charter, in many respects to be preferred to the old."[7]

Thanks in large part to Hutchinson's comprehensive history of the Massachusetts Bay Company, when John Adams and other Americans began debating the legitimacy of parliamentary taxation in 1765, they had no difficulty pointing out that while the British

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[6] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 266–67 (1969).

[7] THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETS BAY 415 (Boston, Thomas & John Fleet, 1764).

constitution might be ethereal, "the Fundamentals of the Constitution of this Province are stipulated in the Charter."[8] That charter was the colony's "Constitution, dearly purchased by our Ancestors, and dear to us."[9] 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.[10] 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.[11]

The first part of this chapter discusses the revolutionary decade between the 1764 publication of Hutchinson's *History of the Colony* and the 1774 parliamentary legislation that revoked several clauses of the Massachusetts charter.[12] The debates during this

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[8] Answer of the House of Representatives of Mass. to Gov. Thomas Hutchinson (Jan. 26, 1773), *in* THE SPEECHES OF HIS EXCELLENCY THOMAS HUTCHINSON 33, 53–54 (Boston, Edes & Gill, 1773).

[9] Letter from the Council of Mass. to the Earl of Hillsborough (Apr. 23, 1769), *in* LETTERS TO THE RIGHT HONORABLE THE EARL OF HILLSBOROUGH 23, 39 (Boston, Edes & Gill, 1769).

[10] Reply of the House of Representatives of Mass. to Gov. Thomas Hutchinson (Mar. 2, 1773), *in* 1 PAPERS OF JOHN ADAMS, *supra* note 1, at 331–46.

[11] In this respect, this chapter responds to the modern critique of Wood and Bailyn as "republican revisionists" who fail to explain the American Revolution's radicalism because they fail to focus on the economic individualism of people in the 1760s and 1770s who increasingly participated in international markets. *See, e.g.*, JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992). Participation in international markets was not unique to the late 18th century; the debates over the Massachusetts Bay Company one hundred years earlier were also conducted in a context of taxation and international trade. Accepting that the ideology of written constitutionalism did not emerge in an economic vacuum, it also did not emerge in a historical vacuum—the idea was passed down alongside other ideas, including the Puritan concept of a covenant, the republican ideal of a public-spirited citizenry, and the liberal ideal of responsibly self-interested individuals exercising their right to self-government. *See generally* JAMES KLOPPENBERG, THE VIRTUES OF LIBERALISM (1998).

[12] *See* Massachusetts Government Act 1774, 14 Geo. 3, c. 45.

decade—over parliamentary taxation, the presence of British soldiers, and the crown's power to regulate the colonial government—often took the form of interpretive disputes over the text of "the Province Charter, which established its Constitution."[13] In defending British authority, Hutchinson commonly referred to the American colonies as mere "Corporations or political Bodies" whose charters restricted their power without immunizing them from parliamentary or crown oversight.[14] But the Americans quoted back the words of Increase Mather, Simon Bradstreet, and other characters in Hutchinson's *History* to accuse him of rendering "null and void those Clauses in our Charter, upon which the Freedom of our Constitution depends, . . . and introduc[ing] an arbitrary Government into this Province . . . repugnant to the Charter."[15]

The second part discusses the six years from 1774 through 1780, a period during which Massachusetts had no "constitutional" government. After Parliament nullified "the charter constitution of the Massachusetts-Bay" in 1774, Massachusetts revolutionaries constructed a shadow government as "consistent with the Charter and Constitution of the Government" as circumstances would allow.[16] At the same time, residents recognized that "our former Constitution (the Charter) is at an End, and a New Constitution of Government, as soon as may be[,] is absolutely necessary."[17] Massachusetts was not alone—many colonies followed John Adams's recommendations regarding the form their post-

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[13] Answer of the Council of Mass. to Gov. Thomas Hutchinson (Jan. 25, 1773), *in* THE SPEECHES OF HIS EXCELLENCY THOMAS HUTCHINSON, *supra* note 8, at 20, 22.

[14] Speech of Gov. Thomas Hutchinson (Jul. 14, 1772), *in* 49 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 128 (Boston, Edes & Gill, 1772).

[15] Answer of the House of Representatives of Mass. to Gov. Thomas Hutchinson (Feb. 12, 1773), in 49 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 14, at 224.

[16] John Adams, *Novanglus No. 6*, *in* 2 PAPERS OF JOHN ADAMS, *supra* note 1, at 288–307; 51 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 197 (Boston, Benjamin Edes, 1775) (Oct. 26, 1775).

[17] Return of the Town of Lexington (Oct. 21, 1778) (Mass. Archives, vol. 156, pp. 178–79).

revolutionary "constitutions of government" should take.[18] But Massachusetts residents uniquely declared that their written constitution had to be distinct from and less alterable than ordinary legislation, just as their historical charters had been.[19]

The final part emphasizes the corporate legacy of linking the terms "constitution" and "charter" in Massachusetts and the federal government. In Massachusetts, the 1780 constitution not only closely resembled a corporate charter, but in many respects it also literally functioned as a corporate charter. Several of its articles defined the privileges and immunities of "corporate towns" as well as "the President and Fellows of Harvard-College, in their corporate capacity."[20] Eventually, residents of these towns began demanding more detailed corporate charters to govern their internal organization—charters they called "entire new constitution[s]" predicated "on the same principles as the Federal and State Constitutions."[21] Indeed, in the federal constitutional convention of 1787, participants described the "charter" they were constructing for the new nation as one in which the states were "corporations" whose laws relative to Congress "were analagous to that of bye-laws to the supreme law."[22]

All in all, the story of constitutionalism during the American Revolution is one of surprising continuity. Americans' understanding of what was meant by the Massachusetts "constitution" did not radically transform in the decade after 1764. Instead, it consistently

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[18] *See* [JOHN ADAMS,] THOUGHTS ON GOVERNMENT 1 (Philadelphia, John Dunlap, 1776).

[19] As will be discussed later, the first constitutions of Virginia, Pennsylvania, and other states were passed as ordinary legislation by unicameral revolutionary legislatures.

[20] MASS. CONST., ch. V., §1.

[21] *Incorporation*, BOS. AM. HERALD, Nov. 7, 1785, at 2.

[22] 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 464 (Max Farrand ed., 1911) (statement of James Madison) (Jun. 29, 1787).

referred to the governmental arrangement expressed in the colony's 1629 corporate charter and the 1691 charter that followed. Only after that charter was nullified did Massachusetts residents go to war and eventually demand a permanent replacement for their "defective Charter" and "antient Constitution."[23] The constitutions they adopted, in Cambridge and in Philadelphia, not only resembled their old charters, but functioned similarly to them as well. In this respect, a written constitution was not an invention of the 1670s, but one of those "Institutions" that, in John Adams's words, had been "uninterruptedly preserved" from the seventeenth century "to this day."[24]

I

Although the American Revolution is often thought of, correctly, as arising from a dispute over the British Parliament's power to tax the colonies, in practice this dispute took the form of legal arguments over how to interpret the colonies' charters. In colonial Massachusetts, whose residents had, for generations, considered their charter a "compact" with the crown that protected them from nonconsensual British exercises of power, questions of taxation and regulation became matters of textual—and "constitutional"—interpretation.

In 1764, when the dispute between Great Britain and its American colonies began, colonial government in Massachusetts was roughly 130 years old. For its first fifty years, from 1629 to 1686, the colony had been a literal corporation whose government was framed by the charter of the Massachusetts Bay Company. In 1686, after English courts determined that the corporation's leaders had forfeited their charter by taking actions more consistent with an independent "commonwealth" than a corporation, the crown appointed

[23] Return of the Town of Pittsfield (May 29, 1776) (Mass. Archives, vol. 181, pp. 42–45).

[24] Letter from John Adams to Antoine Marie Cerisier, *supra* note 3.

Edmund Andros, Edward Randolph, and other officers to administer the colony. Their administration was soon overthrown, however, by a coup demanding a return of the colony's "Charter Constitution."[25] The crown complied in 1691, granting the colony a near-identical "Royall Charter to Incorporate Our Subjects in Our said Collony."[26] This royal charter, drafted in consultation with New England's leading minister, Increase Mather, largely replicated the corporate government of the Massachusetts Bay Company and remained in effect through the revolution.

The 1691 charter of the Province of Massachusetts Bay codified many attributes of the corporate government that had existed in 1686. After reciting the above history, the charter established a "General Court or Assembly" modeled after the Massachusetts Bay Company's annual meetings of shareholders and directors.[27] As before, this assembly would begin its annual sessions on the last Wednesday in May, during which "representatives" from each town would meet and elect a twenty-eight-member "Councill."[28] 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 Civil 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

[25] The Humble Address, and Petition of the Governour, and Council, and Convention of Representatives of the People of Your Majesties Colony of the Massachusets in New England (Jun. 6, 1689) (class 5, no. 905, pp. 114–17, The National Archives, Kew, England).

[26] Charter of the Province of the Massachusetts-Bay (1691), *in* 1 THE ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 1, 8 (Boston, Wright & Potter, 1869).

[27] *Id.* at 11.

[28] *Id.* at 12.

welfare of our said Province."[29] This power came with a familiar proviso: none of the courts, offices, and laws could be "repugnant or contrary to the Lawes of this our Realme of England."[30] Moreover, the charter guaranteed Massachusetts residents "Liberty of Conscience" and all the other "Libertyes and Immunities of Free and natural Subjects" as if they had been "borne within . . . England."[31]

The principal distinction between the 1691 charter and the one it replaced was that the new charter's authors, King William III and Queen Mary II of England, drafted a number of safeguards to ensure that the Province of Massachusetts Bay would not drift toward independence in the same way that the Massachusetts Bay Company had done. For example, the charter required the general assembly to send all legislation to England for the crown's privy council to review and, if necessary, disallow.[32] The most important of the charter's safeguards was its replacement of the corporation's elected chairman and vice-chairman with a crown-appointed "Governour" and "Lieutenant or Deputy Governour."[33] The charter gave the governor full power to veto or give his "Negative voice" to proposed bills; to "adjourn[,] Prorogue and dissolve" the general assembly; and, with "the advice and consent of the Councill," to "nominate and appoint Judges . . . and other Officers."[34] 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

[29] *Id.* at 14–16.

[30] *Id.*

[31] *Id.* at 14.

[32] *Id.* at 17.

[33] *Id.* at 13–14.

[34] *Id.* at 14–16.

and execute all and every such Acts matters and things which the said Governour . . . could lawfully doe."[35]

Among the first generations who lived under this charter, no one better understood its words or the history behind it than Thomas Hutchinson. An enormously successful politician, Hutchinson began his career holding virtually every office the charter authorized. Beginning in 1737, when Hutchinson was 25, his hometown of Boston elected him eleven times to the house of representatives, where in 1748 he made a name for himself proposing a successful plan to replace the province's paper money with currency backed by precious metals. This plan so angered his Boston constituents that they threw him out of office and burned his house down, but his friends in the legislature immediately elected Hutchinson to the council, where he served for another decade. In 1758, the crown named Hutchinson lieutenant governor of the province. 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.[36]

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, from his great-grandmother Anne Hutchinson to his brother-in-law Samuel Mather, grandson of Increase Mather.[37] Hutchinson dedicated much of his life compiling these records into a coherent narrative. He

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[35] *Id.* at 19.

[36] For a comprehensive biography of Thomas Hutchinson, see generally BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1976).

[37] HUTCHINSON, *supra* note 7, at i.

published the first edition of this narrative, *The History of the Colony of Massachusets Bay*, in 1764.

Hutchinson's *History* described in thorough detail the evolution of the Massachusetts Bay Company's charter from the "letters patent" for "a corporation in England" to the "form of . . . constitution" for a New England "commonwealth."[38] 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.[39] And he described the 1689 coup, the subsequent "desire to reassume the charter," and the charter William and Mary granted in 1691.[40] "Seventy years practice under the new charter, in many respects preferred to the old, has taken away, not only all expectation, but all desire of ever returning to the old charter," Hutchinson concluded. "Many of the most sensible men" in the corporate governments of Rhode Island and Connecticut, which retained "their ancient charters, . . . would be glad to be under the same constitution that the Massachusetts province happily enjoys."[41]

Hutchinson's *History* was immediately popular—printers from Boston to London published two more editions within a few years of its first printing in 1764.[42] But its publication could not have come at a worse time for Hutchinson's political career. The

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[38] *Id.* at 240–41.

[39] *Id.* at 337.

[40] *Id.* at 386.

[41] *Id.* at 415–16.

[42] *See, e.g.*, THOMAS HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSET'S BAY 415 (2d ed., London, M. Richardson, 1765).

History reminded readers that their ancestors strongly believed that their "charter privileges" insulated them from parliamentary and crown authority. 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."[43] 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" that they believed the taxes violated.[44] The first was the clause of the Massachusetts charter that gave the general assembly "full power and Authority" to "impose and leavy . . . Taxes." As a Boston town meeting explained to James Otis and other town representatives, "By 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."[45] Each of Parliament's taxes therefore "annihilate[d] our Charter Right to Govern and Tax ourselves."[46] Otis took this message to heart in his own 1764 pamphlet, *The Rights of the British Colonies Asserted and Proved*.[47] As recipients of William and Mary's charter—living "under the best national civil constitution in the world"—

[43] Sugar Act 1764, 4 Geo. 3, c. 15; Stamp Act 1765, 5 Geo. 3, c. 12.

[44] 16 A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 182–83 (Boston, Rockwell & Churchill, 1886) [hereinafter BOSTON TOWN RECORDS] (May 26, 1766).

[45] *Id.* at 155–56 (Sep. 18, 1765).

[46] *Id.* at 120–22 (May 24, 1764).

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

Massachusetts residents possessed exclusive powers to do certain things within their jurisdiction free from parliamentary intrusion.[48]

The second fundamental law at issue was the clause in the charter guaranteeing the colonists the "Libertyes and Immunities of Free and natural Subjects . . . of England." As Boston again 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."[49] In other words, the constitution of Massachusetts, expressed in its charter, incorporated the constitution of Britain, an amorphous concept that somehow forbade Parliament from taxing anyone not represented in its assembly. As Otis explained, it was "manifest from the provincial charters" that colonial residents were entitled to the rights of British subjects—rights that included the protections of the "British constitution."[50]

On the surface, it might appear that Boston residents were using the term "constitution" imprecisely to refer a number of different ideas, particularly with respect to the "British constitution." Indeed, John Adams, a lawyer from the Boston suburb of Braintree, complained in early 1766 that there was no single "Diffinition" of the term: "Some have called it, Custom, some have call'd it the most perfect Combination of human Powers in society, . . . Some have said that the whole Body of the Laws are the

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[48] *Id.* at 32; *see ALSO* CHARLES CHAUNCY, A DISCOURSE ON THE GOOD NEWS FROM A FAR COUNTRY 19–20 (Boston, Kneeland & Adams, 1766).

[49] 16 BOSTON TOWN RECORDS, *supra* note 44, at 155–56 (Sep. 18, 1765).

[50] OTIS, *supra* note 47, at 37.

Constitution—I confess there is nothing in any one of these, that is satisfactory to my mind."[51] At the same time, Adams could not "say that I am at any Loss about my own or any Man's Meaning when he uses those Words." To Adams, the term "constitution" was simply a metaphor for referring to a government in the same way that someone might refer to "[t]he Constitution of the human Body." When physicians spoke of a human's constitution, they referred to the "Nerves, fibres, Muscles, or certain Qualities of the Blood" that constituted, or made up, the human body. Similarly, when people spoke of "Constitutions of Government," they meant the "Frame" or "scheme" or "Combination of Powers" for these governments. In Massachusetts, that frame was written down; anyone could read the province's constitution in a single document. But even in Britain, Adams argued, all could agree that some things were as fundamental to the British constitution as the "Heart" or "Lungs" were to the human constitution, including the right of the people to "have a share in the making of Laws and in the Execution of them."[52]

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 authorities as are specially given them in their several charters of incorporation."[53] Even in Pennsylvania, whose 1681 charter expressly authorized Parliament to "assess and impose" taxes, Benjamin Franklin argued that "by the same charter, and otherwise, [Pennsylvanians] are intitled to all the privileges

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[51] 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 296–99 (L.H. Butterfield ed., 1961) (Jan. 18, 1766).

[52] *Id.*

[53] WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND SUPPLEMENT iii (Oxford, Clarendon Press, 1765).

and liberties of Englishmen," which included a protection from "taxes on the inhabitants, unless it be with the[ir] consent."[54]

Such arguments drew scorn from Thomas Hutchinson and other crown-appointed officials across the continent, who saw nothing in any "charter, which is the ancient constitution of the Colony, which could serve to justify [anyone] in refusing to pay any tax."[55] In Maryland, Daniel Dulaney went further and responded that the text of charters was irrelevant to the question of whether Parliament could tax British subjects. "Should the analogy between the *colonies* and *corporations* be even admitted for a moment," Dulaney wrote in 1765, "it would only amount to this: The *colonies* are vested with as complete authority, to all intents and purposes, to tax themselves, as any *English corporation* is to make a bye-law."[56] But, Dulaney concluded, just because the charter of an English corporation like London gave the city power to tax its residents did not mean that Londoners were "entitled to an exemption from parliamentary taxations."[57] To this argument, an anonymous pamphleteer responded that "the comparison is totally unfair."[58] While the charters of London and other English corporations gave them "a right of representation in the British Parliament," the charters of American colonies "d[id] not."[59]

Parliament eventually repealed the Stamp Act in 1766—too late to save Thomas Hutchinson's rebuilt home, however, which an anti-tax mob burned along with many of his

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[54] THE EXAMINATION OF DOCTOR BENJAMIN FRANKLIN 21–22 (Philadelphia, 1766).

[55] WILLIAM KNOX, THE CONTROVERSY BETWEEN GREAT BRITAIN AND HER COLONIES RENEWED 55 (Boston, Mein & Fleming, 1769).

[56] DANIEL DULANY, CONSIDERATIONS ON THE PROPRIETY OF IMPOSING TAXES IN THE BRITISH COLONIES FOR THE PURPOSE OF RAISING A REVENUE 12 (Boston, William M'Albine, 1765).

[57] *Id.* at 11.

[58] CASE OF GREAT BRITAIN AND AMERICA 3 (Boston, Edes & Gill, 1769).

[59] *Id.*

historical manuscripts. But when Parliament again tried to tax paper and other supplies in 1767, Massachusetts residents once again sought refuge in both the Massachusetts constitution and in the British 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; "and the same is also in violation Of the undoubted natural Rights of Subjects."[60] During an election-day sermon, Daniel Shute added that "This 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."[61] James Otis and Samuel Adams even argued that colonists were entitled to the protections of the British constitution "exclusive of any consideration of charter rights."[62] The British constitution was "fixed," they declared, and Parliament "cannot overleap the bounds of it without destroying its own foundation."[63]

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 the town in October 1768. The town meeting of Boston called this an attempt "to overthrow the Civil Constitution" of the province; John Adams called it 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

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[60] 16 BOSTON TOWN RECORDS, *supra* note 44, at 262–63 (Sep. 13, 1768).

[61] DANIEL SHUTE, A SERMON PREACHED BEFORE HIS EXCELLENCY FRANCIS BERNARD 59 (Boston, Richard Draper, 1768).

[62] Circular Letter from the House of Representatives of Mass. (Feb. 11, 1768), *in* 44 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 237 (1975).

[63] *Id.*

Charter . . . . A Constitution, dearly purchased by our Ancestors, and dear to us."[64] In a sermon that could have been delivered a century earlier, the minister Jason Haven explained that "our happy constitution" was "secured to us by *royal charter*," and "Our fathers faithfully performed the conditions, on which the charter privileges were granted."[65] Another minister, Samuel Cooke, cited Thomas Hutchinson's *History of the Colony* to emphasize that "The New-England Charter" was the only thing separating the province from the "despotic power" of an historical governor like Edmund Andros—or the present governor, Francis Bernard, who was recalled to England in late 1769.[66]

By the terms of the charter, once Francis Bernard left the province, the lieutenant governor, Thomas Hutchinson, acquired his powers. And as tensions exploded after the Boston Massacre in 1770, Hutchinson engaged in three disputes with the general assembly over the interpretation of the Massachusetts constitution.

The first constitutional dispute, from 1770 through 1772, was over where the general assembly should reassemble after Governor Bernard dissolved it. Ordinarily, the assembly met in Boston. But under instructions from the crown, Hutchinson refused to let the assembly meet in that tinderbox, instead calling for it to assemble in nearby Cambridge. Hutchinson explained that, under the charter, the governor had "full power" to "adjourn[,] Prorogue and dissolve" the general assembly—a power that implied the complimentary power to call it back into session wherever he wanted. In calling for the

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[64] 16 BOSTON TOWN RECORDS, *supra* note 44, at 296 (Jul. 4, 1769); *id.* at 286 (May 8, 1769); Letter from the Council of Mass. to the Earl of Hillsborough (Apr. 23, 1769), *supra* note 9, at 39.

[65] JASON HAVEN, A SERMON PREACHED BEFORE HIS EXCELLENCY SIR FRANCIS BERNARD 45 (Boston, Richard Draper, 1769).

[66] SAMUEL COOKE, A SERMON PREACHED AT CAMBRIDGE, IN THE AUDIENCE OF HIS HONOR THOMAS HUTCHINSON 33–36 (Boston, Edes & Gill, 1770).

assembly to meet in Cambridge, he was therefore doing "no more than what the Charter authorizes."[67]

John Adams, James Otis, and other members of the general assembly agreed with Hutchinson's reading of the charter—they even added 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."[68] But for that reason, they demanded to see the instructions sent by the crown, which they thought exceeded the crown's power under the charter and posed a "Danger to the Constitution."[69] The general assembly elaborated on their position with what might now be described as textualist and originalist accounts of the charter. From a textualist perspective, the charter gave the governor "full power" to decide where to call the assembly—its words left no room for the crown to add its opinion.1 ` And from an originalist perspective, the general assembly cited Hutchinson's *History of the Colony* to explain that this textual limitation was important because the charter was originally understood as "a Compact between the Crown and this People to be mutually observed and kept."[70]

Put together, the general assembly and its allies declared that the text of the charter expressed the "constitutional laws of government," laws that "equally bound" the crown as well as the people of Massachusetts. It bound the crown so that it "may be directed and guided thereby, and not depart from, or counteract the design of their institution, to the injury, or disquietude of the people." And it bound the people so that, "knowing the bounds

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[67] 47 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 36–37 (1978) (Jun. 15, 1770).

[68] *Id.* at 39 (Jun. 19, 1770).

[69] *Id.* at 25–32 (Jun. 12, 1770).

[70] *Id.* at 39 (Jun. 19, 1770).

of submission, and the extent of their privileges, they may [guard] against transgression, and yield a ready and full obedience."[71] "[E]very Power should have a Check," the assembly summarized, and the checks on the crown's power were made in "the Royal Grant made to them in the Charter."[72] The assembly therefore refused to do business in Cambridge in order to protect "the Charter Rights of the Province" and "to defend the Constitution of its Government" from "An exterior Power [that] claims a Right to govern us."[73]

Hutchinson replied that the assembly was misreading his *History* and misunderstanding the Massachusetts constitution. Under "the first Charter[,] the Crown had constituted a Corporation in England," Hutchinson wrote, not a "solemn Contract" with the people in which "the Crown excludes itself from a Right of Controul." The shareholders of the Massachusetts Bay Company departed from that premise when they took the charter with them to Massachusetts, but in 1691, the crown replaced the charter with one that gave "better guidance and directions to the several powers and authorities mentioned in the said Charter." Since then, "Instructions from the Crown have been, in fact, part of our Constitution for fourscore years together."[74] Under Hutchinson's reading, the Powers vested in me by Charter" allowed him to relocate the general assembly when necessary, and "by the Constitution I am made the Judge of that Necessity."[75]

This back-and-forth bled into the second constitutional dispute, from 1772 through 1774, after the crown announced that it would take over paying the salaries of the governor

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[71] JOHN TUCKER, A SERMON PREACHED AT CAMBRIDGE, BEFORE HIS EXCELLENCY THOMAS HUTCHINSON 17–18, 32–33 (Boston, Richard Draper, 1771).

[72] 48 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 63 (1979) (Jun. 19, 1771).

[73] 47 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 67, at 39 (Jun. 19, 1770).

[74] 48 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 72, at 191 (Apr. 25, 1772).

[75] 49 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 15 (1980) (May 30, 1772).

and provincial judges. The charter said nothing about who would pay the governor, but it did empower the general assembly to erect courts and "name and settle annually all Civil Officers." Once again, the residents of Boston and the members of the general assembly accused the crown of betraying the constitutional contract between the crown and the people of Massachusetts, who had used the threat of withholding salaries as a check on the governor and the judges he appointed. "Our Ancestors received from King William & Queen Mary a Charter," the residents of Boston declared, in which the balance of power "was fixed; and therefore every thing which renders any one branch of the [government] more independent of the other two than it was originally designed, is an alteration of the constitution as settled by the Charter."[76] The house of representatives called the salary issue one of "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."[77] Later, they declared that any judge who took a crown salary was "an Enemy to the Constitution" who acted "contrary to the plain Sense and Meaning of the said Charter and against the known Constitution of this Province."[78] When a judge named Peter Oliver accepted a salary from the crown, the house even moved to impeach him. Members of the house admitted that the charter said nothing about impeachment, but they claimed that such a power was "necessarily therein implied." Otherwise, "total subversion of the constitution" would result if "any person may by his conduct, break through the

[76] 18 BOSTON TOWN RECORDS *supra* note 44, at 106 (Nov. 20, 1772).

[77] 49 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 75, at 224 (Feb. 12, 1773).

[78] *Id.* at 281–82 (Mar. 3, 1773).

constitution of the province grounded on the charter and confirmed by constant usage, without being liable to be called to account by any judicatory here."[79]

Not even this impeachment was as important as the third constitutional dispute, which continued to be fought over Parliament's authority to tax tea and other domestic products in Massachusetts. In a series of speeches to the general assembly laying out "the Principles of your Constitution," now-governor Thomas Hutchinson defended parliamentary taxation with an historical account of the colony's corporate origins. The "Constitution" of the colony, "as appears from the Charter itself and from all other irresistible Evidence," is like all other "Corporations still remaining subject to the general Laws of the Kingdom," Hutchinson said.[80] Quoting 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 charter and the corporate government was supposed to remain in England and "remain subject to the Supreme Authority of Parliament."[81] Indeed, thanks to the British constitution, the crown lacked the power to immunize the corporation from the authority of Parliament, just as the crown could not immunize the city of London from Parliament. Hutchinson concluded that he knew of "no Line that can be drawn between the supreme Authority of Parliament and the total Independence of the Colonies," and if the assembly resisted parliamentary taxes they would be moving toward independence.[82]

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[79] 50 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 233 (1981) (Mar. 7, 1774).

[80] 49 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 75, at 138–43 (Jan. 6, 1773).

[81] *Id.* at 229–36 (Feb. 16, 1773).

[82] *Id.* at 141 (Jan. 6, 1773).

Hutchinson's speeches outraged John Adams and the other members of the general assembly, who returned fire with their own historical account of the Massachusetts constitution. The assembly explained that "the Fundamentals of the Constitution of this Province are stipulated in the Charter," a charter that, concededly, began its history as a corporate charter. But the Massachusetts Bay Company was no ordinary English corporation whose "Residence subject[ed] them to the Authority of Parliament, in which they [we]re also represented." Instead, once the company's founders left for America, they also believed they were leaving Parliament's jurisdiction. The assembly quoted the speeches of John Winthrop, the letters of Edward Randolph, the text of "the old Charter of this Colony," and "large Extracts we have made from your Excellency's History of the Colony" to prove that the company's founders believed themselves immune from British authority so long as they respected the terms of the compact. They 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."[83]

Hutchinson continued to accuse 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."[84] But the battle lines were drawn. Hutchinson believed that the Massachusetts constitution was nothing more than a corporate charter. 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

[83] *Id.* at 178–90 (Jan. 26, 1773).

[84] 50 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 79, at 182.

within our Limits which could be claimed by the People or Government of England, with no other exceptions than those in the Charter expressed."[85]

Either way, in all of the debates from 1764 through 1774, both sides tied the constitution of Massachusetts to the province's charter, just as the "Charter Constitution" of the Massachusetts Bay Company had been tied to its corporate charter. And just as the crown had vacated the corporate charter to reverse Massachusetts's trend toward independence, Parliament soon passed a law that declared certain clauses of the new charter "void and of none effect."

II

In 1774, Parliament passed the Massachusetts Government Act, a law that nullified several clauses of the 1691 charter. For the first time since 1686, Massachusetts no longer had a fixed, written "constitution" to frame its government and protect its residents from provincial, parliamentary, or royal abuses of power. Over the next six years, residents lamented that "our former Constitution (the Charter) is at an End, and a New Constitution of Government, as soon as may be[,] is absolutely Necessary."[86] These lamentations eventually produced a "Constitution and Form of Government" that differed in many important ways from the 1629 and 1691 charters, but was still recognizably similar to the written charters it replaced.

In December 1773, a group of Bostonians disguised as Mohawks destroyed a shipment of tea in Boston Harbor to protest the recently enacted Tea Act. Parliament responded in the spring of 1774, interrupting the general assembly's constitutional debates with Thomas Hutchinson. As rumors of Parliament's planned response reached New

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[85] 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 51, at 297–302.

[86] Return of the Town of Lexington, *supra* note 17.

England, John Adams wrote in his diary that "the Constitution of this Province" was such "an Obstacle to [Hutchinson's] Views and Designs of Raising a Revenue by Parliamentary Authority" that Adams expected the "Destruction of our Charter."[87] The town meeting of Boston even drafted a letter to other towns warning them that "Two Acts of Parliament, altering the Course of Justice & annihilating our free Constitution of Government, are every day expected."[88] In spite of these fears, when General Thomas Gage arrived in Boston to replace Hutchinson as governor, the general assembly congratulated him. They expressed their hope "that you will make the known Constitution and Charter of the Province the Rule of your Administration."[89]

This hope did not last long. Soon after Gage's arrival, Boston received copies of Massachusetts Government Act, one of four "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.[90] Parliament explained its reasoning in the preface to the law. It declared that "repeated experience" and "an open resistance to the execution of the laws . . . in the town of Boston" had demonstrated that the elected council and town meetings were "extremely ill adapted to the plan of government established in the province of the Massachuset's Bay."[91]

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[87] 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 51, at 88–95 (Mar. 12, 1774).

[88] 18 BOSTON TOWN RECORDS *supra* note 44, at 186 (Jul. 26, 1774).

[89] 50 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS., *supra* note 79, at 264 (Jun. 9, 1774).

[90] Massachusetts Government Act 1774, 14 Geo. 3, c. 45.

[91] *Id.*

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."[92] Beginning in July, conventions of leaders from Berkshire County in the west to Plymouth County in the east condemned "the alteration of our constitution and laws," the "late attempt to alter the constitution of this province," and Parliament's "unparalleled usurpation of unconstitutional power."[93] One county, embracing the corporate history of the province, 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."[94]

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."[95] But the delegates there resisted any proposal "to frame an American Constitution, instead of indeavouring to correct the faults in an old one."[96] Instead, the congress appointed the Adamses to a committee "to

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[92] PETER WHITNEY, THE TRANSGRESSION OF A LAND PUNISHED BY A MULTITUDE OF RULERS 46–47 (Boston, John Boyle, 1774).

[93] Convention of Middlesex County (Aug. 31, 1774), *in* JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS 612–13 (William Lincoln ed., Boston, Dutton & Wentworth, 1838) [hereinafter JOURNAL OF THE MASS. PROVINCIAL CONGRESS]; Convention of Suffolk County (Sep. 9, 1774), *in* JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra*, at 601–04; Convention of Essex County (Sep. 9, 1774), *in* JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra*, at 615–16.

[94] Convention of Berkshire County (Jul. 6, 1774), *in* JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 652.

[95] Letter from Joseph Warren to Samuel Adams (Sep. 4, 1774), *in* RICHARD FROTHINGHAM, LIFE AND TIMES OF JOSEPH WARREN 357 (Boston, Little, Brown, 1865).

[96] 1 JOURNAL OF THE CONTINENTAL CONGRESS 26 (Worthington Chauncey Ford ed., 1904) (Sep. 6, 1774).

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."[97]

Although some members of the committee argued that the colonists should base their rights on their "Charters, without recurring to the Law of Nature," the majority of the committee worried that relying on their charters would leave the colonists vulnerable to accusations "that the Colonies are only like Corporations in England, and therefore subordinate to the Legislature of the Kingdom."[98] Ultimately, the committee tried to make everyone happy by agreeing "to found our rights upon the laws of Nature, the principles of the English Constitution, and charters and compacts."[99] The congress as a whole agreed to this, but emphasized in a petition to the crown that the Massachusetts Government Act was at odds with the corporate history of that colony. "[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," the congress 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."[100]

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 cancelled this assembly, however, after reading some of the "extraordinary resolves" of the county

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[97] *Id.*

[98] 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 51, at 128–31 (Sep. 8, 1774).

[99] *Id.*

[100] 1 JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 96, at 87 (Oct. 21, 1774).

conventions.[101] The representatives who were elected nevertheless met at Salem on the appointed day and waited for the governor to show up.[102] After a day in 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.'"[103] 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."[104]

Gage criticized the provincial congress's attempt to "assume to themselves the powers and authority of government, independent of, and repugnant to his majesty's government legally and constitutionally established within this province." While "you complain of acts of parliament that make alterations in your charter," Gage reasoned, "you will not forget that by your assembly you are yourselves subverting that charter, and now acting in direct violation of your own constitution."[105] But the provincial congress responded that they were doing nothing other than what the Convention Parliament did during the

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[101] Proclamation of Gov. Thomas Gage (Sep. 28, 1774), *in* JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 3–4.

[102] 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).

[103] JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 5–6 (Oct. 7, 1774).

[104] *Id.* at 5–6; 40 (Oct. 7 and 28, 1774).

[105] Proclamation of Gov. Thomas Gage (Nov. 10, 1774), *in* JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 743.

Glorious Revolution or what the Committee of Safety did after the 1689 coup in Boston. Although the charter had been abridged, they were "directed by the principles of the constitution itself," acting "for the laudable purposes of preserving the constitution, and therein their freedom."[106]

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, for example, compared the situation to when the allies of Edmund Andros "overthrew the charter" in 1686. He described how "from the days of Gardiner and Moreton, 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.[107] An anonymous author agreed that the "Charter to us granted by King WILLIAM III and Queen MARY" was as "valid and sacred" as the *Magna Charta* "granted by King JOHN."[108] He implored the provincial leaders to preserve their "Constitution sacred and entire."[109]

But critics maintained that the Province of Massachusetts Bay was still nothing more than a corporation whose charter could be voided after its leaders abused its terms. Thomas Chandler compared the colony to a municipal corporation like the city of Albany in New York. He noted that, under the spurious logic of Massachusetts's defenders, "the charter of the city of *Albany*, granting a power to make laws for its internal regulation, . . . place[d] the inhabitants of that city beyond the reach of laws made by the assembly of *New-*

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[106] JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 44 (Oct. 28, 1774).

[107] Josiah Quincy, Jr., Observations on the Act of Parliament 45 (Boston, Edes & Gill, 1774).

[108] A FREE AND CALM CONSIDERATION OF THE UNHAPPY MISUNDERSTANDINGS AND DEBATES 23 (Salem, S. & E. Hall, 1774).

[109] *Id.* at 4.

York."[110] Besides, Chandler wrote, no one disputed "that charters *may* be forfeited," and it was proof of Parliament's leniency "that the *Massachusetts* charter, after so many abuses and provocations, has not been totally vacated, rather than abridged."[111] But this comparison between Massachusetts and other corporations only went so far. As Massachusetts's defenders explained, corporations in England were represented in Parliament. Indeed, a member of Parliament even asked his colleagues in a pamphlet whether it made sense to subject "the fundamental constitution of a powerful state" like Massachusetts to "as capricious alterations as you think fit to make in the charters of a little mercantile company or the corporation of a borough."[112]

The most scholarly debate over the charter of Massachusetts was fought between Daniel Leonard, writing under the pen name Massachusettensis, and John Adams, writing under the pen name Novanglus. Both men drew extensively on Hutchinson's *History* to argue that the situation was exactly like that of the Massachusetts Bay Company in the seventeenth century. From Leonard's perspective, the story of the Massachusetts Bay Company proved that the "provincial constitutions, considered as subordinate," would become "wholly monarchial or wholly republican, were it not for the checks, controuls, regulations and supports of the supreme authority of the empire."[113] Such checks, whether wielded "by the King or parliament," were needed to ensure that the colonies did not forfeit

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[110] THOMAS B. CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS ON THE SUBJECT OF OUR POLITICAL CONFUSIONS 12–13 (America, 1774).

[111] *Id.* at 20.

[112] JONATHAN SHIPLEY, A SPEECH INTENDED TO HAVE BEEN SPOKEN ON THE BILL FOR ALTERING THE CHARTER OF THE COLONY OF MASSACHUSETTS-BAY 13 (Salem, E. Russell, 1774).

[113] DANIEL LEONARD, MASSACHUSETTENSIS 44 (Boston, 1775).

their charters "through negligence or *abuse* of their franchises, in which cases the law judges that the body politic has broken the condition upon which it was incorporated."[114]

From Adams's perspective, by contrast, the charter of the Massachusetts Bay Company was a 140-year-old compact between the king and the people of New England, a compact which continued to hold, and which Parliament had no authority over. He explained that "it is plain and uncontroverted, that the first charter was intended only to erect a corporation within the realm, and the governor and company were to reside within the realm, and their general courts were to be held there."[115] At its inception, the charter was no different from other "Charters of all Corporations in England," with clauses "intended to restrain those Bodies politick within the limits of the Constitution and the laws."[116] But once "the company came over to America, and brought their charter with them, . . . they got out of the English realm, dominions, state, empire, call it by what name you will, and out of the legal jurisdiction of parliament." At that point, the charter "became only Evidence of a Contract" between the company and the crown.[117] And as Edward Randolph himself observed, people in Massachusetts always understood their "charter constitution" as a "check, on every branch of power, and therefore as long as it lasted, parliamentary taxations, &c. could never be inforced."[118]

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[114] *Id.* at 74.

[115] John Adams, *Novanglus No. XII*, *in* 2 PAPERS OF JOHN ADAMS, *supra* note 1, at 373–80 (Apr. 17, 1775).

[116] John Adams, *Novanglus No. XIII*, *in* 2 PAPERS OF JOHN ADAMS, *supra* note 1, at 380–87 (Apr. 1775).

[117] *Id.*

[118] John Adams, *Novanglus No. VI*, *in* 2 PAPERS OF JOHN ADAMS, *supra* note 1, at 288–307 (Feb. 27, 1775).

As this debate raged through the winter of 1774–1775, Thomas Gage remained in Boston while 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 defense, by raising and establishing an army."[119] 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."[120] Warren was in something of a rush: the 1691 charter set the "last Wednesday in the Moneth of May" as the date for the governor to call for a new assembly, but the provincial congress thought that Gage had "utterly disqualified himself to serve this colony as a governor" and that a new plan was needed.[121] 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."[122] Warren even added that "we shall readily submit to such a general plan as you may direct for the colonies; or make it

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[119] JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 135 (Apr. 8, 1775).

[120] *Id.* at 187 (May 3, 1775).

[121] *Id.* at 192 (May 5, 1775).

[122] *Id.* at 229–30 (May 16, 1775).

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."[123]

The provincial congress's letter was fittingly similar to the letter that Simon Bradstreet wrote to King William III and Queen Mary II in 1689, in which Bradstreet's Committee of Safety asked for the crown's permission to form a new government "agreeable to our Charter Constitution."[124] Both letters acknowledged a readiness to "submit" to someone else's plan now that their charters were of dubious legality. In private, however, Warren made clear that he hoped that the Continental Congress would permit them to draft an entirely new constitution without their own charter's obvious vestiges of royal authority. "We cannot think, after what we have suffered for a number of years, that you will advise us to take up that form established by the last charter, as it contains in it the seeds of despotism," he wrote in a personal letter to Samuel Adams, one of the Philadelphia delegates.[125] At the same time, Warren recognized that "it is difficult to frame a government *de novo* which will stand in need of no amendment."[126]

As the provincial congress waited for the Continental Congress's reply, the last Wednesday in May arrived. Ignoring Governor Gage's absence, the towns elected new representatives and reelected Warren president of the provincial congress. Samuel Langdon, the president of Harvard College, preached an election-day sermon announcing that the province had "a right to set up over themselves any form of government which to

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[123] *Id.*

[124] The Humble Address, *supra* note 25.

[125] Letter from Joseph Warren to Samuel Adams (May 15, 1775), *in* FROTHINGHAM, *supra* note 95, at 483.

[126] Letter from Joseph Warren to Samuel Adams (May 26, 1775), *in* FROTHINGHAM, *supra* note 95, at 495.

them might appear most conducive to their common welfare."[127] But when some residents of Boston petitioned to "give their Representatives Instructions to form a Plan for a new Government," the rest of the town voted to wait for Philadelphia's instructions before "forming a Constitution."[128]

It took until the following month of June before the Philadelphia Congress got around to considering the provincial congress's letter. The Congress, unsure of how to respond, appointed a committee of five delegates to draft an answer. This committee 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. To answer both questions, the committee conferred with Samuel Adams, John Adams, and the other Massachusetts delegates.

Regarding the first question, John Adams was an influential proponent of giving "Advice to the seperate States to institute Governments," which he thought would set an important precedent when the other colonies sought to adopt their own independent governments.[129] "[T]he case of Massachusetts was the most urgent," he later wrote, but "it could not be long before every other Colony must follow her example."[130] This view overcame Samuel Adams's skepticism regarding "any Plan to be recommended to a State," which Samuel thought was the people's job to create on their own.[131]

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[127] Sermon of Samuel Langdon (May 31, 1775), *in* FROTHINGHAM, *supra* note 95, at 498.

[128] 18 BOSTON TOWN RECORDS *supra* note 44, at 283 (May 22, 1775).

[129] 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 51, at 353–54 (Jun. 9, 1775).

[130] *Id.* at 352.

[131] *Id.* at 353–54.

The committee had a more difficult time reaching a consensus on the second question, however, about the form of government Massachusetts should adopt. Some of the delegates, led by Samuel Adams, proposed placing "all Power in a House of Representatives."[132] 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." In particular, 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."[133] Ultimately, John Adams won out again. The committee—and the 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 endeavor to subvert, that charter."[134] Instead, the Continental Congress instructed Massachusetts to "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."[135]

Officially, the provincial congress of Massachusetts responded to these instructions with gratitude for the "compassion, seasonable exertion, and abundant wisdom, evidenced in your recommendation to this people."[136] Unofficially, its new president, James Warren, privately wrote that "I can't, however, say that I admire the form of government

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[132] *Id.*

[133] *Id.*

[134] 2 JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 96, at 83–84 (Jun. 9, 1775).

[135] *Id.*

[136] JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 365 (Jun. 20, 1775).

presented."[137] Warren, like Samuel Adams, wanted the Continental Congress to give the provincial congress more latitude to depart from its royal inheritance. "We could only have wished you had suffered us to have embraced so good an opportunity to form for ourselves a constitution worthy of freemen," Warren wrote.[138]

Nevertheless, the provincial congress immediately instructed the towns to elect new representatives for a new general assembly pursuant to the charter.[139] On July 21, the newly assembled house of representatives elected a new council of twenty-eight members.[140] A week later, the house recited the clause in the 1691 charter that gave the council the governor's "full power and Authority" whenever the governor and the lieutenant governor were "displaced" from the colony.[141] The house resolved that, because Governor Thomas Gage "refused to govern the Province according to said Charter, . . . this House will 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."[142]

Over the next few months, the general assembly governed the province as if the charter were still intact and the governor and lieutenant governor were displaced. Occasionally, this produced some friction between the house and council. For example, in November 1775, the house and council entered a disagreement over which branch had

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[137] Letter from James Warren to John Adams (Jun. 21, 1775, *in* FROTHINGHAM, *supra* note 95, at 512.

[138] Letter from James Warren to Samuel Adams (Jun. 21, 1775), *in* FROTHINGHAM, *supra* note 95, at 512.

[139] JOURNAL OF THE MASS. PROVINCIAL CONGRESS, *supra* note 93, at 358–59 (Jun. 20, 1775).

[140] 51-I Journal of the House of Representatives of Mass. 6 (1982) (Jul. 21, 1775).

[141] *Id.* at 21 (Jul. 28, 1775).

[142] *Id.*

authority to appoint military officers to lead the provincial militia.[143] The house declared that under "the natural Rights of Men," it was their responsibility as representatives of the people to compose the people's army. But the members of the council disagreed, noting that the charter empowered the governor to lead the militia, and it was their duty "to conform as near as may be to the Spirit and Substance of the Charter."[144] 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."[145]

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."[146] 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 also worried about the "Absurdity of carrying on War, against a King, When so many persons were daily taking Oaths and Affirmations of Allegeance to him" thanks to the royal charters.[147] He also believed that, in contrast to ancient governments, which were typically created "in a hurry, by a few chiefs," the American people had an opportunity to consult "the theories of the wisest writers" and "erect the whole building with their own hands, upon the broadest foundation"—if only Congress would encourage them.[148]

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[143] *Id.* at 251 (Nov. 9, 1775).

[144] *Id.* at 261–62 (Nov. 10, 1775).

[145] *Id.*

[146] 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 51, at 354–55 (Oct. 18, 1775).

[147] *Id.*

[148] *Id.*

Although the Congress recognized that Parliament could, at any moment, "take from us our charters or written civil constitution, which we love as our lives," most of the delegates considered Adams's ideas to be "new, strange, and terrible."[149] But, as Adams wrote in his diary, some "Members of Congress began to hear me with more Patience, and some began to ask me civil questions."[150] In particular, the sympathetic delegates had two questions: how would the colonies institute new governments, and what sort of governments would Adams recommend they adopt?

Adams's answer to the first question was for each colony to assemble a "Conventio[n] of Representatives, freely, fairly and proportionally chosen," which could "fabricat[e] a Government, or a Constitution rather," to replace the colonial charter.[151] Adams explained that if any state'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." As for the second question, Adams 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." "Kings We never had among Us," Adams explained; "Nobles We never had. Nothing hereditary ever existed in the Country: Nor will the Country require or admit of any such Thing." But as in Massachusetts, Adams hoped that each new state would preserve its "Governors, and Councils," houses of "Representatives," and the "independent Judges" that "We have always had."[152]

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[149] 2 JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 96, at 179 (Jul. 13, 1775).

[150] 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra* note 51, at 355–56 (Oct. 18, 1775).

[151] *Id.* at 356.

[152] *Id.*

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, that conventions could send for the people to review. Indeed, the very idea of a "Constitution," to Adams, was an age old document dressed in revolutionary clothes.

Among the delegates, only "Mr. John Rutledge, of South Carolina, and Mr. John Sullivan, of New Hampshire," took Adams's ideas home with them.[153] In October 1775, Sullivan returned with 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."[154] The Continental Congress appointed Adams to a committee of five, which deliberated over an answer for weeks. Ultimately, this committee, and Congress, adopted half of Adams's previous proposal, recommending 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."[155] Soon, South Carolina's delegation made an identical request of the Congress, which issued an identical response.[156]

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[153] *Id.* (Oct. 26, 1775).

[154] 3 JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 96, at 298 (Oct. 18, 1775).

[155] *Id.* at 319 (Nov. 3, 1775).

[156] *Id.* at 326–27 (Nov. 4, 1775).

It took the New Hampshire convention two months, but on January 5, 1776, it adopted a written "FORM OF GOVERNMENT" in the colony.[157] 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.[158] In April, John Adams anonymously published a best-selling pamphlet, *Thoughts on Government*, in which he argued that the rest of the colonies should adopt simpler "Forms" or "constitutions of government" with bicameral legislatures, independent executives, and independent judiciaries.[159]

In the ten months between June 12, 1776, and April 20, 1777, the legislatures of Virginia, New Jersey, Delaware, Pennsylvania, Maryland, North Carolina, Georgia, and New York enacted or proclaimed versions of Adams's advice with documents they called a "Constitution or Form of Government," the "Charter of this Colony," the "Declaration of Rights, &c.," or simply the "Constitution of this State."[160] As Thomas Paine anonymously wrote during Pennsylvania's deliberations, "All constitutions should be contained in some written Charter," one "drawn up and framed by the people."[161] All of these constitutions were adopted as positive legislation, implying that the constitutions could later be amended by the legislatures. None of the constitutions were reviewed and ratified by the general public before they were adopted.

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[157] N.H. CONST. OF 1776, *in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2451 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE, CONSTITUTIONS].

[158] S.C. CONST. OF 1776, *in* THORPE, CONSTITUTIONS, *supra* note 157, at 3241.

[159] *See generally* [ADAMS], *supra* note 18.

[160] *See generally* THORPE, CONSTITUTIONS, *supra* note 157.

[161] [THOMAS PAINE,] FOUR LETTERS ON INTERESTING SUBJECTS 15–16 (Philadelphia, Styner & Cist, 1776).

Ironically, the three places that did not immediately adopt new written constitutions included Adams's home state of Massachusetts.[162] Most people in Massachusetts, including Adams, saw no reason 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*. War was not the time to permanently resolve "our constitution of civil government."[163] The residents of the town of Topsfield agreed: "As enovasions [sic] 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."[164]

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."[165] 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.[166] From Allen's perspective, the charter had

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[162] The other two were Connecticut and Rhode Island—which continued to govern themselves by the corporate charters they had each received in the 1660s.

[163] To the Electors of Representatives for the Colony of Massachusetts, MASS. SPY, May 18, 1776.

[164] Instructions of the Town of Topsfield (Jun. 14, 1776), *in* POPULAR SOURCES OF POLITICAL AUTHORITY 97–98 (Oscar Handlin & Mary Flug Handlin eds., 1966).

[165] Petition of the Town of Pittsfield (Dec. 26, 1775) (Mass. Archives, vol. 180, p. 150). For more on the constitutionalists and their effect on the Massachusetts Constitution, see generally MASSACHUSETTS, COLONY TO COMMONWEALTH (Robert J. Taylor ed., 1961); ROBERT TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION (1954).

[166] Petition of the Town of Pittsfield, *supra* note 165.

been "of great value" when Massachusetts was a colony of Great Britain.[167] But the attributes that had made it special dissolved as soon as Massachusetts went to war.

Allen argued that the 1691 charter had done two things well: it represented a "Compact" between the people of Massachusetts and the crown, and, for that reason, it offered a check "against the wanton Exercise of power" by the crown, the provincial government, or third parties like Parliament.[168] The charter's check was also a durable check: neither the British government nor the provincial government could amend it without the other side's consent. Allen recognized that the British government violated this principle with acts like the Massachusetts Government Act—acts which led to war. But now, even though the charter was no longer the compact or durable check that it had been, the general assembly of Massachusetts "Had taken up the old Constitution contrary to the minds of the People."[169]

"We have hear[d] much of Governments being founded in Compact," Allen wrote. "What Compact has been formed as the foundation of Government in this province?"[170] The only people who had participated in "the Reassumption of this discordant Constitution," he wrote, were members of the general assembly. But if the legislature were free to unilaterally modify and "impose said fundamental Constitution upon a people," then the constitution was not only a weak check on that legislature's power, but also "an Engine of

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[167] *Id.*

[168] Declaration of the Town of Pittsfield (May 29, 1776) (Mass. Archives, vol. 181, pp. 42–45).

[169] Affidavit of Elijah Brown (Mar. 2, 1776), *in* MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 165, at 24.

[170] Declaration of the Town of Pittsfield, *supra* note 168.

Oppression & deep Corruption."[171] A constitution amendable at will by the legislature would only entrench the legislature's own power.

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."[172] That is, "If 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."[173] This principle was reflected in the old charter, which was similarly above the provincial government and could not be amended unilaterally. And it was also present in the "British Constitution," which neither Parliament nor the crown could amend without "the great rational Majority of the people."[174]

Allen's allies mobilized in December 1775, when the representatives of several towns in Berkshire County held conventions to protest the reopening of local courts by judges they had not nominated. Under the charter, the power to nominate and appoint judges belonged to the governor and council, but the Berkshire dissenters called the charter "defective" and illegitimate.[175] At county conventions, Allen and others demanded that the general assembly petition the Continental Congress for new constitutional instructions or allow "a better Constitution" to be made and "adopted by the people."[176] Their opponents,

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[171] Petition of the Town of Pittsfield, *supra* note 165.

[172] Declaration of the Town of Pittsfield, *supra* note 168.

[173] *Id.*

[174] *Id.*

[175] Petition of the Town of Pittsfield, *supra* note 165.

[176] *Id.*

meanwhile, accused Allen of rousing "the prejudice of the people against the present Constitution of this Colony" so that the dissenters could avoid repaying outstanding debts after the courts opened.[177]

The general assembly responded to these protests in January 1776, ordering each court and town meeting in the province to read a message drafted by John Adams. The message explained that the government had an obligation to act "according to the Principles, Forms and Proportions stated by the Constitution, and established by the original Compact," and that the entire point of the war against Britain was to defend "our Constitution by charter."[178] This message did not work: in February, Allen argued that "he had rather be without any Form of Government than to Submit to this Constitution."[179] And in March, county conventions in Berkshire County and nearby Hampshire County voted that it was "inexpedient and improper" for the courts there to reopen until a new constitution was formed.[180]

Meanwhile, on March 17, 1776, in the eastern half of the province, the Continental Army under George Washington's command forced Thomas Gage to evacuate his regiments from Boston, marking the end of fighting in Massachusetts. Weeks later, John Adams wrote the president of the general assembly that "it is now the precise Point of Time for our Council and House of Representatives, either to proceed to make such Alterations in our Constitution as they may judge proper, or to Send a Petition to Philadelphia for the

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[177] Petition of John Ashley et al. to the General Court of Mass. (Apr. 12, 1776), *in* 5 AMERICAN ARCHIVES 1275–76 (Peter Force ed., M. St. Clair Clark, 1843).

[178] 51-II JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 189–92 (1983) (Jan. 23, 1776).

[179] Affidavit of Elijah Brown, *supra* note 169.

[180] Declaration of the Town of Chesterfield (Mar. 4, 1776), *in* MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 165, at 22–23.

Consent of Congress to do it."[181] But the general assembly waited. On July 18, the assembly accepted and proclaimed 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."[182] And on September 17, the general assembly finally issued a proposal to the towns. The proposal asked the towns for their permission to enact a new "Constitution and Form of Government for this State" that would be "made public, for the inspection and perusal of the inhabitants, before the ratification thereof by the Assembly."[183]

The vast majority of the towns that responded—74 to 23—approved the general assembly's proposal.[184] As the residents of Lexington explained, "our former Constitution (the Charter) is at an End, and a New Constitution of Government, as soon as may be is absolutely Necessary."[185] But many of the towns that objected, including Boston, echoed the arguments of Thomas Allen, noting that "the People have some higher Privileges, than A bare Inspection & Perusal of the Constitution under which they are to live."[186] The town meeting of Concord best exemplified the logical conclusion of Allen's arguments. "[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," the Concord meeting wrote. But "a Constitution

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[181] Letter from John Adams to James Warren (Apr. 22, 1776), *in* 4 PAPERS OF JOHN ADAMS, *supra* note 1, at 86.

[182] U.S. DECL. OF INDEPENDENCE (1776).

[183] 52-I JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 110 (1985) (Sep. 17, 1776).

[184] Samuel Eliot Morison, *Massachusetts Constitutional Conventions*, 50 PROCS. OF THE MASS. HIST SOC'Y 241, 242 (1917).

[185] Return of the Town of Lexington, *supra* note 17.

[186] 18 BOSTON TOWN RECORDS *supra* note 44, at 247–48 (Oct. 11, 1776).

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."[187] 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."[188] Even the town meeting of Lexington, whose residents were enthusiastic about a new constitution, cautioned that the current general assembly was the wrong institution to create one. The assembly's members "were not elected for the Purpose of agreeing upon and enacting a Constitution of Government, for this State," the meeting resolved. Therefore the assembly's "proposing themselves to the People, and asking their Consent as Candidates for this Service, appears to Us to be a Clog to that Freedom of Election which ought always to be exercised, by a free People, in Matters of Importance, more especially in an affair of such lasting Concernment as this."[189]

When the committee in charge of tallying these returns met in January 1777, they reported that most towns favored a new constitution, but they wanted the constitution to be "framed by themselves."[190] The committee therefore called for new elections for a constitutional convention. But the house of representatives rejected this plan. And on June 17, 1777, the general assembly resolved itself into a "Constitutional Convention."[191]

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[187] Return of the Town of Concord (Oct. 22, 1776) (Mass. Archives, vol. 156, p. 182).

[188] *Id.*

[189] Return of the Town of Lexington, *supra* note 17.

[190] Morison, *supra* note 184, at 242–43.

[191] 53-I JOURNAL OF THE HOUSE OF REPRESENTATIVES OF MASS. 28 (1987) (Jun. 17, 1777).

John Adams did not participate in this convention—instead, he traveled to Paris as one of three ambassadors from the United States to France. In his absence, the convention deliberated for eight months, until February 28, 1778, when it approved a new "Constitution and Form of Government for the State of Massachusetts Bay."[192] This constitution was published in pamphlet form for the towns' "Inspection and Perusal," and its dozens of articles proposed a government very similar to the Massachusetts Bay Company. For example, it created a "General Court" composed of "a Senate and House of Representatives"; an elected "Governor and Lieutenant-Governor" who were part of the Senate; and a judiciary appointed by the General Court.[193] It also imposed steep property qualifications on who could vote, excluding "Negroes, Indians and molattoes" entirely.[194]

Under the convention's proposal, the constitution would be ratified if two-thirds of the property-owning adult male population voted for it. But the voters overwhelmingly rejected it: 9,972 to 2,083.[195] Many objected to how the judiciary was appointed, the property qualifications on voting, the color clause, and the fact that the members of the Constitutional Convention were not elected for that purpose. The most famous of the responses, written by Theophilus Parsons of Essex County, objected that the constitution lacked "a bill of rights, clearly ascertaining and defining . . . the class of unalienable rights [over which] the supreme power hath no controul."[196] Parsons demanded that the

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[192] A CONSTITUTION AND FORM OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY (Feb. 28, 1778), *in* 9 OLD SOUTH LEAFLETS 148 (Chester A. McLain ed., 1917).

[193] *Id.* at 151–52.

[194] *Id.* at 152–53.

[195] MORISON, *supra* note 102, at 16.

[196] THEOPHILUS PARSONS, THE ESSEX RESULT, *in* THEOPHILUS PARSONS, JR., MEMOIR OF THEOPHILUS PARSONS 359–402 (Boston, Ticknor & Fields, 1859).

constitution clearly define "the rights of conscience, and the security of person and property[, that] each member of the State is entitled to." 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."[197]

One group that was disappointed by the rejection of the constitution were Thomas Allen's dissidents in the western half of the state, which continued to protest the reopening of the courts there until a new constitution was adopted. In Berkshire County, a convention of delegates argued that it would create "a dangerous pre[ce]dent to admit or consent to the operation of Law until there is a Constitution or form of Government with a Bill of Rights explicitly approved of and firmly established by a Majority of the Freemen of this State."[198] In Hampshire County, a convention agreed "that no Select Body of men can Lawfully Legislate for them, unless the People have by Some mode or form Delagated their Power to them as their Representatives" with a constitution that expressed the "Proper Bounds set to the Legislative, and Executive Authority."[199] Both counties rejected the legitimacy of the charter government. "[S]ince the Declaration of Independence," the Berkshire convention resolved, "there has been no social Compact or fundamental Constitution formed and adopted by the great Majority of the People of this State[. T]herefore the Basis and foundation of the present mode of Government is what we dislike."[200]

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[197] *Id.*

[198] *See* MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 165, at 110–11.

[199] *Id.* at 109.

[200] *Id.* at 110–11.

Chastened by the response to the 1778 constitution but also worried about anarchy in the western counties, on February 19, 1779, the house of representatives asked the towns to vote on a new constitutional convention elected for that particular purpose.[201] A "large majority of the inhabitants of such Towns" agreed, and the general assembly called for a convention to meet on September 1, 1779. The timing was fortuitous, as John Adams returned from Paris a month earlier, on August 2. His hometown of Braintree elected him to be one of the 312 members of the Constitutional Convention in Cambridge.

The Constitutional Convention attracted some of the best-known and most well-respected leaders in the state, from Theophilus Parsons and Caleb Strong to John Hancock and Benjamin Lincoln. They began their work enthusiastically, quickly resolving "That the government to be framed by this convention shall be a FREE REPUBLIC," and that it was the "essence of a free republic, that the people be governed by FIXED LAWS OF THEIR OWN MAKING."[202] Within a week, the Convention had organized itself, adopted rules and orders, and elected a committee of thirty to prepare a draft document. But this committee of thirty soon delegated its duties to a subcommittee of three: James Bowdoin, John Adams, and Samuel Adams. And this subcommittee of three soon delegated most of its responsibilities to a sub-subcommittee of one: John Adams.[203]

Between September 7 and October 28, 1779, John Adams mostly wrote the entire draft constitution by himself. After submitting the draft for the Convention's approval, he then left for Paris to negotiate a peace treaty with Great Britain.[204] In his absence, the rest

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[201] JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 189 (Boston, Dutton & Wentworth, 1832).

[202] *Id.* at 24.

[203] MASSACHUSETTS, COLONY TO COMMONWEALTH, *supra* note 165, at 110–11.

[204] MORISON, *supra* note 102, at 20.

of the Convention debated Adams's draft, but in an unusually cold winter, only a few dozen people attended the Convention's meetings. On March 2, 1780, the Convention ultimately adopted "A Constitution or Form of Government for the Commonwealth of Massachusetts" that largely preserved the draft submitted by Adams.[205]

The Constitution of 1780 addressed several of the problems raised by the towns in 1778: it created a bicameral legislature, an independent executive, a judiciary that served for life, and, most importantly, began with a "Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts."[206] The draft also reduced the property qualifications for the House while maintaining them for the Senate on the theory that "the House of Representatives is intended as the Representative of the Persons and the Senate, of the property of the Common Wealth."[207] The rest of the document, in the words of the Convention, attempted to give the government "Power to exert itself" while adding "*checks* . . . to every Branch of Power as maybe sufficient to prevent its becoming formidable and injurious to the Common wealth."[208] In short, like the charter of 1691, the constitution "laid a good Foundation" for the government while imposing durable limits on its power.[209]

The Convention gave the towns until June 13, 1780, to return their votes. Most towns, like Boston, voted on each article, "Paragraph by Paragraph," before proposing additional amendments.[210] About 16,000 people out of a total population of 363,000 voted.[211]

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[205] *Id.*

[206] JOURNAL OF THE CONVENTION, *supra* note 201, at 223.

[207] *Id.* at 218.

[208] *Id.*

[209] *Id.*

[210] 26 BOSTON TOWN RECORDS, *supra* note 44, at 125 (May 3, 1780).

[211] MORISON, *supra* note 102, at 21–22.

After adopting a tabulating system that today might be called "political jugglery," the Convention processed the returns and determined that every article in the document received a majority of support. The Constitution for the new "Commonwealth" went into effect on October 25, 1780.

III

The Constitution of 1780 was very different from the corporate charter of the Massachusetts Bay Company that preceded it by 151 years. That charter had been drafted by an English monarch, as an exercise of his prerogative, to organize a trading company to govern one of his dominions across the Atlantic Ocean. Only a few copies of the charter were made; no one who owned a share of the company had any input; and the charter could not be amended without sanction from the crown. In addition, as the company's leaders recognized, if a single member violated one of the charter's terms, the crown could vacate the charter and redistribute their possessions to an entirely different group of people. The charter was just that—a corporate charter, a gift of liberties from the crown to a group of his subjects.

But in more ways than one, the Constitution of 1780 was surprisingly similar to the Massachusetts Bay Company's charter. Both documents gave anyone with an ownership stake in the enterprise the ability to negotiate its terms at its inception. Afterward, each document became a foundational set of instructions for how Massachusetts's government was to operate, as well as a written limit on the government's powers that the government could not unilaterally amend. Each document, in short, organized a "commonwealth": a "body-politic" formed "by a voluntary association of individuals." Rather than allow everyone in the commonwealth to weigh in on all decisions, the documents created representative assemblies that had written responsibilities to the general public.

The similarities between the "Constitution" and the charter were more than coincidental. From a very early period, Massachusetts residents thought of their charter as the written document that "constituted," or established, its colonial government and its powers. They thought of their "Charter Constitution" not only in corporate, but also in political terms. Even after the charter was vacated in 1686 and replaced by a noncorporate charter in 1691, the new charter did not molt its corporate lineage. Thomas Hutchinson, John Adams, and other advocates on both sides of the revolutionary debates of the 1760s and 1770s continued to describe their charter in corporate terms. From Hutchinson's perspective, the charter was something like the charter of the British East India Company or 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, rules that were supreme in their jurisdiction so long as both sides of the contract respected its terms.

In the years immediately following the convention of 1779–1780, people continued to think of written constitutions as corporate charters. In 1785, for example, one of America's best-known lawyers, James Wilson of Pennsylvania, asked aloud what was the "constitution of the United States"? 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 the Commonwealth of Massachusetts, were nothing more than corporations. To him, "States [we]re corporations

or bodies politick of the most important and dignified kind," with the powers to make bylaws, govern territory, and even charter new corporations.[212]

Wilson took this view with him to the constitutional convention of 1787, during which delegates from across America debated what relationship a new federal government would have with the states. Once again, Wilson argued that the "States are now subordinate corporations or Societies," by which he meant they governed territory relative to the United States government in the same way that the City of London governed territory relative to Parliament.[213] Wilson and other proponents of a strong federal government—particularly Alexander Hamilton, Gouverneur Morris, and James Madison—spent much of the convention attempting to reduce the states to this "corporate" role. States are "Subordinate authorities" and "corporations for local purposes," Hamilton argued early in the debate over the composition of the Senate. "Even with corporate rights, the states will be dangerous to the national government, and ought to be extinguished, new modified, or reduced to a smaller scale."[214] Morris agreed, calling states "nothing more than colonial corporations" whose "Charters & Constitutions" ought to be thrown "into the fire."[215] Madison was sympathetic to these views but less worried that preserving states' constitutions, laws, and corporate status would infringe on the federal government. "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

[212] 1 COLLECTED WORKS OF JAMES WILSON 67 (Mark David Hall & Kermit L. Hall eds., 2007).

[213] 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 22, at 331 (Jun. 19, 1787).

[214] *Id.* at 328 (Jun. 19, 1787).

[215] *Id.* at 552 (Jul. 7, 1787).

argued. "The states ought to be placed under control of the general government—at least as much so they formerly were under the king and the British Parliament."[216]

Immediately after the Philadelphia Convention, James Wilson continued to defend the draft Constitution in his home state of Pennsylvania. One of his speeches, delivered in the yard of the Pennsylvania State House, was reprinted in 34 newspapers as "the most famous, to some the most notorious, federalist statement of the time."[217] He responded to the accusation that "the federal constitution [i]s not only calculated, but designedly framed, to reduce the state governments to mere corporations."[218] Rather than deny this accusation, he reframed it: "Those who have employed the term corporation upon this occasion, are not perhaps aware of its extent. In common parlance, indeed, it is generally applied to petty associations for the ease and conveniency of a few individuals; but in its enlarged sense, it will comprehend the government of Pennsylvania, the existing union of the states, and even this projected system is nothing more than a formal act of incorporation."[219]

In 1793, when the Supreme Court of the United States asked whether the state of Georgia was a sovereign entitled to legal immunity or a corporation that could be sued, members of the Court copied Wilson's speech and pasted it into their opinions. "[A]ll States whatever are corporations or bodies politic," Justice William Cushing of Massachusetts wrote in his opinion.[220] He added that constitutions, like corporate charters, "mark[] the

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[216] *Id.* at 471 (Jun. 29, 1787).

[217] BAILYN, *supra* note 5, at 328.

[218] 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 212, at 174 (Oct. 6, 1787).

[219] *Id.*

[220] Chisholm v. Georgia, 2 U.S. 419, 468 (1793) (Cushing, J., *seriatim*).

boundary of powers."[221] Although Justice James Iredell of North Carolina disagreed with Justice Cushing's holding in the case, he agreed that not only "each State singly, but even the United States may without impropriety be termed 'corporations.'"[222] Later, when Chief Justice John Marshall of Virginia joined the Court, he too wrote that "[t]he United States of America will be admitted to be a corporation."[223] And in Massachusetts, Chief Justice Isaac Parker defined all "bodies politic and corporate" as "metaphysical persons . . . created by various acts . . . ; all of them enjoying the power which is expressly bestowed upon them; and perhaps, in all instances where the act is silent, possessing, by necessary implication, the authority which is requisite to execute the purposes of their creation."[224]

But the legacy of the Massachusetts Bay Company was not just that American constitutions were understood as corporate charters.[225] In addition, the charters for new corporations were thought of as miniature constitutions. And this was nowhere more evident than with the prototypical corporation of the eighteenth century: the municipal corporation, or city.

Municipal corporations were not only the dominant form of corporation in eighteenth-century America, but they were often the only form of corporation. Under longstanding British law, it was illegal for one corporation to charter another corporation without express permission from the crown, which meant that the Massachusetts Bay Company could not legally charter any other corporations for its entire existence. In 1650,

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[221] *Id.*

[222] *Id.* at 447–48 (Iredell, J., *seriatim*).

[223] Dixon v. United States, 7 F. Cas. 761, 763 (C.C.D. Va. 1811).

[224] Inhabitants of Fourth Sch. Dist. in Rumford v. Wood, 13 Mass. 193, 198–99 (1816).

[225] For more on this point, *see* David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418 (2017).

during the English Civil War, the company tried to issue a charter for Harvard College on the theory that the crown no longer existed to give or withhold its permission. But as soon as King Charles II was restored to the throne, the crown treated Harvard as an illegitimate corporation and evidence of Massachusetts's inclination toward independence.

The charter of 1691 legally solved this problem of colonial incorporation because the crown's governor had to assent before any bill could become a law and the crown's privy council had the option of disallowing any law. Accordingly, one of the Province of Massachusetts Bay's first acts in 1692 was to pass An Act for Incorporating of Harvard College, at Cambridge, New England. But the privy council disallowed this law—not because it created a corporation, but rather because it did not allow the king to appoint visitors to regulate the school.[226] This process repeated itself in 1697, when the privy council again disallowed an attempt to incorporate Harvard.[227]

The provincial government was more successful with creating municipal corporations: small towns like Chelsea, Provincetown, Stockbridge, Waltham, Acton, Leominster, and Methuen. Each act creating one of these towns allowed the residents to "be incorporated into a township" with "all the powers, privileges and immunities that the inhabitants of the other towns within this province are or by law ought to be vested with."[228] Between 1692 and 1768, the province incorporated 135 of these towns, along with 46 "districts" that were legally identical except they lacked "the priviledge and duty of sending a representative to the general assembly."[229] In conversation, lawyers and activists

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[226] 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 38 (Boston, Wright & Potter, 1869).

[227] *Id.* at 288.

[228] *E.g.*, 2 *id.* at 991 (Jun. 22, 1739).

[229] 4 *id.* at 468 (Jul. 3, 1761).

often referred to the towns as "the corporations," as in, the Commonwealth of Massachusetts was "a state already divided into nearly three hundred Corporations."[230] And this was by no means unique to Massachusetts: Thomas Jefferson was appointed to the Second Continental Congress by "a Convention of Delegates for the Counties and Corporations in the Colony of Virginia."[231]

Unlike English municipal corporations, the Massachusetts towns did not have individualized charters that were distinct from the legislation that incorporated them. Instead, the provincial government passed general laws that affected all towns: for example, An Act to Enable Towns, Villages and Proprietors in Common and Undivided Lands, &c., To Sue and Be Sued.[232]

The few non-municipal corporations the provincial legislature incorporated also lacked standalone corporate charters. In 1754, for instance, the province successfully chartered its first legal, nonmunicipal corporation: The Marine Society at Boston in New England, a sort of insurance company for Boston sailors. The act that created the corporation looked like a corporate charter. It gave the corporation a purpose (including to "Make the navigation more safe, and to relieve one another and their families in poverty").[233] It gave the corporation certain powers (including the "power of making by-laws, for the preservation and advancement of said body, not repugnant to the laws of

[230] JOURNAL OF THE CONVENTION, *supra* note 201, at 218.

[231] 2 JOURNAL OF THE CONTINENTAL CONGRESS, *supra* note 96, at 101 (Jun. 21, 1775).

[232] 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY, *supra* note 226, at 182–83 (Oct. 25, 1694).

[233] 3 *id.* at 708–09 (Jan. 25, 1754).

government").[234] And it gave the corporation a common seal and perpetual succession.[235] But unlike in Great Britain, this "charter" was ordinary legislation, not a document signed by the crown's agent.

By 1772, soon after Thomas Hutchinson took over as governor, the province had only nine nonmunicipal corporations: four marine societies at Boston, Marblehead, Newburyport, and Salem; two schools, Phillips Academy at Andover and the Grammar School in Ipswich; two charities, the Boston Overseers of the Poor and the Massachusetts Charitable Society; and one infrastructure corporation, the Proprietors of Boston Pier. (A few other corporations, like the Society for Propagating Christian Knowledge Among the Indians, had been disallowed by the privy council.)[236] Even then, Hutchinson was unsure of whether the province even had the power to issue these charters by legislation, preferring instead to draft a written charter on behalf of the crown's prerogative. When Hutchinson asked the privy council "[i]f there is nothing in the Constitution to abridge or restrain the Prerogative," the privy council reported that the governor's power came not from the crown but from the 1691 charter, and the charter alone could decide who could create corporations.[237] The privy council ultimately concluded "that the power to incorporate, not by Patent but by Act of Legislature," was given to the general assembly "by the Principles and Provisions of the said Charter."[238] This was evident not only because the charter granted "full powers of Legislature to the General Court, of which the power to incorporate

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[234] *Id.*

[235] *Id.*

[236] 4 *id.* at 520.

[237] 5 *id.* at 190–91 (May 8, 1772).

[238] *Id.* at 191 (Apr. 19, 1774).

is a part," but also because this power had long been "exercised frequently, for the constituting of Townships."[239]

The Massachusetts Constitution of 1780 largely codified this existing situation for the new Commonwealth of Massachusetts to continue. Several articles functioned as charters for the "corporate towns" throughout the commonwealth, setting the rules for how many representatives each town could elect to the House of Representatives; requiring certain municipal officers, including "Selectmen" and the "Town Clerk"; and explaining how town meetings would generally proceed in certain circumstances.[240] As for the difficult-to-incorporate Harvard College, the constitution could not have been more explicit. Following "Chapter I. The Legislative Power" and "Chapter II. Executive Power," the fifth chapter, "The University at Cambridge," literally incorporated the university. "Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty six, laid the foundation of Harvard-College," the chapter began, "It is declared, that the PRESIDENT AND FELLOWS OF HARVARD-COLEGE, in their corporate capacity . . . shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have, or are entitled to have . . . forever."[241]

These provisions regarding the corporations in Massachusetts proved to be some of the most controversial as towns considered the constitution over the summer of 1780. The town of Petersham, for example, wrote that "We think it too much to give the Corporation of the university at Cambridge a Section in Our Constitution."[242] It continued: "we are of the

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[239] *Id.*

[240] JOURNAL OF THE CONVENTION, *supra* note 201, at 199.

[241] *Id.* at 213–14.

[242] Return of the Town of Petersham (May 29, 1780) (Mass. Archives, vol. 277, p. 104).

Mind that it might with Safety be left to the Care of the Legislature and that it may be possible that the Legislature in time may find it Necessary to Curtail that Rich and Growing Corporation Least it should Endanger the Liberties of the Commonwealth."[243] The town of Middleborough agreed that the privileges of the corporation needed to be audited—at least once in a while.[244] The town of Bellingham demanded this audit immediately, asking for "all the Gifts and Grants of the Generall Courts of this State . . . to and for said University," as well as "the Annual Income to and for said university, and how the Same is annually Expended."[245] The town of Mendon simply wrote that "we judge that if our rights and Privledges are Secured to us by this Constitution the same securs them and their privileges."[246]

Other towns objected to the rules the constitution laid out for municipal corporations, which permitted every "corporate town" to elect at least one representative to the general assembly, and allowed larger towns to elect an additional representative for every 250 male taxpayers or so who lived in the town. Residents of large towns, like Boston or Roxbury, argued that this rule benefitted residents of very small towns, and that a better rule would tie all representation to population. "The admission of small Corporations to send a Representative to the General Assembly we think inconsistent with the fundamental principle laid down in the Constitution, viz., that Representation ought to be *founded on the principle of equality*," the town meeting of Roxbury declared.[247] "Such a Representation in

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[243] *Id.*

[244] Return of the Town of Middleborough (May 1780) (Mass. Archives, vol. 277, p. 40).

[245] Return of the Town of Bellingham (Jun. 5, 1780) (Mass. Archives, vol. 277, p. 60).

[246] Return of the Town of Mendon (Jun. 5, 1780) (Mass. Archives, vol. 277, p. 97).

[247] Return of the Town of Roxbury (May 29, 1780) (Mass. Archives, vol. 277, p. 75).

the future, we apprehend may work great Mischiefs by giving the *Minority of People, the Majority of Power and Influence*."[248]

But the residents of small towns, like Lincoln, objected that all towns, big and small, should be allowed to send only one representative. "This State is Constituted of a great number of Distinct and very unequal Corporations," Lincoln's residents wrote. Those "Corporations are the Immediate Constituant part of the State and the Individuals are only the Remote parts in many respects."[249] In other words, Lincoln's residents were arguing that the relevant unit for citizenship in Massachusetts was not the individual, but the corporate town itself. But the constitution allowed multiple representatives from the same town to team up "under an undue bias in favor of the Corporation he Represents . . . till they over ballance all the other[s and] Compleately Tyraniz over all the rest."[250] Lincoln therefore thought that the constitution needed to be amended behind the principle of "corporate equality."[251]

Lincoln's amendments did not come to pass. But the debates over the 1780 constitution made clear that residents were worried about special privileges that were granted to individual corporations. Indeed, one of the articles in the Declaration of Rights stated that "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public."[252] And the way

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[248] *Id.*

[249] Return of the Town of Lincoln (Jun. 6, 1780) (Mass. Archives, vol. 277, p. 17).

[250] *Id.*

[251] *Id.*

[252] JOURNAL OF THE CONVENTION, *supra* note 201, at 194.

residents immediately enforced this article was through their evaluations of corporate charters.

This sort of enforcement began the first few years of the 1780s, as the Massachusetts legislature began chartering entire new fields of corporation, from the Massachusetts Medical Society in 1781 to the Massachusetts Bank in 1784.[253] In keeping with the general skepticism of giving privileges to new corporations, the laws creating these corporations explained the public purpose behind the corporation as well as the ways in which the legislature was going to ensure that the corporation stuck by that purpose. The Massachusetts Bank is a case in point. The bank's origins began on the last day of December, 1781, when the Congress of the United States incorporated the Bank of North America to administer the public debt relating to the war. This bank was immediately successful; as Robert Livingston wrote John Adams in 1782, "Nothing can be more pleasing after the Chaos into which our Affairs were plunged, than the order which begins now to be established in every department."[254] It did not take a group of Boston merchants long to realize that "well regulated Banks" in Massachusetts could be "highly useful to Society, as they promote Punctuality in the Performance of Contracts, increase the Medium of Trade, facilitate the Payment of Taxes, prevent the Exportation of, and furnish a safe Deposit of Cashe, and in the way of Discount, render easy and expeditious the anticipation of Funds at the Expense only of common interest."[255] Accordingly, this group petitioned the legislature for a charter to begin its first bank in 1784. Weeks later, the legislature chartered the bank,

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[253] 1 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 115–16 (Boston, Manning & Loring, 1801).

[254] Letter from Robert Livingston to John Adams (Mar. 5, 1782), *in* 12 PAPERS OF JOHN ADAMS, *supra* note 1, at 297–98.

[255] PROPOSALS FOR A BANK (Boston, 1782).

resolving that it "will probably be of great public utility" and "particularly beneficial to the trading part of the community."[256] And, as a check, the legislature also required that any person "specifically appointed by the Legislature of this State, for that purpose, shall have a right to examine into the affairs of the bank, and shall at all times have access to the bank books."[257] Considered in context, the charter—with its declaration of public purpose and its checks on the bank's power—looked like Thomas Allen's definition of a "fundamental Constitution" for the bank.

This equation of a constitution with a corporate charter was made literally with the municipal corporation of Boston later that year, after residents there petitioned the town to adopt a new charter that would convert the town into a "city" form of government. For its first century-and-a-half of existence, from 1630 to 1784, Boston was a "town" in the sense that all municipal decisions were made by a town meeting. The town could appoint certain officers, like selectmen, but the selectmen could not spend any money unless a town meeting of dozens of residents appropriated the cash. Boston's town meeting was highly influential during the 1760s and 1770s, as it adopted declarations opposing parliamentary taxation and demanding that the town's representatives in the general assembly defend their "Civil Constitution."[258] But in the calmer days after the revolution, many residents argued that it was time to replace the town meetings with the representative government of "an Incorporated City," one that had an annually elected mayor and city council.[259]

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[256] 1 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 253, at 115–16.

[257] *Id.*

[258] 16 BOSTON TOWN RECORDS, *supra* note 44, at 296 (Jul. 4, 1769).

[259] 31 BOSTON TOWN RECORDS, *supra* note 44, at 25 (May 11, 1784).

At first, in May 1784, the proponents of incorporating Boston into a city emphasized "the various inconveniences that now arise under the present administration of the town constitution."[260] The town typically held one meeting every few weeks, and relatively few residents attended any or most town meetings. The consequence was that most people "le[ft] the management of their ALL, to a few that have leisure to attend."[261] With a city government, by contrast, the new corporation would meet only three times a year, and the mayor and city councilors would be "accountable annually for their conduct, and they would have every excitement to induce them to discharge their trust with fidelity."[262] Acquiring a new corporate charter, in other words, would introduce a form of representative government along the lines of the state constitution.

But opponents of incorporating Boston into a city, led by Samuel Adams, were terrified of a plan that "might in its consequences be instrumental to the introduction of an aristocracy"—the worst government of all.[263] They understood the term "corporation" not in terms of representativeness, but in terms of how it would give a few officers new titles and privileges that the rest of the community could not share. Moreover, the town government "had the experience of above a century to recommend it," and the town meetings had been vital for the recent revolution.[264] In June 1784, a highly attended town meeting voted to

[260] *Boston*, MASS. CENTINEL, May 15, 1784, at 3.

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

defeat a proposal to "*alter its Constitution of Government*" by being "incorporated into a City."[265]

Proponents of incorporation tried again in October 1785, this time embracing language and terminology from the revolution. One of the principles behind the revolution was that it was impermissible to tax a person without his "Consent in person or by proxy." With the town meetings, however, "the taxes are almost always voted at an adjournment of an adjournment, when the meetings are thin," and populated by the few people with time on their hands.[266] As a consequence, most people in Boston were taxed by people whom they did not elect, and who had no responsibility to represent the general public. "In a City," by contrast, "the taxes will be assessed by the Corporation, men picked from every ward in the town, and who feel the weight themselves."[267] With an "entire new constitution"—an individualized charter for Boston—the residents could hold their leaders "ACCOUNTABLE FOR THEIR CONDUCT" with annual elections, clearly understood bylaws, and officers who must every year settle their accounts.[268]

Although this pitch was more successful than the first attempt, the town meeting once again rejected any proposal to fix "the *pretended defects* of the present *Constitution* of this town."[269] One newspaper columnist who went by the name of "Old Whackum" called the proponents of incorporation no better than Thomas Hutchinson or "the pimping, misrepresenting spy, *Edward Randolph*," who believed that a city government would

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[265] *Boston*, INDEPENDENT LEDGER, Jun. 21, 1784, at 3.

[266] *Incorporation*, AMERICAN HERALD, Nov. 7, 1785, at 2.

[267] *Id.*

[268] *Id.*

[269] Old Whackum, *Incorporation*, AMERICAN HERALD, Nov. 28, 1785, at 3.

prevent mobs from dominating the "better sort" of people.[270] The columnist argued that the "better sort" wished to replace Boston's "decedent, fair, plan, substantial, solid fabric" with a "showy, gorgeous, *lordly* dome of *Corporation with City Privileges*," in which "monies are raised upon the *whole body of the people* by a *few* who are not elected by the voice of all that are compelled to pay."[271] But, "Had there been no publick debates in *Town Meeting*, the true knowledge of the unalienable rights and privileges of the people would not have been so universally disseminated, nor so publicly known."[272] Other writers echoed Old Whackum's argument that incorporation would put "the power the inhabitants now possess into the hands of a few."[273]

The next attempt for incorporating Boston occurred nearly a decade later, in 1792. This time, John Quincy Adams, the son of John Adams, joined the committee to argue in favor of replacing Boston's town meetings with a chartered, corporate government. Quincy Adams was motivated, in part, by jealousy of the other corporate cities throughout New England. Visiting New Haven, Connecticut, in 1785, Quincy Adams wrote to his sister Abigail that New Haven was "one of the Capitals of Connecticut, and was about 18 months ago made a City." With a tinge of disappointment in his voice, he noted that "five towns, Hartford, New-Haven, New London, Norwich, and Middleton, were form'd into Corporations, so that this State has five Cities, while poor Massachusetts has not one, for there they could not form a corporation even at Boston."[274]

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[270] Old Whackum, *Incorporation Matters*, MASS. CENTINEL, Oct. 26, 1785, at 2.

[271] Old Whackum, *supra* note 269, at 3.

[272] Old Whackum, *supra* note 270, at 2.

[273] *On Corporation*, BOS. GAZETTE, Nov. 28, 1785, at 2.

[274] Letter from John Quincy Adams to Abigail Adams 2d (Aug. 18, 1785), *in* 6 ADAMS FAMILY CORRESPONDENCE 251–56 (Richard Alan Ryerson ed., 1993).

The report Quincy Adams's committee drafted in 1792 was "predicated on the principles of the Federal and State Constitutions—a *government by Representation*—with a well-regulated "Town-Council, which was to exercise the power of enacting by-laws" after holding themselves accountable to the people and being "chosen annually" by them.[275] Quincy Adams was confident that his committee connected municipal incorporation with written constitutionalism "with more popular eloquence than I ever saw exhibited upon any other occasion."[276]

But the pro-incorporation crowd was once again disappointed. As Quincy Adams wrote, "seven hundred men, who looked as if they had been collected from all the Jails on the continent, . . . outvoted by their numbers all the combined weight and influence of Wealth of Abilities and of Integrity, of the whole Town."[277] The episode confirmed Quincy Adams's "abhorrence and contempt of simple democracy as Government."[278] Afterward, supporters of incorporation lamented that "A man who would call this a *link in* the great *scale of aristocracy*, must suppose, that the government of the United States, with those of all the States in the Union, form the great scale, and that all *America* are slaves, and under an *aristocratical government*."[279] These proponents could not understand how the majority of the town missed that giving Boston a charter was "on the same principle" as "All the

[275] *Town Police*, COLUMBIAN CENTINEL, Jan. 21, 1792, at 151.

[276] Letter from John Quincy Adams to Thomas Boylston Adams (Feb. 1, 1792), *in* 9 ADAMS FAMILY CORRESPONDENCE 252–55 (Margaret A. Hogan ed., 2009).

[277] *Id.*

[278] *Id.*

[279] Town-Born Child, *Miscellany*, COLUMBIAN CENTINEL, Feb. 4, 1792, at 165.

governments in *United America*," whose constitutions regulated "a delegation of power from, and dependant upon the people."[280]

Ultimately, it was not until 1822 that a massive town meeting of over 4,800 residents voted to "approve of the alteration in the form of town government."[281] But the arguments for incorporation did not change. The official report described the representative structure of an incorporated city as "sufficiently obvious to a community, who are in the habit of considering constitutional forms and principles."[282] Upon those principles depended "the organization of the general and state governments, of all banking institutions, insurance and manufacturing companies, and generally of corporations of every kind; these are all conducted by representatives or directors who act for the joint interest under general laws."[283]

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The convergence of organizing principles between "banking institutions," municipal corporations, and "the general and state governments" lay in their common origin: all were descendants, at least in part, of the seventeenth-century Massachusetts Bay Company. That company's charter, which acquired the metaphorical attributes of a "constitution," set the standard for what a constitution would look like for generations that followed.

As John Adams recognized in his discussion with the French journalist that opened this chapter, one of the threads that connected the corporation with its descendants were works of history, like Thomas Hutchinson's *History of the Colony*. As late as the 1790s,

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[280] Friend to Good Order, *For the Centinel*, COLUMBIAN CENTINEL, Feb. 15, 1792, at 178.

[281] 37 BOSTON TOWN RECORDS, *supra* note 44, at 263 (Jan. 7, 1822).

[282] *Id.* at 255 (Jan. 2, 1822).

[283] *Id.* at 38 (Sep. 25, 1815).

people still referred to Edward Randolph and Ferdinando Gorges on a last-name basis, as villains who improperly sought to cut down the Massachusetts Bay Company in its prime. The fear that others would follow in their footsteps helped future generations recognize the importance of charters as "checks"—not only on the governments they chartered, but also on the nominally superior powers. Just as the corporate charter was a compact of sorts, the charters and constitutions that followed were also compacts between governors and governed; people and representatives. The Constitutional Corporation of the seventeenth century gave way to the Corporate Constitution of the eighteenth.

Chapter Three
Industrial Democracy, 1822–1914

The "Continental Congress of the working class" convened for the first time on June 27, 1905, in Chicago, Illinois.[1] From the outset, its members recognized how different they looked from the Philadelphia Congress of over a century earlier. For one thing, the chairman of the Chicago Congress was a "huge, one-eyed man" from Utah whom friends called "Big Bill" and whom reporters called "that big two-fisted thug."[2] For another, this new Congress contained representatives from communities who had been excluded from both the Philadelphia Congress and its Washington, D.C., successor. Women, black men, children, and recent immigrants had spent America's first hundred years building the country into an industrial powerhouse while being formally and informally barred from voting on basic decisions about their living or working conditions. From the committee rooms of the United States Congress to the boardrooms of the United States Steel Corporation, the vast majority of Americans had no voice.

The Continental Congress of the working class sought to change that. From the perspective of its chairman, William "Big Bill" Haywood, American history demonstrated that if workers wanted power in political government, they first needed power in corporate government. "The first English settlements in North America were made by such corporations as the Virginia Company and the Plymouth Company," Haywood recalled—corporations that had been controlled by the governments that granted to them rights

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[1] INDUS. WORKERS OF THE WORLD, PROCEEDINGS OF THE FIRST CONVENTION OF THE INDUSTRIAL WORKERS OF THE WORLD 1 (1905) [hereinafter FIRST IWW CONVENTION] (speech of Chairman William D. Haywood).

[2] MARY HEATON VORSE, A FOOTNOTE TO FOLLY 7–8 (1935); WILLIAM D. HAYWOOD, BILL HAYWOOD'S BOOK: THE AUTOBIOGRAPHY OF BILL HAYWOOD 251 (1929).

through their charters.[3] But after 1800, as "corporations [became] engaged in the production of iron, of lumber and of many other commodities, . . . [they] developed rapidly in both numbers and in size" until they were their own "Governments of Industry."[4] By 1905, corporations like the American Telephone & Telegraph Company or the American Woolen Company had become as important as "a state like New York, Missouri or California. Instead of controlling a definite section of the Nation's territory, it controls a branch of the Nation's industry."[5] Indeed, "the new industrial government, the corporations," now "use[d] the government at Washington as a tool to serve their ends": passing restrictive laws, issuing harsh injunctions, and mobilizing armed militias to crush all demands by the nation's disenfranchised to improve their quality of life.[6] But unlike the government at Washington, Haywood argued, the chief rulers of these industrial governments did not even pretend to govern democratically. "The workers thus live under an awful tyranny. They are ruled without their consent. The government which oppresses them is the government of the shops, the mines and the railroads. This government declares when they shall work and when they shall be idle. . . . This industrial government makes the real laws of the land."[7]

Haywood proposed that the Continental Congress democratize this industrial government. He demanded "the supervision of industry in the hands of those who do the

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[3] WILLIAM D. HAYWOOD & FRANK BOHN, INDUSTRIAL SOCIALISM 32 (1911).

[4] *Id.*

[5] *Id.* at 35.

[6] *Id.* at 39.

[7] *Id.* at 37.

work."[8] He argued that the participants could realize such a demand if they formed a democratic organization of workers that engaged in industry-wide strikes, which in turn would force corporate executives to cede decisionmaking power to their employees.[9] Such a Continental Army of workers would be capable not only of shutting down entire industries to win concessions, Haywood maintained, but it would also give workers the ability to "vote for directors to operate the industries in which they are all employed." The result would be to enfranchise black men, women, and "every boy and girl employed in a shop . . . to legislate for themselves where they are most interested in changing conditions, namely, in the place where they work."[10] The rest of the Chicago Congress agreed with Haywood's message. After a two-week convention, they chartered an organization called the Industrial Workers of the World to "build up within itself the structure of an Industrial Democracy—a Workers' Co-Operative Republic—which must finally burst the shell of capitalist government, and be the agency by which the working people will operate the industries, and appropriate the products to themselves."[11]

The Industrial Workers of the World, and its message of "Industrial Democracy," both terrified and puzzled a skeptical general public who did not believe that workers should have any role managing industrial corporations. Their skepticism was not because anyone necessarily disagreed with Haywood's history lesson: Even the most conservative writers could see that after a century of development, business corporations were no longer

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[8] FIRST IWW CONVENTION, *supra* note 1, at 2 (speech of William D. Haywood).

[9] *Id.* at 1–2.

[10] Speech by William D. Haywood (Mar. 16, 1911), *in* WILLIAM D. HAYWOOD, THE GENERAL STRIKE 1, 2–3 (1917).

[11] *The Industrial Organization of the Workers*, in FIRST IWW CONVENTION, *supra* note 1, at 7; see also *Preamble to the Constitution of the Industrial Workers of the World*, in FIRST IWW CONVENTION, *supra* note 1, at 247.

individually chartered by legislatures to be "creatures of the State, . . . guaranteed by [the State] to the public in all particulars of responsibility and management."[12] Instead, business corporations now looked like feudal "despotisms" run by identifiable individuals—Vanderbilt, Rockefeller, Morgan—who appeared to exercise more power than the legislatures "in New York, in Pennsylvania, in Maryland, in New Jersey, and not in those States alone."[13] But Haywood's critics argued that corporations should be reined in not by enfranchising workers, but by legislative oversight, regulatory commissions, aggressive prosecutions, and other traditional forms of regulation. In the words of Frederick W. Hamilton, the president of Tufts University in 1912, Haywood was calling for a form of industrial "Socialism . . . a greater danger than ever was King George III or the British Parliament to American liberties."[14]

These competing visions of how to regulate corporations came to a head in Lawrence, Massachusetts, in 1912. For nine weeks, workers affiliated with the Industrial Workers of the World shut down the largest textile mills in the world, demanding "the democratic control of industry by labor and for labor, instead of private capitalists, as at present."[15] The Lawrence strike brought national attention to the Industrial Workers, spawning Congressional hearings, think pieces in America's most-read magazines, and a federal Commission on Industrial Relations that interviewed 740 witnesses over one

[12] MASS. COMM. ON CORP. LAWS, REPORT OF THE COMMITTEE ON CORPORATION LAWS 20 (1903).

[13] CHARLES F. ADAMS, JR., & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS (Boston, James R. Osgood & Co., 1871).

[14] *Tyranny Like That of Kings*, BOS. DAILY GLOBE, Jan. 18, 1912, at 5.

[15] JUSTUS EBERT, THE TRIAL OF A NEW SOCIETY 33–34 (1913).

hundred fifty-four days of testimony.[16] The conduct of the strike itself was an example of what Big Bill Haywood meant by "industrial democracy." Workers of all skills, genders, and nationalities elected a sort of "Industrial Congress" at which delegates voted on future working conditions for Lawrence's half dozen different textile corporations.[17] As Haywood declared on the Lawrence Common after the strike concluded, it was "the first time in the history of the labor movement in America that a strike has been conducted as you have carried on this one," with virtually all textile workers in the city joining an industry-wide strike to "express themselves to the fullest as citizens of industry."[18]

The Industrial Workers' victory in Lawrence did not last long. Over the next few years, state and federal officials violently suppressed the organization, sending Haywood and other leaders into hiding, prison, or exile.[19] But its cry for industrial democracy survived, albeit in a deradicalized form. Immediately after the strike, politicians, progressive activists, and even John D. Rockefeller called for "the inauguration of democracy in industrial relations on a scale never before undertaken."[20] As progressive lawyer Louis D. Brandeis explained, industrial democracy required corporate executives to either form their own unions or recognize traditional labor unions, organized by craft. Such an organization would "create practically an industrial government—a relation between

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[16] 1 U.S. COMM'N ON INDUS. RELATIONS, FINAL REPORT AND TESTIMONY, S. DOC. NO. 64-415, at 19 (1916); HAYWOOD, *supra* note 2, at 283 ("The reason for this commission was the industrial unrest of the period: the woolen and cotton strike at Lawrence, the silk strike at Paterson, . . . etc.").

[17] WILLIAM D. HAYWOOD, ON THE CASE OF ETTOR AND GIOVANNITTI 11 (1912).

[18] Leslie H. Marcy & Frederick Sumner Boyd, *One Big Union Wins*, 10 INT'L SOCIALIST REV. 613, 628 (1912); 11 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 10,588 (testimony of William D. Haywood).

[19] *See* Interview of Mary Heaton Vorse (Apr. 13, 1957), at 4 (on file at the Lawrence History Center, Lawrence, Mass., box 3, folder 10); ELIZABETH GURLEY FLYNN, I SPEAK MY OWN PIECE: AUTOBIOGRAPHY OF "THE REBEL GIRL" 245–47 (1955); HAYWOOD, *supra* note 2, at 360–62.

[20] *A Visit—and a Return*, COLORADO FUEL & IRON CO. INDUSTRIAL BULLETIN, Jul. 31, 1918, at 3.

employer and employee where the problems as they arise from day to day, or from month to month, or from year to year, may come up for consideration and solution as they come up in our political government."[21] It would also rely on each stockholder to play a bigger role in corporate government and "see that those who represent him carry out a policy which is consistent with the public welfare."[22] Allowing workers to "participate" in corporate governance alongside stockholders and executives was a far cry from the Industrial Workers' demand for workers alone to manage the corporation. But these ideas of collective bargaining and shareholder democracy carried on through the New Deal.

This chapter's story of industrial democracy before and after the Lawrence strike arrives at a different conclusion than most histories of how corporations evolved during the "long nineteenth century," from 1789 to 1914.[23] The typical narrative is similar to the one understood by Big Bill Haywood: non-municipal corporations began the nineteenth century as "public" entities, but, thanks to a number of factors—favorable judicial rulings, general incorporation laws, economies of scale, interstate competition—they ended the century as "private" organizations "allowed to do anything that an individual may do."[24] As this story will demonstrate, Massachusetts-based corporations like the American Woolen Company and the American Telephone & Telegraph Company certainly followed this trajectory. They became so "private" that they incorporated in other states to avoid Massachusetts

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[21] 8 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 7662 (testimony of Louis D. Brandeis).

[22] *Id.* at 7660.

[23] For the definition of the long nineteenth century see ERIC HOBSBAWM, THE AGE OF EMPIRE: 1875–1914, at 6 (1987).

[24] MASS. COMM. ON CORP. LAWS, *supra* note 12, at 20. *See generally, e.g.*, WALTER LICHT, INDUSTRIALIZING AMERICA (1995); RONALD SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855 (1982); ALFRED CHANDLER, THE VISIBLE HAND (1977) DOUGLASS NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES, 1790–1860 (1966); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT (1948).

regulations that they considered "provincial and not able to handle, with entire satisfaction, big enterprises which require large sums of money and which need a broad market for the securities."[25]

But what this story shows is that "privatization" did not imply that everyone at the end of the nineteenth century understood corporations as if they were individuals. To the contrary, the thousands of wage-earners represented by the Industrial Workers of the World continued to argue that corporations were governments: the "government of the shop, the mine, and the store."[26] And, after their success in the Lawrence strike, their metaphor of industrial democracy became the mainstream metaphor by which anyone would describe the ideal corporation. Even the most private corporation, in other words, was still a government. This point has long been appreciated by labor historians and historians of corporate governance, but it is often obscured in discussions of corporate regulation.

The first part of this chapter discusses the corporate background of the American Woolen Company from the perspective of its founder, Frederick Ayer. Born in 1822, Ayer personally witnessed the evolution of industrial corporations from public to private enterprises. Over the course of his career in the patent medicine, telephone, and textile industries, Ayer saw how Massachusetts's attempt to regulate manufacturing corporations as if they were municipal corporations had the undesirable effect of pushing companies out of the state. Even as he financed the construction of the world's largest mills in the industrial city of Lawrence, he chartered his own corporation in New Jersey to avoid its being treated as a public-service enterprise.

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[25] *Calls Boston Provincial*, L.A. TIMES, Dec. 22, 1905, at 11.

[26] HAYWOOD & BOHN, *supra* note 3, at 32.

The second part discusses the origins of "industrial democracy" from the perspective of two organizers of the Lawrence strike: Big Bill Haywood and Elizabeth Gurley Flynn. The term began as an abolitionist metaphor to contrast wage labor, or "industrial Democracy," with slave labor, or a "Military Despotism." The power of the metaphor was its assumption that the structure of economic society should be the same as the structure of political society—"No nation can escape the consequences of its own first principle of politics," one abolitionist maintained.[27] By the time Haywood and Flynn became familiar with the term in the 1890s, it had become a popular metaphor among socialists and trade unionists to describe the need for employers to recognize labor unions.[28] But the term really took off after the "Continental Congress of the working class" in 1905. In pamphlets, speeches, books, and articles, the Industrial Workers of the World and allies such as Eugene V. Debs spread the gospel of "industrial democracy" as a vision for what the ideal corporation and nation would look like. "Whenever the organized workers gain partial control over the shop in which they work, we have the growth of industrial democracy," Haywood explained in 1911. "If the workers have been employed twelve hours a day and they force their employer to grant them the ten-hour day, they are passing . . . a mightier law in the interest of the working class than all the laws ever passed by Congress and the state legislatures."[29]

The third part describes the Lawrence strike, and the final part its aftermath. As Flynn later recalled, the strike was the Industrial Workers' first major opportunity to

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[27] *Speech of Rev. Theodore Parker*, The Liberator, Feb. 19, 1858, at 1; *see also The Conspiracy Charge Repeated*, CHI. PRESS & TRIBUNE, Aug. 4, 1858, at 1.

[28] *See, e.g.*, SIDNEY WEBB & BEATRICE WEBB, INDUSTRIAL DEMOCRACY (London, Longmans, Green & Co., 1897).

[29] HAYWOOD & BOHN, *supra* note 3, at 52–53.

convert tens of thousands of workers to the cause of industrial democracy: "We talked to the strikers about One Big Union, regardless of skill or lack of it, foreign-born or native-born, color, religion, or sex."[30] And as Haywood recalled, the successful strike by thousands of workers from dozens of nations was only possible because of their organization: "[T]he most significant part of that strike was that it was a democracy. The strikers handled their own affairs. . . . Though foreigners not having a franchise, most of them women, many of them children—still they had their economic power. They had their labor power."[31] Although many commentators were repulsed by a strike that they unfairly labeled as violent and anti-American, even non-socialists concluded that the only way to prevent similar strikes in the future was to make corporations more democratic for workers and shareholders.[32] Indeed, the United States Commission on Industrial Relations, convened in the wake of the Lawrence strike, issued a full-throated endorsement of "industrial democracy" in what contemporaries called the most radical report of a federal body since Reconstruction.[33] The company with which Frederick Ayer was at one point affiliated—American Telephone & Telegraph Co., or A.T.&T.—even began referring to itself in its advertisements as an "investor democracy." A.T.&T. boasted that, by virtue of its voting shares and progressive labor policies, it was "a democracy that now has more than 200,000 stockholders—a

[30] FLYNN, *supra* note 19, at 124–25.

[31] HAYWOOD, *supra* note 17, at 9–12.

[32] 1 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 19.

[33] *See* JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921, at 12–14 (1997); David Montgomery, *Industrial Democracy or Democracy in Industry? The Theory and Practice of the Labor Movement, 1870–1925*, *in* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 20 (Nelson Lictenstein & Howell John Harris eds., 1993).

partnership of the rank and file who use the telephone service and the rank and file employed in that service."[34]

After the Lawrence strike, it would still be many years before the federal and state governments began protecting workers' right to organize instead of dispatching armed soldiers to suppress it. Nevertheless, the twentieth century dawned with workers, executives, and politicians continuing to think of private corporations as if they should be democracies.

I

1822 was an important year in the history of Massachusetts corporations. On February 23, after a decades-long debate, the Massachusetts legislature granted a corporate charter to the town of Boston, making it the first "city" in the commonwealth's history.[35] That same month, the legislature chartered the Middlesex Manufacturing Company, one of the first corporations to construct textile mills on that ancient landmark announcing the last three miles before the New Hampshire border—the Merrimack River.[36] In December, a descendant of one of the first English colonists to settle that river was born in Connecticut, Frederick Ayer. Over the course of his ninety-five-year lifetime, Ayer would have a hand in erecting three of Massachusetts's largest industrial corporations.[37]

At the time of Ayer's birth, Massachusetts corporations were not very different from the towns, banks, universities, and trading companies that the crown and commonwealth

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[34] Advertisement, *Owned by Those It Serves*, THE OUTLOOK, Oct. 25, 1922, at 352.

[35] An Act Establishing the City of Boston, Feb. 23, 1822, ch. 110, 1821 Mass. Acts 734.

[36] An Act to Incorporate the Merrimack Manufacturing Company, Feb. 5, 1822, ch. 46, 1821 Mass. Acts 631; An Act to Incorporate the Middlesex Manufacturing Company, Feb. 6, 1822, ch. 53, 1821 Mass. Acts 642.

[37] *Frederick Ayer Dies in Georgia at 95*, N.Y. TIMES, Mar. 15, 1918, at 13.

had chartered throughout the seventeenth and eighteenth centuries.[38] Although corporations were emerging in previously unforeseen industries such as transportation and manufacturing, corporations were desirable in 1822 for the same reason as they had been earlier: a corporation allowed a group to conduct their business and govern themselves through a single legal entity instead of through the equivalent of a town meeting at which everyone had to sign off on decisions.[39] Corporations also typically possessed special powers of some sort, whether it be a monopoly on collecting tolls on a bridge, the privilege of maintaining a hospital in a particular geographic area, or the power of using eminent domain to construct a canal or railroad.[40] And corporations were also attractive vehicles for investment; in exchange for giving the corporation $100, a shareholder would get a vote in the enterprise and an annual $5 to $15 return in the form of dividends.

Another thing that did not change was that the Massachusetts legislature remained as skeptical as King Charles II had been that unregulated corporations would challenge its sovereignty. Like the crown, the legislature believed that corporations were "creatures of the State," and therefore should be closely scrutinized "in all particulars of responsibility and management."[41] For example, eight years after the legislature chartered the Bank of Massachusetts in 1784, critics successfully urged the legislature to pass an "Act in Addition

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[38] For a comprehensive list of the dozen or so business corporations chartered before the nineteenth century, see JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 4–30, 79–103 (1917).

[39] *See* An Act Defining the General Powers and Duties of Manufacturing Corporations, Mar. 3, 1809, ch. 65, 1808 Mass. Acts 464; OSCAR HANDLIN & MARY HANDLIN, COMMONWEALTH 107–130 (1947).

[40] *See, e.g.*, An Act to Establish the Boston and Lowell Rail Road Corporation, Jun. 5, 1830, ch. 4, 1830 Mass. Acts 494; An Act to Incorporate Certain Persons, by the Name of The Massachusetts General Hospital, Feb. 25, 1811, ch. 94, 1810 Mass. Acts 339; An Act for Incorporating Certain Persons for the Purpose of Building a Bridge over Charles River, Mar. 9, 1785, ch. 53, 1784 Mass. Acts 135.

[41] MASS. COMM. ON CORP. LAWS, *supra* note 12, at 19–20.

to" that act of incorporation, which limited the bank's powers and prohibited any single stockholder from dominating the corporation by voting more than ten shares.[42] Indeed, this skepticism of corporate privileges was enshrined in the Massachusetts Constitution of 1780, which declared that "[n]o man, nor corporation, nor association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public."[43]

At the same time, the commonwealth did not have nearly enough money to pay for all the canals, turnpikes, hospitals and other public projects it wanted to see quickly completed. Like the crown in the seventeenth century, the commonwealth held out corporate privileges as a useful inducement for its wealthy citizens to pay for and manage these projects in exchange for corporate benefits and the promise of profits.[44] At its origin, therefore, the corporation in Massachusetts was understood as an agency of the government designed to serve a social function for the state—similar to modern corporations like the Massachusetts Bay Transportation Authority or the Massachusetts Port Authority.[45]

Accordingly, although Massachusetts became a national leader in the number of corporations it chartered by 1822, it also developed some of the strictest regulations in the

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[42] An Act in Addition to an Act, Entitled, "An Act to Establish a Bank in This State & To Incorporate the Subscribes Thereto," Mar. 9, 1792, ch. 65, 1791 Mass. Acts 369. For more on anti-corporation sentiment in the first fifty years of the Commonwealth of Massachusetts, see Pauline Maier, *The Debate over Incorporations: Massachusetts in the Early Republic*, *in* MASSACHUSETTS AND THE NEW NATION 73, 95–117 (Conrad Edick Wright ed., 1992).

[43] MASS. CONST. decl. of rights, art. VI.

[44] HANDLIN & HANDLIN, *supra* note 39, at 98.

[45] Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945); *see* Act of Jun. 18, 1964, ch. 563, 1964 Mass. Acts 429 (creating "a body politic and corporate and a political subdivision of the commonwealth under the name of Massachusetts Bay Transportation Authority"); Act of Jun. 21, 1956, ch. 465, 1956 Mass. Acts 322 (creating "a body politic and corporate to be known as the Massachusetts Port Authority").

country to ensure that the leaders of those corporations worked for a set of common, statewide interests instead of for their private gain.[46] No resident could form a new corporation on his or her own; a group of people first needed to petition the state legislature to pass a statute—an act of incorporation—to charter the new company.[47] This petition had to specify the purpose for which the corporation would be formed so that others who invested in or did business with the corporation knew that the incorporators would not spend the money on their own personal projects. In later years, the petition also had to certify the value of the assets, or "capital stock," that the incorporators had already "paid in" to the enterprise.[48] This capitalization requirement eventually became the most important corporate regulation in Massachusetts, "designed primarily in the interest of creditors and secondarily in that of the stockholders, who were looked after as carefully as if they were the wards of the State when dealing in corporation matters."[49] By default, the law prohibited any corporation from incurring debts greater than the capital stock it certified to the legislature, and a corporation had to petition the legislature if it wanted to increase its capital stock past a certain figure. The idea was that if a corporation was valued at, say, $100,000, creditors could be sure that the corporation owned at least $100,000 worth of property that the creditors could draw from if the business went bankrupt.[50]

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[46] HANDLIN & HANDLIN, *supra* note 39, at 130; *see* WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICa (1996).

[47] *See, e.g.*, An Act to Incorporate the Boston Manufacturing Company, Feb. 23, 1813, ch. 92, 1812 Mass. Acts 162.

[48] *See, e.g.*, An Act Relating to Joint Stock Companies, May 15, 1851, ch. 133, 1851 Mass. Acts 633.

[49] MASS. COMM. ON CORP. LAWS, *supra* note 12, at 21.

[50] *Id.*

There were other regulations too. For example, even as other states began limiting the liability of stockholders for the liabilities of a corporation, an 1829 *American Jurist and Law* article correctly observed that it was "the standing policy of the legislature of Massachusetts to *increase* the liability of the individual stockholders in manufacturing corporations for the debts of the corporation."[51] The commonwealth's leaders considered limited liability an invitation to recklessly harm others who did business with the corporation. In addition, Massachusetts virtually ignored the Supreme Court's 1819 ruling in *Dartmouth College v. Woodward*, which held that non-municipal corporations were "private," meaning that their charters could not be amended by a legislature without the incorporators' consent.[52] Instead of surrendering its power over private corporations, the legislature simply conditioned all future charters on the incorporators' willingness to agree that "the Legislature may from time to time, upon due notice to any corporation, make further provisions, and regulations for the management of the business of the corporation, and for the government thereof, or wholly to repeal any act, or part thereof, establishing any corporation as shall be deemed expedient."[53] In other words, if you wanted to

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[51] *Manufacturing Corporations*, 2 AM. JURIST 92, 95 (1829) (emphasis added); *See* Henry N. Butler, Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges, 14 J. LEG. STUD. 129 (1985); Ronald E. Seavoy, *Laws to Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute,* 46 BUS. HIST. REV. 85, 90 (1972); W.C. Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 J. POL. ECON. 877, 880–81 (1940); Shaw Livermore, *Unlimited Liability in Early American Corporations*, 43 J. POL. ECON. 674, 677 (1935).

[52] Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 634 (1819).

[53] 1808 Mass. Acts at 466–67; *see also* An Act Concerning Corporations, Mar. 11, 1831, ch. 81, 1830 Mass. Acts 613. In Dartmouth College's charter, by contrast, "no power [was] reserved to the . . . government in any manner to alter, amend or control the charter." *Dartmouth Coll.*, 17 U.S. at 680 (Story, J., concurring). For more on the cultural and legal effects of the *Dartmouth College* decision, see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 111–14, 201–07 (1977); Morton Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1086 (1980).

incorporate in Massachusetts, you had to accept that the legislature might unilaterally modify your corporate charter.

Many corporate lawyers considered Massachusetts's regulations to be "as impolitic as they are unjust." That same *American Jurist and Law* article argued that the "obvious" tendency of Massachusetts's laws was to "drive property, industry, and talent from the place of their birth to seek refuge under milder laws."[54] But any such threats were theoretical—in the 1820s, Massachusetts chartered more corporations than almost any other state in the Union.[55] Even the *American Jurist* critics recognized that "Massachusetts will, in spite of these laws, always offer attractions for manufacturing capital superior to those of any of the surrounding states."[56] Such attractions kept the legislature busy; of the 145 acts passed in 1828–1829, over 100 created, continued, or modified a specific corporate charter.[57]

Frederick Ayer entered this corporate landscape through his older brother, James. The two boys' father, a veteran of the War of 1812, passed away when the brothers were young. While Frederick was sent to a private school in upstate New York, James was sent to live with their uncle, who was an agent for one of the newly chartered textile corporations along the Merrimack River. James became a store clerk in a local apothecary shop in the nascent town of Lowell, Massachusetts.[58]

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[54] *Manufacturing Corporations*, *supra* note 51, at 104–05; *see* Maier, *supra* note 42, at 95–107.

[55] *See generally* EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954).

[56] *Manufacturing Corporations*, *supra* note 51, at 104–05.

[57] *See generally* 1828 Mass. Acts 1–230.

[58] *See* CHAIM M. ROSENBERG, GOODS FOR SALE: PRODUCTS AND ADVERTISING IN THE MASSACHUSETTS INDUSTRIAL AGE 89–90 (2007); *Frederick Ayer Dies in Georgia at 95*, *supra* note 37, at 13.

After two friendly physicians taught James how to mix syrups of squills, spirits of nitre, and other nineteenth-century ingredients, James began calling himself a "Doctor of Medicines." Standing outside his shop, he distributed handbills advertising one such medicine he invented called "Ayer's Cherry Pectoral." He described the medicine as a miracle drink, "a scientific combination of the medicinal principles and curative virtues of the finest drugs, so united chemically, as to insure the greatest possible efficiency and uniformity of results." He claimed it could cure "coughs, colds, asthma, croup, laryngitis, whooping cough," and even "consumption."[59]

Somewhat surprisingly, James's drug became a hit. He soon began advertising in Lowell newspapers, then Boston newspapers, and finally in papers around the country. By 1850, he made enough money to purchase the drugstore and develop new cure-alls, including Ayer's Cathartic Pills (to stimulate digestion) and Ayer's Ague Cure (to cure "all malarial disorders"). Eventually he abandoned the drugstore entirely to focus on advertising and manufacturing his remedies. He quickly became a very rich man.[60]

Lowell itself underwent a similarly radical transformation during the same period. In 1820, no such town existed. To many visitors, the area was a "barren waste" on the banks of the Merrimack River with more rocks and "stunted trees" than residents.[61] But the Merrimack River was noteworthy—and not only because of its role in settling the border between the Massachusetts Bay Company and the Province of New Hampshire in the seventeenth century. More remarkable to nineteenth-century observers was the river's

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[59] ROSENBERG, *supra* note 58, at 90; *In Printer's Ink the Secret*, N.Y. TIMES, Oct. 14, 1894, at 21.

[60] *In Printer's Ink the Secret*, *supra* note 59, at 21.

[61] CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 11–12 (New York, Wilson & Co., 1842); MICHAEL CHEVALIER, SOCIETY, MANNERS AND POLITICS IN THE UNITED STATES 128 (Boston, Weeks, Jordan & Co., 1839).

current. When Henry David Thoreau visited from Concord in the 1830s, he wrote that the current "hurried along rapids, and down numerous falls" between where it "bubble[d] out of the rocks of the White Mountains above the clouds, to where it [was] lost amid the salt billows of the ocean on Plum Island beach."[62] Thoreau was not the only person who contrasted the Merrimack River with the Concord River by his home—the placid "flood" over which the "shot heard round the world" had been fired decades earlier.[63]

The Merrimack's fast-moving current attracted the attention of more than just nature enthusiasts. In 1820, a group of Boston-based associates surveyed the river and determined that it could also power textile mills. Within the span of three years, they converted the area into a capital of manufacturing. They acquired all the land bordering the river by a thirty-foot waterfall in Middlesex County; they purchased the water rights to the river downstream of the waterfall; they petitioned the legislature to charter the Middlesex Manufacturing Company and other corporations to administer the river and produce textiles from its power; and they began constructing roads, mills, factories, dormitories, and all the other features of a modern city.[64] In 1826, as the town's population grew from 200 to 2,000, the Massachusetts legislature incorporated the new Town of Lowell.[65] In 1830, as the

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[62] HENRY DAVID THOREAU, A WEEK ON THE CONCORD AND MERRIMACK RIVERS 87–88 (Cambridge, James Munroe & Co., 1849).

[63] *Id.* at 84; *see* RALPH WALDO EMERSON, *Hymn, Sung at the Completion of the Concord Monument, April 19, 1836*, *in* POEMS 250, 250 (Boston, Ticknor & Fields, 1860). For more on the geography of the region, *see* THEODORE STEINBERG, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND (1991). Steinberg begins his fantastic environmental history of the Merrimack with an extended account of Thoreau's journey. *Id.* at 1–9.

[64] ORRA L. STONE, HISTORY OF MASSACHUSETTS INDUSTRIES 7, 91–93, 730–35 (1930). For a comprehensive biography of the "Boston Associates," *see generally* ROBERT F. DALZELL, JR., ENTERPRISING ELITE: THE BOSTON ASSOCIATES AND THE WORLD THEY MADE (1987); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY (2005); Carl E. Prince & Seth Taylor, *Daniel Webster, The Boston Associates, and the U.S. Government's Role in the Industrializing Process, 1815-1830*, 2 J. EARLY REPUBLIC 283 (1982).

[65] An Act to Incorporate the Town of Lowell, Mar. 1, 1826, ch. 112, 1825 Mass. Acts 181.

town began exporting literal tons of cloth, the legislature chartered the Boston & Lowell Railroad Corporation to construct one of the first rail connections in America.[66] In 1836, as the population swelled to 15,000, the legislature chartered Lowell as the third city government in the commonwealth after the two-hundred-year-old cities of Boston and Salem.[67] And in the 1840s, as young men and women from all over New England descended on Lowell to work in its mills, the city became an international tourist destination. Charles Dickens from England, Michael Chevalier from France, Henry David Thoreau from Concord, and others reported on the "large, populous, thriving place" where "nothing in the whole town looked old . . . except the mud."[68] Lowell was a model company town whose corporations financed buildings with steam heat, streets with sewers, sperm oil lamps on the brick sidewalks, and other modern contrivances.[69] The European visitors were also impressed by the transient population of female millworkers whose wages were four times higher than in Europe.[70] The visitors noticed that the "manufacturing companies exercise the most careful supervision over these girls."[71] They educated the workers and sent them to church; they required the workers to keep themselves clean and well dressed; and they boarded the workers in dormitories whose owners were careful "to allow no one in the house whose characters have not undergone a searching inquiry."[72]

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[66] An Act to Establish the Boston and Lowell Rail Road Corporation, Jun. 5, 1830, ch. 4, 1830 Mass. Acts 494.

[67] An Act to Establish the City of Lowell, Apr. 1, 1836, ch. 128, 1836 Mass. Acts 789.

[68] DICKENS, *supra* note 61, at 12; THOREAU, *supra* note 62, at 66.

[69] STONE, *supra* note 64, at 733.

[70] DICKENS, *supra* note 61, at 13; CHEVALIER, *supra* note 61, at 138.

[71] CHEVALIER, *supra* note 61, at 140.

[72] DICKENS, *supra* note 61, at 12. For a more skeptical perspective, see generally THOMAS DUBLIN, WOMEN AT WORK: THE TRANSFORMATION OF WORK AND COMMUNITY IN LOWELL, MASSACHUSETTS,

This was the Lowell that Frederick Ayer visited in 1855, when the twenty-two-year-old decided to join his brother James's patent medicine business. At this time, James's business was already fourteen years old, and its advertising feats had made him internationally famous.[73] Under the trade mark of Dr. J.C. Ayer & Company, the two brothers began marketing James's most successful invention: Ayer's Sarsaparilla, a predecessor to root beer. Of course, the brothers did not just claim that their drink tasted good; they also claimed that it could offer "rapid and complete cures" for at least twenty-five conditions, including "Ulcers, Pimples, Blotches, Tumors, Salt Rheum, Scald Head, Syphilis and Syphillitic Affections."[74] To reassure skeptical readers, the brothers spent $60,000 annually on advertisements that blanketed newspapers across the country with testimonials and even sponsorships. One series of ads featured "The mayors of the chief cities of the United States," from Boston and New York to Chicago and Galveston, in which the mayors each certified "that the Remedies of Dr. J.C. Ayer & Co., of Lowell . . . have been found to be Medicines of great excellence, and worthy of the confidence of the community."[75] Another series of ads featured multicolored trade cards of young women restored to the fullest of health by one of the company's products.[76]

These advertisements paid off; by the 1860s, the brothers annually sold more than one million bottles and nearly two million pill boxes for a dollar each.[77] As the *New York*

1826-1860 (1979); ALAN DAWLEY, CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN (1976); MARGARET T. PARKER, LOWELL: A STUDY OF INDUSTRIAL DEVELOPMENT (1940).

[73] *In Printer's Ink the Secret*, *supra* note 59, at 21.

[74] *Ayer's Sarsaparilla*, N.Y. TIMES, Jul. 14, 1860, at 5.

[75] *Mayors of the Great Cities*, BALTIMORE SUN, Jun. 5, 1860, at 2.

[76] ROSENBERG, *supra* note 58, at 95.

[77] STONE, *supra* note 64, at 744.

Times later reported, the Ayers were "among the first men in the world who appreciated the fact that advertising is one of the most profitable investments in which a man can put his money. . . . Money came rolling in so fast that [James] was soon the richest man in Lowell, if not in New England."[78] And with success came fame. In 1860, the University of Pennsylvania conferred on James an actual Doctor of Medicine degree.[79] A decade later, Frederick made national headlines for eliminating a smallpox epidemic while serving as the chairman of the Lowell Board of Health.[80] In 1871, the Ayers purchased a majority stake in two of the largest textile companies in Lowell—the Tremont Mills and the Suffolk Manufacturing Company—which the Massachusetts legislature permitted them to operate as a single merged corporation called the Tremont and Suffolk Mills.[81] And later that year, residents in Middlesex County petitioned the Massachusetts legislature to incorporate a new "Town of Ayer" fifteen miles southwest of Lowell.[82] This town, of course, was another advertising coup: in exchange for the naming rights, James paid the residents $10,000.[83]

In 1874, James achieved his greatest feat of all, securing the Republican nomination to represent Massachusetts's seventh congressional district, which included the town of Ayer.[84] But this would mark the high-water mark of his individual success. During the campaign, newspapers around the country joked that "Ayer didn't want to go to Congress at

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[78] *In Printer's Ink the Secret*, *supra* note 59, at 21.

[79] ROSENBERG, *supra* note 58, at 95.

[80] *Small-Pox: How the Disease Was Exterminated in Lowell, Mass*., N.Y. TIMES, Dec. 25, 1872.

[81] An Act Uniting and Consolidating the Proprietors of the Tremont Mills and the Suffolk Manufacturing Company, Mar. 31, 1871, ch. 152, 1871 Mass. Acts 526.

[82] An Act to Incorporate the Town of Ayer, Feb. 14, 1871, ch. 23, 1871 Mass. Acts 450.

[83] *Ayer*, BOS. DAILY GLOBE, Jun. 18, 1872, at 5.

[84] *Republican Caucuses in Lowell—Dr. J.C. Ayer Carries the Entire Delegation*, BOS. DAILY GLOBE, Oct. 13, 1874, at 1.

all, but only ran to advertise his pills."[85] In November, James was humiliatingly defeated, including by voters in the town named after him.[86] James soon checked into an asylum for the insane. He died while confined in the asylum in 1878; his obituary in the *New York Times* remarked that it seemed "likely that brooding over his defeated hope of acquiring political position, and over the indignities cast upon him by the men he expected to rally to his support, caused his mind to become unhinged."[87]

This was not the end of Ayer's Sarsaparilla, however. Frederick Ayer continued the business by converting the J.C. Ayer Company into a corporation that would continue selling Sarsaparilla and Cherry Pectoral well into the twentieth century.[88] Frederick also inherited some of James's massive $15 million fortune, which, along with revenue from the J.C. Ayer Company and the Tremont and Suffolk Mills, Frederick poured into other investments.[89] In 1884, for example, Frederick purchased and reorganized a thirty-year-old textile company in nearby Lawrence, Massachusetts, called the Washington Mills Company.[90] And in 1883, Frederick became an early investor in another promising technology: the telephone.

Alexander Graham Bell, a resident of nearby Salem, had recently obtained two patents in 1876 and 1877 for an invention that he called the "electric telephone."[91] Until

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[85] *After the Battle*, BOS. DAILY GLOBE, Nov. 5, 1874, at 8; *see also Political Morsels*, DETROIT FREE PRESS, Oct. 21, 1874, at 2; *Massachusetts*, ATLANTA CONSTITUTION, Nov. 4, 1874, at 2.

[86] *Death of Dr. James C. Ayer*, N.Y. TIMES, Jul. 4, 1878, at 5.

[87] *Death of Dr. James C. Ayer*, N.Y. TIMES, Jul. 4, 1878, at 5.

[88] STONE, *supra* note 64, at 744; *Ayer's Family Medicines*, BOS. DAILY GLOBE, Aug. 17, 1885, at 4.

[89] *In Printer's Ink the Secret*, *supra* note 59, at 21.

[90] An Act to Incorporate the Washington Mills Company, Mar. 1, 1884, ch. 54, 1884 Mass. Acts 41.

[91] *Sent by Telephone: The First Newspaper Despatch Sent by a Human Voice over the Wires*, BOS. DAILY GLOBE, Feb. 13, 1887, at 5.

they expired twenty years later, these patents gave Bell a monopoly on both the "method of, and apparatus for, transmitting vocal or other sounds telegraphically."[92] Bell and his associates quickly took advantage of this monopoly, administering it through a new corporation called the American Bell Telephone Company. American Bell made national headlines when the Massachusetts legislature chartered it in 1880 with an enormous capital stock of $10 million and the power to "become a stockholder in or become interested with other corporations hereafter organized for like purposes."[93] The large capitalization was warranted: American Bell Co. had an immediately successful business plan of manufacturing telephones and licensing the Bell patents to local exchange companies, which in turn provided telephone service to fixed geographic areas for a price. In 1883, Frederick Ayer was elected to the first board of directors of one of these new exchange companies for Massachusetts, the New England Telephone & Telegraph Company.[94] The American Bell company placed several of its own directors on the board of the New England company and purchased a controlling percentage of its stock—a pattern it repeated with most of the other regional exchanges.[95]

By the 1890s, the Massachusetts-based American Bell developed a prosperous national network of regional exchanges; it connected these exchanges with long-distance service provided by one of its New York subsidiaries, the American Telephone & Telegraph

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[92] U.S. Patent No. 186,787 (issued Jan. 30, 1877); U.S. Patent No. 174,465 (issued Mar. 7, 1876); *see* FED. COMMC'NS COMM'N, INVESTIGATION OF THE TELEPHONE INDUSTRY IN THE UNITED STATES 1–4, 83–84 (1939); Dolbear v. American Bell Tel. Co., 126 U.S. 1 (1888).

[93] An Act to Incorporate the American Bell Telephone Company, Mar. 19, 1880, ch. 116, 1880 Mass. Acts 74; *see The Bell Telephone*, CHI. DAILY TRIBUNE, Feb. 20, 1880, at 7.

[94] *To Mark 50 Years of Phone Service*, BOS. DAILY GLOBE, Oct. 16, 1933, at 10; *Telephone Stockholders*, BOS. DAILY GLOBE, Apr. 30, 1885, at 2.

[95] FED. COMMC'NS COMM'N, *supra* note 92, at 21–23.

Company, or A.T.&T.[96] Ayer too prospered; the man in his seventies became so wealthy that he commissioned Louis Comfort Tiffany to design an ostentatious mansion for his family on Boston's Commonwealth Avenue. Ayer's wife of twenty years, Cornelia Wheaton, had recently died, but he was determined to impress his new wife, Ellen Banning, an actress from Minnesota who was thirty years his junior. The garish, pink-granite Ayer Mansion, which still stands, was full of Tiffany-designed glass mosaics, bold skylights, and a gold foyer dominated by a 7-foot-long stuffed jaguar. It was not well received by his neighbors.[97]

Ayer was not alone in prospering from a single company's control over an entire industry. Indeed, the 1880s marked a wave of similar corporate activity later known as the "Great Merger Movement."[98] The movement began when dominant shareholders of leading companies within a few industries—the petroleum, sugar, and cottonseed-oil industries among them—decided to cooperate with their industrial competitors instead of engage in "ruinous" competition.[99] Unlike American Bell, few companies nationwide were authorized to purchase and hold stock in other companies, so instead of merging directly, the collaborators created voting "trusts" to indirectly control national conglomerates like the so-called Cotton Oil Trust. In 1888, after such anticompetitive trusts became the targets of federal legislation and state prosecution, New Jersey passed three statutes that expressly

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[96] *Id.* at 67.

[97] Nell Porter Brown, *The "Scandalous Mansion*," HARV. MAG. (Jan.–Feb. 2017), https://harvardmagazine.com/ 2017/01/scandalous-mansion; Christopher Muther, *Tiffany's Last Stand: The Ayer Mansion Gets a Makeover*, BOS. GLOBE, Nov. 7, 2013, at G16; *A Stranger in the House of Ayer*, BOS. MAG (Nov. 20, 2007), https://www.bostonmagazine.com/2007/11/20/a-stranger-in-the-house-of-ayer/; *Frederick Ayer Dead in Georgia*, BOS. DAILY GLOBE, Mar. 15, 1918, at 1.

[98] *See generally* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985); RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956 (1959); Alfred D. Chandler, Jr., *The Beginnings of "Big Business" in American Industry*, 33 BUS. HIST. REV. 1, 10–14 (1959).

[99] *See* Alfred D. Chandler, Jr., The Visible Hand 319–20 (1977).

gave any corporation chartered there the same power as American Bell to own stock in other corporations.[100] Within months, industry-dominating trusts like the Cotton Oil Trust began converting themselves into industry-dominating corporations like the American Cotton Oil Company; the National Biscuit Company, International Harvester, American Tobacco, and U.S. Steel soon followed.[101] Indeed, New Jersey began collecting so many franchise taxes from new corporations that other states began offering similar incentives for corporations to charter there, including decreased taxes and fewer regulations on the corporate charters they once scrutinized so closely.[102]

This "race to the bottom" was not new—as discussed above, corporate lawyers warned Massachusetts as early as 1829 that its restrictive corporate laws would drive corporations out of the state. But the threat to Massachusetts became apparent in 1892, when the Thomson-Houston Electric Company of Massachusetts decided to acquire the Edison General Electric Company of New York to create "one of the most important and wealthy manufacturing corporations in the world," with "nearly three-fourths of the general electric business of the United States."[103] As the electric executives publicly deliberated where they would seek to charter their new corporation, state legislators outside of

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[100] *See* 1889 N.J. Laws 414; 1888 N.J. Laws 445; 1888 N.J. Laws 385. For an excellent account of interstate competition over corporate charters during the Great Merger Movement, see Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey, 1880–1910*, 32 J. CORP. L. 323, 328–40 (2007).

[101] NELSON, *supra* note 98, at 161–62; Yablon, *supra* note 100, at 340.

[102] As Charles Yablon discusses, this phenomenon has been described both as a race to the bottom and a race to the top. *Compare* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (race to the bottom), *with* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (race to the top).

[103] *To Control All Electric Roads*, CHI. DAILY TRIBUNE, Apr. 28, 1892, at 5; *Mr. Edison Is Satisfied*, N.Y. TIMES, Feb. 21, 1892, at 2; *Likely to Consolidate*, N.Y. TIMES, Feb. 6, 1892, at 2; *What's in the Wind?*, BOS. DAILY GLOBE, Feb. 2, 1892, at 9.

Massachusetts fell over themselves offering tax breaks and other incentives to induce the executives to pick their states. The executives ultimately selected New York to charter the General Electric Company after the legislature there passed a special tax reduction that allowed the new company to pay one third of the taxes that other companies paid.[104] The governor of New York explained that there was "a growing sentiment in favor of less severe restrictions in our corporation laws," and that "without the concession," General Electric would have been "incorporated under the laws of New-Jersey."[105]

This situation was a far cry from Massachusetts, where Frederick Ayer had once had to ask the legislature for permission even to merge two companies in the same city.[106] Indeed, even though more than seven decades had passed since Ayer's birth, the Massachusetts legislature had barely changed its corporate laws from the laws of his youth.[107] Instead, Massachusetts officials like railroad commissioner Charles Francis Adams, Jr., the great-grandson of John Adams, described with fear how corporations in other states were using their million-dollar capital stocks to liberalize corporate laws and dominate and corrupt state legislatures. "It is but a very few years since the existence of a corporation controlling a few millions of dollars was regarded as a subject of grave

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[104] *A Shrewd Corporation: Its Special Charter Robs the State of a Large Tax Revenue*, N.Y. TIMES, May 3, 1892, at 2.

[105] *Gov. Flower Signs the Electric Construction Company Bill*, N.Y. TIMES, Apr. 17, 1892, at 2.

[106] An Act Uniting and Consolidating the Proprietors of the Tremont Mills and the Suffolk Manufacturing Company, Mar. 31, 1871, ch. 152, 1871 Mass. Acts 526.

[107] Massachusetts had, like most states, passed "general incorporation" laws that nominally allowed people to form a corporation or increase its capital stock. *See* An Act Concerning Manufacturing and Other Corporations, May 9, 1870, ch. 224, 1870 Mass. Acts 154; An Act Relating to Joint Stock Corporations, May 15, 1851, ch. 133, 1851 Mass. Acts 633. But this change turned out to be less than radical because the laws applied only to small corporations capitalized at less than $1 million. It was not until 1903 that Massachusetts accepted corporations as instruments "primarily for private profit, rather than public service, with minimal obligations to the community." RICHARD M. ABRAMS, CONSERVATISM IN A PROGRESSIVE ERA 79 (1964).

apprehension, and now this country already contains single organizations which wield a power represented by hundreds of millions," Adams wrote in 1871. "These bodies are the creatures of single States; but in New York, in Pennsylvania, in Maryland, in New Jersey, and not in those States alone, they are already establishing despotisms which no spasmodic popular effort will be able to shake off."[108] After recounting the "Erie War," an outlandish event during which the financiers of the Erie Railroad Company pitted the New Jersey legislature against the New York legislature and bribed both until both states had passed favorable legislation, Adams lamented how the rise of large corporations meant the decline in people's faith in representative government. "We know what aristocracy, autocracy, democracy are; but we have no word to express government by moneyed corporations."[109]

Massachusetts legislators sought to avoid this catastrophe by continuing to impose some of the strictest corporation regulations in the country. Although the commonwealth presided over the merger of many of its industries, particularly its railroads, it also passed new laws that prohibited certain large companies from issuing new shares or increasing their capital stock unless a "commissioner of corporations" deemed the increase warranted.[110] "I think Massachusetts is justly proud of her corporation laws," one legislator

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[108] ADAMS, JR., & ADAMS, *supra* note 13, at 95–96.

[109] *Id.* at 97–98. For its part, the *New York Times* editorialized that "There is no nation on earth where they are so utterly under the control and at the mercy of gigantic corporations and monopolies as the United States." *The Tyranny of Corporations*, N.Y. TIMES, Nov. 10, 1866, at 4. For more on the Erie War, *see generally* T.J. STILES, THE FIRST TYCOON: THE EPIC LIFE OF CORNELIUS VANDERBILT 439–73 (2009).

[110] *See, e.g.*, An Act Relating to the Increase of Capital Stock by Corporations Owning or Operating a Railroad or Railway by Steam or Other Power, and of Gaslight, Electric Light, Telegraph, Telephone, Aqueduct, and Water Companies, Jun. 14, 1894, ch. 472, 1894 Mass Acts. 548. The number of independent railroads in Massachusetts declined from eight at the beginning of the 1890s to two by 1900. *See generally* EDWARD C. KIRKLAND, MEN, CITIES, AND TRANSPORTATION: A STUDY IN NEW ENGLAND HISTORY (1948); GEORGE P. BAKER, THE FORMATION OF THE NEW ENGLAND RAILROAD SYSTEMS (1937).

explained. "I think the fundamental idea is supervision, by some trustworthy government officer."[111] And if a large corporation, like American Bell, wished to raise more than $1 million from investors, its executives still had to petition the legislature to pass a statute authorizing the corporation to increase its capital stock. [112]

In 1894, American Bell tried to do just this, petitioning the Massachusetts legislature to make it one of the largest corporations in the country by increasing its capital stock to $50 million. At hearings at the state house in Boston, the company's executives and their supporters offered a carrot and a stick to legislators skeptical of why any corporation needed to raise that much money. The carrot was an appeal to the legislators' self-conception as supervisors, describing the corporation as "a Massachusetts enterprise. It is a Massachusetts concern. It is a great big business here which looks to Massachusetts as its parent. It is something in which the state should take pride."[113] The stick was a threat to abandon the state unless the legislature complied with its request. If you fail to pass this legislation, ex-governor John Davis Long told the legislators, "you say, 'Surrender your charter. Go to New York, where the amount of capital is unlimited, and increase your capital there as much as you please.' . . . The General Electric company has just removed its works from Lynn to New York. Is it not wise to encourage our corporations to stay within the state?"[114]

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[111] 1 U.S. INDUS. COMM'N, PRELIMINARY REPORT ON TRUSTS AND INDUSTRIAL COMBINATIONS 1128–29 (1900) (testimony of James J. Myers).

[112] *See* An Act in Addition to an Act Concerning Manufacturing and Other Corporations, Mar. 22, 1871, ch. 110, 1871 Mass. Acts 499.

[113] *What It's For,* BOS. DAILY GLOBE, Mar. 8, 1894, at 4.

[114] *Id.*

Not all legislators were persuaded. Representative James J. Myers argued that it was the commonwealth's responsibility to protect the public from the directors of American Bell, a monopoly whose "rates will not be kept down by competition" and whose existing capital stock was already "overcapitalized," meaning its directors were valuing the corporation at a higher price than the value of the physical assets it owned or which had been "paid in." The danger of overcapitalization was that the directors of the Bell System companies, like Frederick Ayer, might start issuing huge numbers of "watered-down" shares, harming buyers who believed their $100 worth of stock was backed by $100 worth of physical assets. Myers recognized that his position might drive away American Bell, and that the loss of the corporate franchise tax "results in a loss of income to Massachusetts." But he argued that Massachusetts should set a high standard for protecting shareholders rather than sink to New Jersey or New York's level: "if all the States applied the same law it would work equally fair to all."[115]

The governor of Massachusetts, Frederick T. Greenhalge, agreed with Myers's position; he vetoed the legislation that would have increased American Bell's capital stock. "The general policy of the commonwealth is to impose proper and salutary restrictions upon any increase of capital stock in quasi-public corporations," the governor explained, "guarding against stock watering and against any measure tending to the public detriment." To the governor, the American Bell Company was indeed overvalued, and

[115] 1 U.S. INDUS. COMM'N, *supra* note 104, at 1129–34 (testimony of James J. Myers); *see Bell Bill Finally Passes Both Houses*, BOS. DAILY GLOBE, Jun. 21, 1894, at 1; *Bell Bill's Day: Senate Votes to Grant Increased Capital*, BOS. DAILY GLOBE, Jun. 15, 1894, at 8; *Fierce Fight: Transit and Telephone Cause Conflict*, BOS. DAILY GLOBE, May 25, 1894, at 1.

shareholders and the public would suffer if the company were authorized to sell $50 million worth of shares when it owned less than $50 million worth of property.[116]

Of course, the directors of the American Bell companies were not pleased. Five years later, to escape Massachusetts's "supervision," the Bell officials shifted control of their entire system from Boston to New York by transferring all of the American Bell Company's assets to its New York–based subsidiary, A.T.&T.[117] On its own terms, A.T.&T. then increased its capital stock to $100 million—double what American Bell had asked for in Massachusetts.[118] The New England Telephone & Telegraph Company, which was already chartered in New York, moved its headquarters there too.[119] In a speech to shareholders, the new president of A.T.&T. later explained that "Boston and New England, much as I dislike to say it, are in a way provincial and not able to handle, with entire satisfaction, big enterprises which require large sums of money and which need a broad market for the securities."[120]

Frederick Ayer did not move with the rest of the telephone industry to New York.[121] After all, in Lowell he still owned the J.C. Ayer Company and Tremont and Suffolk Mills, and in Lawrence he owned the Washington Mills Company. But he did learn from the

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[116] *Bell Bill Veto*, BOS. DAILY GLOBE, Jun. 27, 1894, at 1.

[117] FED. COMMC'NS COMM'N, *supra* note 92, at 7–9. Three things about the Massachusetts corporation laws were particularly objectionable to the Bell interests: first, American Bell was prevented from acquiring more than 30 percent of the capital stock of most other corporations; second, American Bell was not permitted to pay dividends in its own stock or sell its stock at less than the market price, to be determined by the Massachusetts commissioner of corporations; and third, it was difficult for American Bell to secure permission to increase its capitalization. *Id.* at 8–9.

[118] *Id.* at 9.

[119] *Offices to Come to New York*, N.Y. Times, Dec. 3, 1899, at 1.

[120] *Calls Boston Provincial*, L.A. TIMES, Dec. 22, 1905, at 11.

[121] Ayer resigned from the board of the New England Telephone & Telegraph Company in 1895; his son, Charles F. Ayer, replaced him. *New England Telephone*, WALL ST. J., May 6, 1895, at 1.

example of American Bell and the many other industry-dominating corporations of its era. In 1899, the same year American Bell sold its assets to A.T.&T., Ayer met in the Waldorf-Astoria in Manhattan with the chief executives of seven of the largest textile companies in New England to announce their plan to combine their companies into a single corporation.[122] The new conglomerate would control nearly two-thirds of the 75,000 woolen looms in the country. And although nearly all of the executives lived in Massachusetts, they began the interstate bidding war for the privilege of chartering the company by noting "that it had not been decided in what State the new company was to be incorporated."[123] One month later, the American Woolen Company was incorporated under the laws of New Jersey with a $49.5 million capital stock; the company sold $10 million worth of shares within its first ten minutes of existence. Ayer was the first president of a board of directors whose members all continued to live and work in Massachusetts.[124]

"The time has gone by when it is necessary to argue as to the right of large aggregations of capital, for the purpose of industrial development, to exist," Charles R. Flint, the self-described "Father of Trusts," told one of the first gatherings of the executives of the newly formed American Woolen Company. "[C]ombinations of wealth, of judgment, of experience and of executive ability are now generally recognized as a natural evolution in industrial development." Flint explained that "industrial corporations, properly organized and well managed, because they can buy, manufacture, and distribute more cheaply than their weaker and less able competitors, have an inevitable and a necessary advantage in the world's markets, and to my mind they are sure to prosper." But Flint warned the

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[122] STONE, *supra* note 64, at 1410.

[123] *To Regulate Wool*, L.A. TIMES, Mar. 8, 1899, at 2.

[124] AMERICAN WOOLEN CO., A SKETCH OF THE MILLS OF THE AMERICAN WOOLEN COMPANY 7–8 (1901).

executives not to turn themselves into "a Napoleon of industry," administering their business "too dictatorially," which might breed a backlash. "I am equally certain that there will ultimately be a reaction from the present period of unusually business activity. The vital point at this time is to see that industrial corporations are organized and managed upon sound business principles."[125]

The moves of American Bell and the American Woolen Company stunned Massachusetts legislators. The episode became an illustration of how the "strict laws of Massachusetts" were pushing businesses out of the state, all in the name of preventing shareholders from unwisely investing their money.[126] Where Massachusetts had once been a national leader in chartering new corporations, in the year 1900, New Jersey chartered 1,995 companies compared to Massachusetts's 239.[127] In 1903, the commonwealth finally abandoned its attempt to closely regulate corporate charters, which legislators of all parties could agree was "unsuited to modern business conditions." As a Committee on Corporation Laws explained in its report recommending the new legislation, Massachusetts had to abandon "the old theory that, being creatures of the State, [corporations] should be guaranteed by it to the public in all particulars of responsibility and management." It was time to embrace "the modern quite opposite theory that, in the absence of fraud in its organization or government, an ordinary business corporation should be allowed to do anything that an individual may do." Under this modern theory, "the state owe[d] no duty, to persons who may choose to deal with corporations, to look after the solvency of such artificial bodies; nor to stockholders, to protect them from the consequences of going into

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[125] *Talks on Trusts*, BOS. DAILY GLOBE, May 26, 1899, at 1.

[126] 1 U.S. INDUS. COMM'N, *supra* note 104, at 1129–34 (testimony of Francis Lynde Stetson).

[127] Yablon, *supra* note 100, at app. I.

such concerns. . . . [T]he State's duty ends in providing clearly that creditors and stockholders shall at all times be precisely informed of all the facts attending both the organization and the management of such corporations."[128]

This new Massachusetts corporation law eventually encouraged the American Woolen Company of New Jersey to transfer all its assets to a new American Woolen Company chartered in Massachusetts.[129] In the meantime, Frederick Ayer's enormous company expanded by purchasing twenty more mill companies in every state of New England.[130] In 1905, the American Woolen Company embarked on an ambitious plan to build the largest textile mill in the world. It would be constructed next to the fifty-year-old Washington Mills in Lawrence, Massachusetts.[131]

II

Lawrence, like Lowell, was a company town founded and constructed by a textile corporation along the Merrimack River. In the 1840s, while James Ayer was developing his Cherry Pectoral at a drugstore in Lowell, the textile company that brought Ayer and his uncle to Lowell began purchasing nearly all the riverfront property between Lowell and Haverhill, a town in the neighboring Essex County.[132] In 1845, the company's purchasing agent, Samuel Lawrence, petitioned the Massachusetts legislature to incorporate a new Essex Company "for the purpose of constructing a dam across [the] Merrimack river, and

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[128] MASS. COMM. ON CORP. LAWS, *supra* note 12, at 20–22; *see* An Act Relative to Business Corporations, Jun. 17, 1902, ch. 437, 1903 Mass. Acts 418.

[129] AMERICAN WOOLEN CO., SEVENTEENTH ANNUAL REPORT OF THE AMERICAN WOOLEN COMPANY—1915, at 1 (1916).

[130] STONE, *supra* note 64, at 1512.

[131] AMERICAN WOOLEN CO., AMERICAN WOOLEN COMPANY MILLS 20 (1921).

[132] STONE, *supra* note 64, at 327–28; JONATHAN FRANKLIN CHESLEY HAYES, HISTORY OF THE CITY OF LAWRENCE 10–11 (1868).

constructing one or more locks and canals in connection with said dam, . . . to create a water power to use, or sell, or lease to other persons or corporations, to use for manufacturing and mechanical purposes."[133] Samuel Lawrence's brother, Abbot, was elected the first president of the Essex Company, and his lead engineer began designing a "great dam, 900 feet long," with falls steep enough to power over one million textile spindles.[134] The Essex Company immediately began prospectively selling shares of this water power to the flock of new companies incorporated to take advantage of it: the Atlantic Cotton Mills (owned by Abbot Lawrence), the Bay State Mills (owned by Samuel Lawrence), the Pacific Mills (owned by neither), and others.[135]

The first residents of the unincorporated place of "New City," "Andover Bridge," or "Essex" were teamsters and builders; about two hundred of them constructed first a boarding house, then a saw mill, foundry, and machine shop to build the dam and the mills. By the end of 1846, the area had a post office (which called the place "Merrimac"), a newspaper (*The Merrimack Courier*), and 3,500 residents—but virtually all municipal business was conducted by residents of Lowell, ten miles away.[136] In 1847, one year before the completion of the first mills, the Essex Company held a meeting to decide a formal name for the future town. The participants decided on "Lawrence," after the brothers who

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[133] An Act to Incorporate the Essex Company, Mar. 20, 1845, ch. 163, 1845 Mass. Acts 483.

[134] FRANCIS H. MCLEAN et al., THE REPORT OF THE LAWRENCE SURVEY 21–22 (1912); HAYES, *supra* note 132, at 17–19.

[135] An Act to Incorporate the Pacific Mills, Mar. 29, 1850, ch. 128, 1850 Mass. Acts 350; An Act to Incorporate the Atlantic Cotton Mills, Feb. 3, 1846, ch. 7, 1846 Mass. Acts 5; An Act to Incorporate the Bay State Mills, Feb. 2, 1846, ch. 5, 1846 Mass. Acts 4. The Lawrence brothers were members of the "Boston Associates" and were collectively involved in a dozen of the commonwealth's first textile, banking insurance, and life insurance companies. *See* DALZELL, *supra* note 64, at 235–36.

[136] HAYES, *supra* note 132, at 21–23, 29–43; *see* MASS. SANITARY COMM'N, SANITARY SURVEY OF THE TOWN OF LAWRENCE 13 (Boston: Dutton & Wentworth, 1850).

owned the principal companies there, and they sent a petition to the Massachusetts legislature to incorporate the new town.[137]

The first town meetings of Lawrence were presided over by officers of the Essex Company, the town's largest taxpayer by far.[138] One of the town's first decisions was to accept the Essex Company's offer to build a park called Lawrence Common—an offer that came with the proviso that the city had to maintain and ornament the park "under the joint direction of the agents of the Essex, Bay State and Atlantic companies and the chairman of the board of selectmen or mayor of the city." Of course, any resident could participate in these town meetings, and as the town grew in size, so did people's desire to speak their minds. After a handful of these town meetings, which one resident described as full of participants "deeply enamored of the sound of their own voice" and "as wasteful of time as they were lacking in both sense and coherence," a group petitioned the Massachusetts legislature for a city charter so that the town meetings could be replaced by a mayor and board of aldermen.[139]

By the time Lawrence became a city in 1853, the largest employers of its ten thousand residents were the new mills. As in Lowell, the Lawrence mill corporations housed most of their "operatives" in company-owned boarding houses "as a means of preserving a proper supervision over the operatives employed, and for their benefit." In 1850, a visiting state sanitary commission described several of the "regulations to be observed by the inmates of these houses," including one regulation in the Bay State Mills

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[137] *Id.* at 27–29; *see* An Act to Incorporate the Town of Lawrence, Apr. 17, 1847, ch. 190, 1847 Mass. Acts 426.

[138] HAYES, *supra* note 132, at 51–53, 57.

[139] *Id.* at 61–63; *see* An Act to Establish the City of Lawrence, Mar. 21, 1853, ch. 70, 1853 Mass. Acts 392.

that declared that "no males and females are permitted to board in the same house," not even if they were married. Another regulation in the Atlantic Cotton Mills declared that on Sundays, all employees "*are expected to be constant in attendance at public worship*." If any employees made a habit of missing church, the regulation promised that they "will be discharged."[140]

Outside observers, including the sanitary commission, generally praised this paternalistic arrangement. The Pacific Mills even received a gold prize from Napoleon III, the emperor of France, for having "succeeded in securing a state of harmony between employers and their workpeople, and most successfully advanced the material, intellectual and moral welfare of the employees."[141] The Pacific Mills was the only corporation in the United States or United Kingdom to receive the prestigious prize, which was awarded on the basis of a statement the company submitted in connection with the 1867 world's fair. The statement described the mills as an idyllic place. The workrooms for its 3,600 employees were "cheerful, comfortable, and well-ventilated, so as to avoid as far as possible, the unpleasant drudgery of work." The company established the "Pacific Mills Relief Society," an "association of the work-people themselves," that supervised the collection of contributions from workers to donate to sick or injured employees. It also established a Pacific Mill Library Association, another workers' organization that ordered publications "specially adapted to their wants." Due to the large number of female employees—nearly half the workforce—the company's boarding houses were overseen by managers "carefully selected for their ability to influence this class of work-people . . . [and] save them from bad

[140] MASS. SANITARY COMM'N, *supra* note 136, at 10–13.

[141] *The Pacific Mills Manufacturing Establishment at Lawrence, Mass.,* SCIENTIFIC AMERICAN, Aug. 19, 1868, at 115.

moral influences, acting really, as far as possible, in the place of guardians . . . to be their *Friend*." The company officials also explained how the workers, not themselves, were really the bosses of the mills: "Several of the workmen are owners of the *stock* of the company, and have the same rights in regard to the control of the officers and general management as other stockholders."[142]

In the context of the Civil War, Massachusetts abolitionists described this sort of employer-employee relationship as a praiseworthy example of the North's "industrial Democracy," a stark contrast with the South's "military Despotism." For example, in speeches during the 1850s, the prominent Massachusetts abolitionist Theodore Parker argued that the structure of political society could no more be separated from the structure of economic society "than cold from ice. No nation can escape the consequences of its own first principle of politics." Parker argued that the South, whose economic society was generally premised on enslaved labor, was therefore bound to turn into a political "autocracy" as well—"that is, a government of all the people by a part of the people—the masters; for a part of the people—the masters; against a part of the people—the slaves." In the North, by contrast, all institutions, from towns and legislatures to mills and factories, were premised on the idea that the purpose of the institution was to give every person an opportunity to participate in decisionmaking. The North was an "industrial Democracy," that is, "a government of all the people, by all the people, for all the people."[143] General

[142] *Id.* at 115–16.

[143] THEODORE PARKER, DISCOURSES OF SLAVERY 105–06 (London, Trubner & Co., 1863); *Speech of Rev. Theodore Parker*, THE LIBERATOR, Feb. 19, 1858, at 1; *see also, e.g.*, *The Conspiracy Charge Repeated*, CHI. PRESS & TRIBUNE, Aug. 4, 1858, at 1.

Ulysses S. Grant undoubtedly conveyed a similar message when he visited the Pacific Mills on his victory tour in 1865.[144]

In truth, however, the mills were anything but "a government of all the people." Rather, as the Pacific Mills' officers wrote in their statement to Napoleon III, any charitable treatment toward the workers was made not so workers could vote on company decisions, but because "sympathy" and supervision served the "self-interest [of] the proprietor." Even the Pacific Mills Library Association and Relief Society, those "associations of workers themselves," were mandatory organizations whose presidents were officers of the corporation. Thanks to the employers' strict surveillance of everything the workers ate, read, and did, the statement concluded, "There have been no *strikes* among the work-people, which are the curse and the dread of employers."[145]

This paternalistic vision was tested over the next thirty years as the Lawrence mills reacted to declining business conditions by allocating fewer resources toward their increasingly impoverished employees. In 1860, the main building of the Pemberton Manufacturing Company collapsed due to faulty construction, carrying hundreds of its 918 employees into the ruins. The hundreds of dead and injured employees drew dozens of reporters to the "city in mourning." These reporters noticed that the mills still standing had begun introducing heavy machinery, replacing farm girls from New England with unskilled immigrants from the British Isles.[146] After the Panic of 1873, the Bay State Mills went bankrupt, reorganized as the Washington Mills Company, and went bankrupt again until it

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[144] *Gen. Grant's Reception at Lawrence*, BOS. HERALD, Aug. 2, 1865, at 4.

[145] *The Pacific Mills Manufacturing Establishment at Lawrence, Mass., supra* note 141, at 115.

[146] *The Pacific Mills at Lawrence*, N.Y. Times, Aug. 20, 1865, at 3; *More of the Lawrence Massacre*, N.Y. Herald, Jan. 23, 1860, at 1; STONE, *supra* note 64, at 333.

was purchased by Frederick Ayer.[147] The Pacific Mills, meanwhile, began a decade-long decline in wages that finally produced its first major strike in 1882.[148] The strike began when a small group of women and girls who worked at the ring spinning machines protested yet another wage decrease. The company responded by ordering the boarding houses not to board the dissidents. Within a week, all three thousand of the company's "spinners" and weavers went on strike, shutting down production in the entire company. The workers were optimistic that their strike could force an increase in wages because so many other companies in Lawrence were in need of labor.[149]

The 1882 strike drew international attention: it not only involved one of the world's largest cotton mills, but it also involved a company with a widely known reputation for maintaining "a spirit of harmony and good feeling between employers and employed."[150] One unnamed worker complained that this reputation may have been deserved in the past, when the employer "consulted with his men" and workers "were allowed to feel that they were men and had men's rights." But now, he said, "all this is changed." To the worker, the company was now allocating more money to stockholders in the form of dividends than workers in the form of wages, even though workers were the ones whose labor made the dividends possible. "We have corporations, agents, superintendents, overseers," he added,

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[147] AMERICAN WOOLEN CO., *supra* note 124, at 11–12.

[148] *In Open Revolt: Hundreds of Mill Hands at Lawrence Refuse to Work for the Pacific Mills*, BOS. DAILY GLOBE, Mar. 19, 1882, at 1; *Reduction in Wages of Employees*, PHILA. INQUIRER, May 25, 1878, at 1.

[149] Three Thousand Employes on Strike in Lawrence, N.Y. TIMES, Mar. 21, 1882, at 2;

[150] *The United States*, MANCHESTER GUARDIAN, Mar. 20, 1882, at 7; *Still Stalwart*, BOS. DAILY GLOBE, Mar. 20, 1882, at 1.

"a great middle wall so high that the operative, the common factory hand, is no more thought of by the capitalist than the meanest peasant in Russia by the Czar."[151]

The strike ended unsuccessfully; after a few months, the striking spinners and weavers ran out of funds to support themselves, and most of their number either left Lawrence or went to work for the competing Atlantic Mills or Washington Mills.[152] But the strike did damage to the idea that anything but slave labor counted as "industrial Democracy." Paid workers were certainly not going to buy shares in any company and become stockholders themselves if they could barely afford food and clothing.

Lyman Abbott, a progressive editor of a national magazine called *The Christian Union*, wrote critically that a new definition of "Industrial Democracy" was necessary. "Now, our present industrial system is monarchic," he wrote in 1886. "It is based on Carlyle's right of man to be governed by the wise"—the idea that "the survival of the fittest puts the ablest men at the head of our great industrial enterprises." But like Theodore Parker before him, Abbott argued that "[m]onarchy in industry and democracy in politics do not go well together; and that is the combination we have in the United States." The average working person "believe[d] in Lincoln, not in Carlyle; in government of the people, by the people, for the people, in industry as in politics." To Abbott, the way to reconcile America's economic society with its political society was to impose "democracy in industry; captains chosen by the men whom they command, as Governors and Presidents are chosen by the people whom they govern." He wrote that workers could do this by organizing themselves into trade unions just as capitalists had organized themselves into corporations.

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[151] *The Workingman's Standpoint*, BOS. DAILY GLOBE, Mar. 19, 1882, at 1.

[152] *Labor and Capital*, CHI. DAILY TRIBUNE, Aug. 23, 1882, at 2; *Demands of Laboring Men*, N.Y. TRIBUNE, May 23, 1882, at 1.

"Corporations are one contrivance by which men of small means can mass their capital and use it in great industrial enterprises. The workingmen have not yet begun to use this modern machinery; but it is built and ready for their hands." Only when they started could they achieve true "industrial democracy, where the users of tools would own them in whole or in part, where there would be no great rift between the classes because there would be no classes."[153]

"Industrial democracy" soon became a catchphrase among two groups of people who agreed that workers should be allowed to participate in corporate decisionmaking but strongly disagreed about how.[154] Supporters of "trade unions" or "craft unions," such as C.H. Salmons of the Brotherhood of Locomotive Engineers, argued that industrial democracy would be the consequence when skilled workers organized themselves by their trade or craft, as the weavers and spinners in Lawrence had done. When any corporation has a bad year, Salmons wrote, the corporation has a choice: it can cut wages to workers or it can cut dividends to stockholders. But where angry stockholders could theoretically vote out a corporation's leadership, "[o]ne man alone counts nothing before a powerful company; one day's work bears a poor proportion to the thousands of millions of capital invested in the railroads." Salmons concluded that "[u]nless labor combines it cannot be heard at all"; only by organizing with other skilled members of one's craft to stop work at the same time could workers rise to the level of power that stockholders possessed. In 1886, various craft

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[153] Lyman Abbott, *The Labor Problem: Co-Operation*, CHRISTIAN UNION, Mar. 4, 1886, at 8; *see also An Industrial Democracy*, N.Y. TIMES, Nov. 21, 1886, at 9; *The Future of the Labor Problem*, CHRISTIAN UNION, Nov. 21, 1886, at 7.

[154] *See* Montgomery, *supra* note 33, at 20–23. Montgomery argues that the term was "conspicuously absent" from the rhetoric of the labor movement before the 1890s: "The first significant coupling of the words *democracy* and *industry* appeared in the 1890s, and then their joint use suggested collective ownership of the means of production. Nevertheless, union efforts to regulate work relations ahd by then paved the way for an alternative employment of the concept, much narrower in scope, which identified democracy in industry with collective bargaining." *Id.* at 21.

unions modeled after the Brotherhood of Locomotive Engineers united to form the American Federation of Labor in order to provide aid and support to one another during such strikes.[155] And in 1897, the progressive historians Sidney Webb and Beatrice Webb published a massive description of the trade unions in Britain they called *Industrial Democracy*. "Trade Unions are democracies," the Webbs wrote: "that is to say, their internal constitutions are all based on the principle of 'government of the people by the people for the people.' . . . They are, however, scientifically distinguished from other democracies in that they are composed exclusively of manual-working wage-earners, associated according to occupations."[156] The Webbs argued that trade unions brought to life the idea that "[i]n the English-speaking world[,] institutions which desire to maintain and improve their position must at all hazards bring themselves into line with democracy." This was true of the unions themselves, which evolved to become democratic "associations of national extent, [which] raise an independent revenue, elect permanent representative committees, and proceed to bargain and agitate as corporate bodies." But more fundamentally, it was also true of corporations: unions forced corporate decisionmaking to pass "from the hands of private capitalists into the control of representatives of the consumers" and representatives of the workers. "It follows from this analysis," they concluded, "that Trade Unionism is not merely an incident of the present phase of capitalist industry, but has a permanent function to fulfil in the democratic state."[157]

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[155] C.H. SALMONS, THE BURLINGTON STRIKE (Aurora, Ill., Bunnell & Ward, 1889); The Strike at Lawrence, Hearings Before the Comm. on Rules of the House of Reps., H. Doc. No. 62-671, at 132–35 (1912) (testimony of Samuel Gompers); *see generally* MCCARTIN, *supra* note 33, at 14–18; DAVID MONTGOMERY, WORKERS CONTROL IN AMERICA (1979); DANIEL NELSON, SHIFTING FORTUNES: THE RISE AND DECLINE OF AMERICAN LABOR, FROM THE 1820S TO THE PRESENT (1998).

[156] 1 SIDNEY WEBB & BEATRICE WEBB, INDUSTRIAL DEMOCRACY, at *v–vi* (London, Longmans, Green & Co., 1897).

[157] 2 *Id.* at 809–23.

But trade unionism, by definition, was not for everyone. As a matter of ideology, trade unions organized themselves by craft and excluded unskilled workers from their ranks. And as a matter of practice, trade unions typically excluded black men and women of all colors in order to create "brotherhoods" of white, working men.[158] In response to this exclusivity, a second group of people argued that industrial democracy required a more radical restructuring of the corporate form than trade unionism offered: "industrial unionism."

Eugene V. Debs emerged as the leading proponent of industrial unionism in the 1890s. A railroad fireman from Indiana, Debs entered union politics as a conservative member of the Brotherhood of Locomotive Firemen, a craft union. While working in railroads during the "Great Merger Movement" of the 1880s, Debs was startled by the consolidations that brought the management of various railway companies "closer and closer together as far as their employees are concerned, until they are practically united under one management."[159] Moreover, technology appeared to be advancing in such a way that striking railroad workers of any skill level could be replaced by unskilled "scabs," or unemployed strikebreakers from off the street. The net result was that it became difficult for a small group of skilled workers in any single corporation to lead a successful strike; Debs came to believe that only a single "industrial" union of all workers in an industry could compel an industry-dominating corporation to the bargaining table. With this idea in mind, in 1893, Debs helped formed the American Railway Union. The charter of the railway

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[158] *See generally* ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY (2001).

[159] U.S. STRIKE COMM'N, REPORT ON THE CHICAGO STRIKE OF JUNE–JULY 1894, at 138 (Washington: Gov't Printing Office, 1895) (testimony of Eugene V. Debs).

union stated that all railroad workers, no matter their skill, were "entitled to a voice in fixing wages and in determining conditions of employment."[160]

In 1894, Debs and the American Railway Union led a major strike in Pullman, Illinois, that crystallized his developing view of "industrial democracy." Like Lawrence or Lowell, Pullman was a company town named after and dominated by the president and chief executive of an industrial corporation: George Pullman of the Pullman Palace Car Company. The town's board of trustees, board of education, clerk, and treasurer were all officers of the Pullman Company. And like the Pacific Mills, the Pullman Company required most of its workers to live in company-owned houses in which the corporation provided "sanitary arrangements" of "the most complete character" in exchange for membership fees and rent payments.[161] The strike began when the Pullman Company lowered wages in the factories without also reducing rents in the town.

When Debs arrived to assist the strikers, he argued that the municipal corporation of Pullman had the same problem as industrial corporation of the Pullman Company: the lack of democracy. "There is not a breath of free air in Pullman," Debs announced, "nor is there a man, woman, or child who touches his soil who can be called free."[162] The absence of

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[160] *Id.* at *xxiv*. For a comprehensive biography of Debs, see generally NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST (2d ed. 2007).

[161] See *The City of Pullman: A Place Whose Fame Has Extended over All the World*, CHI. DAILY TRIBUNE, Sep. 17, 1888, at 1; *Charles Dudley Warner, Studies of the Great West*, HARPER'S WKLY. MAG., Jun. 1888, at 125; *George M. Pullman—How He Raised Chicago Buildings on Stilts*, N.Y. TIMES, Jul. 11, 1886, at 6; *Pullman—A Miniature City Erected by a Great Corporation*, CHI. DAILY TRIBUNE, Apr. 3, 1881, at 6. For more on Chicago and the railroad industry, see generally JOHN B. JENTZ & RICHARD SCHNEIROV, CHICAGO IN THE AGE OF CAPITAL (2012); WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST (1991); ALFRED CHANDLER, THE RAILROADS: THE NATION'S FIRST BIG BUSINESS (1965); GABRIEL KOLKO, RAILROADS AND REGULATION: 1877–1969 (1965).

[162] *Boycott Is on Today*, CHI. DAILY TRIBUNE, Jun. 26, 1894, at 1; *see also Cause of Low Wages at Pullman*, CHI. DAILY TRIBUNE, May 11, 1894, at 6.

democracy in the town was obviously "un-American," Debs argued. But the Pullman Company was equally un-American, as its president and chief executive were similarly not elected by workers. Debs's vision of industrial democracy was one in which organized workers used their collective bargaining power to win control of all types of corporation, municipal and industrial. "[S]ome day 'Labor day' will be election day," he said, when" there will be a 'shut-down' and a 'walk-out' to the ballot-box, a 'strike' for American citizenship, in fact as well as theory—a political 'boycott' of the enemies of labor, and a 'tie-up' of the master class and their irresponsible and misused power." In other words, Debs's "industrial democracy" was an ideal in which workers inside and outside the workplace would be enfranchised to create for themselves a "co-operative commonwealth."[163]

The Pullman strike ended violently. After Debs called for a national boycott in support of the striking Pullman workers, a federal court issued an injunction against to enforce the Sherman Antitrust Act's prohibition on the restraint of trade. When the American Railway Union violated the injunction, President Grover Cleveland dispatched the U.S. Army to suppress the strike and dispatched federal prosectuors to send Debs to prison.[164] Although the injunction against Debs was upheld by the U.S. Supreme Court, Debs's message was well received by many people in the labor movement, particularly a miner from Utah named William D. Haywood and a young woman from New Hampshire named Elizabeth Gurley Flynn.

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[163] *Dictator Debs' Rant*, CHI. DAILY TRIBUNE, Jul. 1, 1894, at 10. Debs was not the only person to make this connection. *See, e.g.*, WILLIAM CARWARDINE, THE PULLMAN STRIKE 49 (Chicago: Charles H. Kerr & Co., 1894); Jane Addams, *A Modern Lear*, 29 SURVEY 132 (1896).

[164] *See In re Debs*, 158 U.S. 564 (1895); *In re Phelan*, 62 F. 803, 821 (6th Cir. 1894) (opinion of Taft, J.). For more on the strike, *see generally* DAVID PAPKE, THE PULLMAN CASE (1999); U.S. STRIKE COMM'N, *supra* note 159.

Haywood had recently come to his own realization about the importance of industrial unionism. Born in Salt Lake City to a family he described as "so American that if traced back it would probably run to the Puritan bigots," Haywood became a miner at age nine, after his father died.[165] Mining was difficult and dangerous work, often for twelve or more hours per day. Haywood, who blinded himself in one eye in a slingshot accident, recalled that many of the people who worked beside him were also "one-eyed men"—due to accidents in the mines.[166]

In 1886, when Haywood was seventeen, he was given his "first lessons in unionism" by a member of the Knights of Labor, one of the first labor organizations that organized on an industrial basis to create what it called a "workingman's democracy."[167] Haywood's takeaway from these lessons was that workers' organizations needed to model themselves after corporate organizations if they wanted to have any role to play in corporate decisionmaking. Just as corporations were consolidating into industry-dominating conglomerates, workers needed to consolidate into large, multistate unions. Haywood believed that when one group of miners went on strike at a particular mine, as in Coeur d'Alene, Idaho, in 1892, the corporate owners of the mine would wait out the strike by redirecting production to other mines the corporation owned. But when *all* miners in the western states went on strike to support a particular local's demands, as in Cripple Creek,

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[165] HAYWOOD, *supra* note 2, at 7–10; 11 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 10,569 (testimony of William D. Haywood).

[166] HAYWOOD, *supra* note 2, at 42. The best biography of William D. Haywood remains PETER CARLSON, ROUGHNECK: THE LIFE AND TIMES OF BIG BILL HAYWOOD (1983).

[167] *Id.* at 30. *See generally* KIM VOSS, THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY (1993); LEON FINK, WORKINGMEN"S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS (1983).

Colorado, in 1894, then the corporation's officers would be forced to negotiate with their employees.[168]

The federal government's violent response to Debs's national boycott brought a sense of urgency to Haywood's lessons. He and other miners feared that the U.S. Army would only get bigger, particularly as hostilities grew with Spain, and that the standing army would become available to suppress more strikes, as in Pullman. In 1896, Haywood joined the Western Federation of Miners, an industrial union built on the same model as the American Railway Union to represent all miners west of the Mississippi. In 1901, shortly after being elected secretary-treasurer of the Western Federation, Haywood invited Debs to present to the entire convention. "He was known to all of us as one of the finest orators in the labor movement," Haywood explained.[169]

Debs had emerged from his 1894 imprisonment as not only an industrial unionist but also a committed Socialist. Debs was heavily influenced by many of the books he read in jail, particularly Edward Bellamy's *Looking Backward*, an 1888 novel about the year 2000 in which the federal government had nationalized all industry to become "the sole capitalist and employer."[170] When Debs was released, he was a convert: "Government ownership of railroads is decidedly better for the people than railroad ownership of Government," he testified to applause before a federal commission appointed to study the Pullman strike in 1895.[171] Debs even ran for president in 1900, becoming the first person to run for president as a socialist.

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[168] 11 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 10,570 (testimony of William D. Haywood).

[169] HAYWOOD, *supra* note 2, at 52–63, 71–79, 91–95.

[170] EDWARD BELLAMY, LOOKING BACKWARD: 2000–1887, at 401 (Boston, Ticknore & Co., 1888).

[171] U.S. STRIKE COMM'N, *supra* note 159, at 163 (testimony of Eugene V. Debs).

After Debs's speech before the Western Federation in 1901, Haywood also became a socialist, which influenced his own thinking about the end-goal of industrial unionism. "Industrialism is socialism with its working clothes on," Haywood began to preach.[172]

At the Western Federation's 1903 convention, Haywood proposed that the labor organization take control of Colorado's mining corporations "by lease, bond, location or purchase." Mining was "work we knew how to do," he said, "and we could do it better, more scientifically, with much greater regard for the health, lives, and happiness of ourselves if we had the management."[173] For his part, Debs wrote that Haywood's "class-conscious union movement of the West is historic in its origin and development and every Socialist should recognize its mission and encourage its growth." Debs believed that in the workplace, the Western Federation would use the strike as its weapon to take over corporate decisionmaking, and outside the workplace, its members would recognize "the Socialist ballot as the weapon of their class and us[e] it accordingly."[174]

Miners could only do so much on their own, however. After a series of large strikes in Colorado and Idaho, Haywood found himself repeatedly frustrated by card-carrying union men who did not work in the mines at all. For example, during a 1903 strike in Colorado City, Colorado, unionized railroad workers carried unionized members of the state militia to break the strike.[175] In early 1905, Haywood and several other industrial unionists

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[172] HAYWOOD, *supra* note 2, at 158; William D. Haywood, *Shots for the Work-Shop*, 10 INT'L SOCIALIST REV. 588, 588 (1911). Haywood became a socialist right after the "unity convention" that temporarily united the Socialist Labor Party and the Social Labor Party of America into the Socialist Party of America. For more on the various factions and internal politics of socialists during this period, see generally IRA KIPNIS, THE AMERICAN SOCIALIST MOVEMENT 1897–1912 (1952).

[173] HAYWOOD, *supra* note 2, at 108–09.

[174] Eugene V. Debs, *The Western Labor Movement*, 3 INT'L SOCIALIST REV. 257, 264 (1902).

[175] 11 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 10,572–73 (testimony of William D. Haywood).

decided that they needed to develop an institution that went beyond mining: an "Industrial Organization of the Workers" whose members would include railroad workers, miners, textile workers, and every other member of the "working class."[176] Only if they belonged to the same organization, Haywood believed, would all workers of all industries "take possession of and operate successfully for their own interests the industries of the country."[177]

Meeting in Chicago, Haywood, Debs, and several other industrial unionists such as Mother Jones and Frank Bohn issued a "Manifesto" that outlined their vision for an industrial organization. "Social relations and groupings only reflect mechanical industrial conditions," the manifesto began. Capitalists were concentrating power in their consolidated corporations, while workers were given no voice in the enterprises. Whereas the American Federation of Labor and other trade unions were attempting to organize workers on the basis of "artificial distinctions," such as race or skill level, the Chicago Conference argued that this was a failing strategy against corporations that did not maintain such distinctions among themselves. "The employers' line of battle and methods of warfare correspond to the solidarity of the mechanical and industrial concentration," the manifesto declared, "while laborers still form their fighting organizations on lines of long-gone trade divisions." Recalling the antislavery origins of the term "industrial democracy," the manifesto called for "one great industrial union embracing all industries," with the ultimate goal of "establishing an industrial democracy, wherein there shall be no wage slavery, but where the workers will own the tools which they operate, and the product of which they alone will enjoy." This "Industrial Democracy—a Workers' Co-Operative

[176] FIRST IWW CONVENTION, *supra* note 1, at 7.

[177] *Id.* at 82.

Republic," would "burst the shell of capitalist government, and be the agency by which the working people will operate the industries, and appropriate the products to themselves."[178]

The manifesto called for a convention five months later, in June, at which the constitution of this new organization would be drafted. Debs called the 186 delegates that gathered "as representative a proletarian gathering as ever met in this or any other country."[179] Haywood was elected the chairman of this convention, and on June 27 he called it to order with the words: "Fellow workers, this is the Continental Congress of the working class."[180] In drafting his speech, Haywood had initially planned to call the delegates "fellow citizens," but he used "fellow workers" instead after he recalled that most of the delegates present were recent immigrants who could not yet vote in American elections.[181] This disenfranchised status, however, was precisely why he believed the new organization would be perfect for them. Foreigners, black people, women, children—none of them could expect to vote for politicians who would legislate on their behalf. If they wanted to change the conditions of their labor, they needed to force the corporations they worked for to listen to them. But craft unions, that "aristocracy of labor, . . . discriminates against workingmen because of their race and the poverty of their circumstances." If the nation's downtrodden wanted to turn their workplaces into industrial democracies in which they had a voice, they needed to all organize together as a class, just as the "wealthy class" of the "revolution of 1776" had done.[182]

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[178] *Manifesto* (Jan. 4, 1905), *in* FIRST IWW CONVENTION, *supra* note 1, at 2–6.

[179] Eugene V. Debs, *The Industrial Convention*, 6 INT'L SOCIALIST REV. 85, 85 (1905).

[180] FIRST IWW CONVENTION, *supra* note 1, at 1 (speech of William D. Haywood).

[181] HAYWOOD, *supra* note 2, at 181.

[182] FIRST IWW CONVENTION, *supra* note 1, at 117–20, 154, 441.

After two weeks of debate, the convention drafted the constitution for an organization they called the "Industrial Workers of the World." (A more-modest proposal to name the organization the "Industrial Union of America" was rejected.)[183] Founded on the principle that "[t]he working class and the employing class have nothing in common," the organization was structured to be internally democratic.[184] The constitution prescribed that individual members of the Industrial Workers would form "locals," which would include all wage-workers in a particular industry in a small geographic area. The locals could divide themselves into "branches" based on language or nationality if circumstances called for it, but when a local went on strike, all members of the local would strike as well. Locals would elect delegates to "industrial councils" of all workers in a particular industry, and these councils would elect officers of one of thirteen international "industrial departments." These industrial department were like federal departments: there would be a department of all food workers, one for all mining workers, one for all transportation workers, one for all public-sector workers, and so on. One member of each department would form the "general executive board" of the Industrial Workers, which had the "full power" to charter new departments, councils, and locals. Like a legislature, the general executive board also had the power to pass bylaws and "levy a special assessment" on all locals to pay for a strike. But any of the general executive board's decisions could be overruled by the "supreme legislative body of the organization," the annual convention of all members. This convention

[183] *Id.* at 299.

[184] *Id.*

would nominate the leader of the general executive board, the "general secretary-treasurer."[185]

Haywood was elected to the first general executive board of the Industrial Workers of the World—at least until he was arrested in Denver eight months later for his alleged role in the assassination of the governor of Idaho, Frank Steunenberg.[186] Other members of the Industrial Workers immediately branded Haywood's arrest and midnight extradition to Boise as a politically motivated "kidnapping," arguing that there was "no doubt in the minds of the advanced American worker that Haywood's role in launching this new organization was partially responsible for the frame-up against him."[187] Represented by famed defense attorney Clarence Darrow, Haywood was eventually acquitted in 1907, but not before he became an international cause célèbre among labor unionists and politicians alike. In a letter to a congressman that was eventually made public before the jury reached its verdict, President Theodore Roosevelt even called Haywood, Debs, and other members of the Industrial Workers "undesirable citizens."[188]

The trial and its accompanying publicity turned out to be a blessing for Haywood. Immediately after his release, the international celebrity went on a barnstorming trip across the United States, Canada, and Western Europe to promote his vision of industrial

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[185] INDUS. WORKERS OF THE WORLD, PREAMBLE AND CONSTITUTION OF THE INDUSTRIAL WORKERS OF THE WORLD 3–19 (1906); *see also* VINCENT ST. JOHN, THE I.W.W., ITS HISTORY, STRUCTURE AND METHODS 1–14 (1911).

[186] HAYWOOD, *supra* note 2, at 190–99.

[187] FLYNN, *supra* note 19, at 62.

[188] Letter from Pres. Theodore Roosevelt to Rep. James S. Sherman (Oct. 8, 1906), *in* 2 THE ROOSEVELT POLICY: SPEECHES, LETTERS, AND STATE PAPERS, RELATING TO CORPORATE WEALTH AND CLOSELY ALLIED TOPICS, OF THEODORE ROOSEVELT 426, 437 (1908); *Haywood Acquitted by Honest Jury!*, INDUS. UNION BULL., Aug. 3, 1907, at 1.

democracy.[189] Even "the Capitalist Press" agreed that "Haywood gave a red hot lecture," the *International Socialist Review* reported.[190] In pamphlets and speeches, Haywood argued that an industrial union like the Industrial Workers of the World was the next stage in the evolution of corporate government.

"The first English settlements in North America were made by such corporations as the Virginia Company and the Plymouth Company," Haywood declared in his stump speech, which he and Frank Bohn distributed in a pamphlet called *Industrial Socialism*. Corporations were associations of capitalists that "engaged in commerce long before modern machines were invented," and which were closely regulated by the governments that gave them their charters. But once inventors started making machines for the production of iron, lumber, textiles, and other commodities, Haywood said, "the size of the market which could be reached by a corporation grew to include the whole Nation. So the corporations developed rapidly in both numbers and in size." Eventually, the corporations grew larger than the governments that chartered them. Haywood said that the modern corporation was more powerful than "a state like New York, Missouri or California. Instead of controlling a definite section of the Nation's territory, it controls a branch of the Nation's industry." And these "Governments of Industry," Haywood emphasized, were far from democratic. Under corporate government, workers "live under an awful tyranny. They are ruled without their consent. The government which oppresses them is the government of the shops, the mines and the railroads. This government declares when they shall work and when they shall be idle." Worst of all, Haywood said, when workers sought to participate in this corporate

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[189] FLYNN, *supra* note 19, at 62–63, 109; *see, e.g.*, *News and Views*, 10 INT'L SOCIALIST REV. 648 (1911); Robert M. Lackey, *The Brotherhood of Machinists*, 10 INT'L SOCIALIST REV. 607 (1911); *William D. Haywood in Europe*, 10 INT'L SOCIALIST REV. 286, 286 (1910).

[190] *Haywood Drawing Record-Breaking Crowds*, 10 INT'L SOCIALIST REV. 681 (1911).

government, the corporations used violence to respond. One needed only look at when "Grover Cleveland, a Democratic President, broke the great A.R.U. strike in 1894."[191]

To fight this monumental tyranny, Haywood argued that workers needed to organize into unions powerful enough to force the corporation to democratize. "The purpose of labor unions has been to control, or partly control, the conditions of labor and the division of labor's product," Haywood wrote. "That is, the workers seek, through their unions, to help govern the industries, instead of letting the capitalist do as he pleases. Every demand made by organized labor upon the capitalists is in the nature of a proposed law for the shop. When the capitalist surrenders and gives in to the demands of the workers the law is passed."[192]

Haywood intended for the Industrial Workers of the World to be the ultimate source of democracy—not just for the corporation, but for America. Although Haywood was still a socialist, he now believed that "Parliamentary action is secondary in importance to industrial action; it is industrial action alone that makes political action effective."[193] In his speeches, Haywood explained how. "There are vote-getters and politicians who waste their time coming into a community where 90 per cent of the men have no vote, where the women are disfranchised 100 percent, and where the boys and girls under age, of course, are not enfranchised. Still they will speak to these people about the power of the ballot," Haywood said to a packed auditorium in New York in 1911. But even if these workers were disfranchised outside the workplace, Haywood declared, they could enfranchise themselves inside the workplace if they joined an organization like the Industrial Workers. United with

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[191] HAYWOOD & BOHN, *supra* note 3, at 32–39.

[192] *Id.* at 39–45.

[193] William D. Haywood, *News from Europe*, 10 INT'L SOCIALIST REV. 336, 340 (1910).

other workers, even the smallest child had the ability to withhold his or her labor power until he or she were given the opportunity to participate in corporate decisions. "[T]he broadest interpretation of political power comes through the industrial organization," Haywood said. "[T]he industrial organization is capable not only of the general strike"—during which all workers of all industries would strike to support one another—"but [it also] prevents the capitalists from disfranchising the worker; it gives the vote to women, it re-enfranchises the black man and places the ballot in the hands of every boy and girl employed in a shop." When workers organized together, Haywood said, they themselves become "eligible to legislate for themselves where they are most interested in changing conditions, namely, in the place where they work." Haywood concluded with language emphatically declared how future corporate governments would be run democratically by workers:

> Wherever the organized workers gain partial control over the shop in which they work, we have the growth of industrial democracy. If the workers have been employed twelve hours a day and they force their employer to grant them the ten-hour day, they are passing an important law of the shop. That law springs from the power of the workers to govern the shop. Suppose that the workers of the whole Nation demanded and enforced the eight-hour day. That would be a mightier law in the interest of the working class than all the laws ever passed by Congress and the state legislatures.[194]

When asked if the Industrial Workers of the World was a political organization, Haywood responded that the ballot box was important for stopping hostile governments from calling out armed forces to suppress strikes. But, he continued, "I know, too, that when the workers are brought together in a great organization they are not going to cease to vote. That is when the workers will *begin* to vote, to vote for directors to operate the

[194] Speech by William D. Haywood (Mar. 16, 1911), *supra* note 10, at 2–10; HAYWOOD & BOHN, *supra* note 3, at 52–53.

industries in which they are all employed. . . . You must not be content to come to the ballot box on the first Tuesday after the first Monday in November. . . . I want a working class that can hold an election every day if they want to."[195]

The person who organized the New York event in 1911 was a twenty-one-year-old woman named Elizabeth Gurley Flynn, who recalled that Haywood's speech "was like sledge-hammer blows, simple and direct."[196] Born in 1890 to Irish immigrant parents, Flynn was "radicalized," as she put it, by her father, a quarry worker who went to college and became a civil engineer. As the United States went to war with Spain in 1898, Flynn's father joined the Anti-Imperialist League and railed against the occupation of the Philippines over the dinner table. He also voted for Debs when he ran for president in 1900. Both of Flynn's parents encouraged her to read, and the books she picked out strongly influenced her life choices. She became a lifelong vegetarian after reading Upton Sinclair's *The Jungle* and, like Debs, she became a socialist after reading Edward Bellamy's *Looking Backward*.[197]

In 1902, Flynn's teacher gave the twelve-year old the assignment of arguing the affirmative side in a public school debate on the question, "Should the Government Own the Coal Mines?" Gurley Flynn loved the experience so much that she began speaking publicly at local socialist clubs around New York City, giving speeches with titles like "What Socialism Will Do for Women." When the novelist Theodore Dreiser met her, he called her an "East Side Joan of Arc." After Haywood's arrest and extradition to Idaho in 1906, Flynn

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[195] Speech by William D. Haywood (Mar. 16, 1911), *supra* note 10, at 10–13; *see also, e.g.*, William D. Haywood, *The General Strike*, 10 INT'L SOCIALIST REV. 680 (1911); Frank Bohn, *The Ballot*, 10 INT'L SOCIALIST REV. 1118, 1119 (1910) (calling for a "strike at the ballot box . . . in the shop, and by municipalities, states and nations . . . .").

[196] FLYNN, *supra* note 19, at 109–11.

[197] *Id.* at 13, 21, 33–37.

spoke at a protest meeting in Schenectady, New York—her first experience with the Industrial Workers of the World. She joined the organization in 1906, belonging to Mixed Local No. 179, in New York City, even though the only wages she earned were the ones she made giving speeches.[198]

During the months when Haywood sat in jail, Flynn became an organizer for the International Workers. Traveling with her mother and a baby, Flynn and other organizers, such as James P. Thompson and Joe Ettor, crisscrossed the country establishing locals from Chicago to Spokane.[199] One of the locals established in the country's largest gold mining region—Goldfield, Nevada—was so successful that its members included not only all the area's miners but also the town workers, from dishwashers and engineers to stenographers, teamsters, and clerks. "The newsboys were organized," Gurley Flynn later recalled, "and when the *Tonapah Sun* attacked the I.W.W., they refused to sell it." If Pullman and Lawrence were model company towns, Goldfield became a "model union town." The local established a minimum wage of $4.50 per day; it set an eight-hour day for all workers; and if employers wanted to know the wage scale for their own employees, they had to read the notice posted outside the International Workers of the World office downtown.[200]

Another early local was Industrial Union No. 20, chartered in Lawrence, Massachusetts, in 1907.[201] Twenty-five years had passed since the Pacific Mills strike in 1882, but the cause of that strike—the contrast between the wealth of Lawrence's

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[198] *Id.* at 42–43, 51–54, 68.

[199] Interview of Mary Heaton Vorse (Apr. 13, 1957), *supra* note 19, at 5.

[200] FLYNN, *supra* note 19, at 81–84; *see also* ST. JOHN, *supra* note 185, at 19–20.

[201] *See The Work in New England*, INDUS. UNION BULL., Jan. 11, 1908, at 1; *Financial Statement for October*, INDUS. UNION BULL., Oct. 5, 1907, at 3; *Fakers Fear Discussion*, INDUS. UNION BULL., Jul. 6, 1907, at 4.

corporations and the poverty of its immigrant workers—had only gotten worse. The Pacific Mills continued to thrive, paying its stockholders 12 percent dividends "as regularly as sunrise." Frederick Ayer's American Woolen Company paid only 8 percent, but poured so much money into its mills that it had surpassed the Pacific Mills to become the largest single employer in the city, employing over 16,000 workers, or half the working population of the mills. In the area around the Washington Mills that Ayer had purchased in the 1870s, the American Woolen Company also constructed three enormous mills: the Ayer Mills, the Prospect Mills, and the Wood Worsted Mills, the last of which was the world's largest producer of "worsted," a type of woolen fabric. Both companies were doing quite well for their shareholders and directors, most of whom lived in Boston, Lowell, and other places outside the city.[202]

Things were much worse for the people who actually lived in Lawrence. By 1910, fully one-half of Lawrence's population aged 14 and older were employed in the textile mills. Their families—approximately 60,000 of the 85,892 people living in Lawrence—were directly dependent upon earnings in the mills. But almost a third of these workers received less than $1 per day: a wage far lower than the $4.50 minimum wage established in Goldfield.[203] Few workers lived in the "corporation" boarding houses anymore. While superintendents and midlevel management were given three-story houses with orchards in the back, most employees lived in congested blocks of tenements.[204] One visitor recalled

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[202] AMERICAN WOOLEN CO., THIRTEENTH ANNUAL REPORT OF THE AMERICAN WOOLEN COMPANY 1–3 (1912); AMERICAN WOOLEN CO., *supra* note 131, at 20; FLYNN, *supra* note 19, at 122; EBERT, *supra* note 15, at 12; VORSE, *supra* note 2, at 3–4, 19; T.O. Marvin, *Handling the Lawrence Strike*, 23 THE PROTECTIONIST 657, 657 (1912); *American Woolen Company's Business*, HARTFORD COURANT, Mar. 6, 1912, at 11.

[203] BUREAU OF LABOR, DEPT. OF COM. & LABOR, REPORT ON THE STRIKE OF THE TEXTILE WORKERS IN LAWRENCE, MASS., IN 1912, SEN. REP. NO. 62-870, at 9, 19 (1912).

[204] Interview by Yilderay Erdener with Marion Barker in Lawrence, Mass. (May 15, 1989) (transcript on file at the Lawrence History Center); John J. Maginnis, *A City Transformed by Turmoil*,

walking from downtown Lawrence, "a well-ordered New England town with its wide Common bordered by fine elms," into a "squalor that no slum in a large city could equal." There, "in these back alleys of Lawrence, was gray stagnation."[205] She and other visitors described yards littered with rubbish, stairs foul with the smell of bad toilets, and sunless apartments whose floors were covered with boarders' mattresses. One group of public health advocates reported in 1911 that the apartments were built so close together that "by reaching out the kitchen window, four or five kitchen utensils are regularly hung on nails which have been driven in the side wall of the neighbor's house." There was not even enough space "to place a garbage can on the same lot with the house."[206]

Few of Lawrence's millworkers were citizens who could participate in local or state politics to improve their condition. Most of the workers were recent immigrants from Ireland, England, Quebec, Italy, Belgium, and virtually every other country in Europe. Many observers guessed that "[t]here are more languages spoken in the confines of Lawrence than in any other district of its size in the world."[207] This language barrier became an immediate problem for Local No. 20, which divided itself into branches based on nationality so that workers could communicate with one another.[208] Nevertheless, for its first five years, Local No. 20 stagnated, representing only 300 dues-paying members.[209]

LAWRENCE EAGLE-TRIBUNE, Apr. 27, 1980, at 1. Maginnis was a junior at Lawrence High School in 1912.

[205] VORSE, *supra* note 2, at 3–11.

[206] *Id.*; Francis H. McClean et al., The Report of the Lawrence Survey 33–58 (1912).

[207] Mary E. Marcy, *The Battle for Bread at Lawrence*, 10 INT'L SOCIALIST REV. 533, 539 (1912).

[208] *Assist the Striking Fellow Workers*, INDUS. UNION BULL., Aug. 22, 1908, at 3; *The Work in New England*, *supra* note 201, at 1.

[209] BUREAU OF LABOR, *supra* note 203, at 63.

This radically changed in January 1912, however, after members of the local invited Haywood, Flynn, and other organizers to bring "industrial democracy" to Lawrence.

III

In the words of Justus Ebert, a publicist for the Industrial Workers of the World, "The Industrial Democracy Arrived" in Lawrence on January 13, 1912.[210] It was summoned by Angelo Rocco, a 29-year-old high-school student from Italy.

Although Rocco was "considerably older than other members of the class of 1913," he was fortunate to be in school.[211] Like most people in Lawrence, Rocco had emigrated from Europe looking for work in New England, where wages of $5 or $6 per week were considerably higher than anything he could earn in Italy. Before arriving in Lawrence, Rocco had spent time in France, Maine, New York, Vermont, and Rhode Island, but he settled in Lawrence because there were other people there from his hometown in Naples. After ten years of working in textile mills, Rocco had become an accomplished enough weaver to be able to afford a small house with rooms that he could rent to boarders. As it happened, the person who sold Rocco the house tried to cheat him, and Rocco successfully collected damages after taking the seller to court. By the time Rocco was twenty-nine, he had earned and saved enough money to afford to go to high school and work as a weaver

[210] EBERT, *supra* note 15, at 9. For a recent, comprehensive account of the Lawrence textile strike of 1912, including an explanation of why it was later remembered as the "Bread and Roses" strike, see generally BRUCE WATSON, BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM (2005).

[211] Maginnis, *supra* note 204, at 1.

only over the summer.[212] He was the only Italian immigrant in his class, and possibly the first Italian-American to go to Lawrence High School.[213]

Rocco spoke fluent French thanks to his time living in France, and he joined Local No. 20 of the Industrial Workers of the World in 1911, at a time when its members were almost entirely Franco-Belgian. Rocco joined, in part, to disrupt the common stereotype that Italian immigrants were strikebreakers: "Now I said to myself now is the time to have the Italian people join the other workers and not try to break [any] strike," he recalled. Rocco helped form an Italian branch of Local No. 20 later that year. He even invited an Italian-American organizer for the Industrial Workers, Joseph Ettor, to stay in his home for three days to help get it started.[214]

The timing of Rocco's organizing was fortunate. Three years earlier, in February 1908, legendary progressive attorney Louis D. Brandeis persuaded the Supreme Court that it was constitutional for states to pass laws limiting the working hours of women to protect their health.[215] Four months after the ruling, the Massachusetts legislature passed "An Act Relative to the Hours of Labor of Women and Minors," which prohibited companies from employing women or children for more than 56 hours per week.[216] Because women and children represented approximately half of Lawrence's millworkers, the American Woolen Company, Pacific Mills, and other Lawrence companies responded by reducing the hours of

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[212] Interview by Theresa DePippo with Angelo Rocco, in Methuen, Mass. (Apr. 2 & 12, 1982) (transcript on file at the Lawrence History Center, box 3, folder 43).

[213] Interview by Joan Kelley with Gregory Rocco, in Lawrence, Mass. (Aug. 28, 2008) (transcript on file at the Lawrence History Center); *see also*

[214] *Id.*; Interview by Joann Rocco and Gregory Rocco with Angelo Rocco (Mar. 20, 1975) (transcript on file at the Lawrence History Center).

[215] Muller v. Oregon, 208 U.S. 412 (1908).

[216] An Act Relative to the Hours of Labor of Women and Minors, Jun. 13, 1908, ch. 645, 1908 Mass. Acts 768.

all workers and paying them the same weekly wage for 56 hours that they had previously paid for 58 hours.[217] In May 1911, while Rocco was organizing the Italian branch of Local No. 20, the Massachusetts legislature passed another act that further reduced the maximum hours for women and children from 56 hours to 54 hours.[218] The act was scheduled to take effect on January 1, 1912.

As the new year dawned, workers in the various mills slowly learned that while the mill companies intended to reduce the hours of all workers, they had no intention of paying workers the same wages for 54 hours that they had previously paid for 56 hours.[219] William Wood, who had recently replaced Frederick Ayer as chief executive of the American Woolen Company, privately complained that the Lawrence mills could not afford to pay workers the same wage for 54 hours that mills in nearby New Hampshire were paying for 58 hours—a wage that was higher still than what mills in the South were paying for 60 hours.[220] But workers loudly complained that they could not afford a reduction in wages that was already barely enough to pay for food and clothing. Ironically, in a frigid city that was one of the world's leading producers of woolen goods, very few people could afford an overcoat or wool hat.[221]

It took two weeks for workers' paychecks to reflect the reduced wage. During those two weeks, officers of the mills refused to meet with a committee appointed by Local No. 20

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[217] BUREAU OF LABOR, *supra* note 203, at 9, 20.

[218] An Act Relative to the Hours of Labor of Women and Minors, May 27, 1911, ch. 484, 1911 Mass. Acts 473.

[219] BUREAU OF LABOR, *supra* note 203, at 9.

[220] *See* Harry Emerson Fosdick, *After the Strike—In Lawrence*, THE OUTLOOK, Jun. 15, 1912, at 340; Lewis E. Palmer, *A Strike for Four Loaves of Bread*, THE SURVEY, Feb. 3, 1912, at 1695.

[221] Walter E. Weyl, *The Strikers at Lawrence*, THE SURVEY, Feb. 10, 1912, at 309.

to confirm whether the wages would be lowered.[222] Days before the first reduced paychecks were issued, Angelo Rocco organized a noisy meeting of almost all the Italian mill workers of the city at an auditorium called Ford's Hall, one of the largest indoor spaces in the city. Collectively, they decided that if their paychecks were reduced at the end of the week, they would go on strike. Several hundred Poles and Lithuanians unaffiliated with the Industrial Workers held a similar meeting the next day that reached the same conclusion. On the night of Thursday, January 11, as workers began receiving their reduced weekly paychecks, 1,700 weavers and spinners in two of the mills stopped working, shouting "Not enough pay." Rocco called another meeting of the Italian branch of the Industrial Workers at which the Italians promised to join the strike once they received their paychecks the following day. [223]

On the morning of Friday, January 12, the strike spread like a "flash fire" throughout the mills.[224] The striking employees of the previous day gathered outside the Everett Mill—one of about a dozen mills in Lawrence unaffiliated with the Pacific Mills or American Woolen Company—and prevailed upon others to stay away from work. As the crowd grew in size, they marched toward the American Woolen Company mills, singing and carrying Italian and American flags. Once they arrived, they rushed the gates and began shutting off power from the machines, calling for a strike. Outside, after receiving reports that strikers were throwing ice through windows, the mayor sounded a "riot call" by tolling

[222] BUREAU OF LABOR, *supra* note 203, at 31–32.

[223] *Id.* at 32–34; Interview by Theresa DePippo with Angelo Rocco, *supra* note 212; *Big Strike Is Threatening*, BOS. DAILY GLOBE, Jan. 12, 1912, at 10.

[224] Maginnis, *supra* note 204, at 1.

the city hall bell, which placed all police and firemen of the city on duty.[225] The *Boston Globe* reported that the police "charged the crowd with their clubs, striking ruthlessly right and left and bruising and cutting many a head. The vigorous attack took the fight out of the mob, and yard by yard the howling men fell back until at last they turned and ran up the street."[226]

By Friday night, over 10,000 of Lawrence's 28,000 millworkers—men, women, and children—were on strike. As the Lawrence city council began appointing dozens of new "special police officers" to handle the strike, William Wood of the American Woolen Company issued a statement arguing that "[t]here has been no reduction in the rate of wages, but it cannot be expected that people who work fifty-four hours should be paid the wages equivalent to fifty-six hours' work. . . . There is no cause for striking and when the employés find out that justice is not on their side the strike cannot possibly be long lived."[227] An editorial in the *Textile American* agreed with Wood that the wage reduction was the product of overzealous state regulation. "Massachusetts has been giving the country an exhibition of a situation into which industry can be driven when intelligence ceases to be a ruling factor of a law-making legislature. . . . Much to the chagrin of the employees, they found that by demanding less hours . . . they had punished themselves."[228]

But at a mass meeting at Lawrence's "Franco-Belgian Hall," workers were undeterred. Workers assembled themselves into groups by nationality and each group

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[225] *Id.*; BUREAU OF LABOR, *supra* note 203, at 34–36; *Two Hours, Reduced Wages, and a Strike*, THE SURVEY, Jan. 27, 1912, at 1633–34.

[226] John W. Carberry, *Mob Runs Riot in Mills at Lawrence*, BOS. DAILY GLOBE, Jan. 13, 1912, at 1.

[227] Minutes of the Lawrence City Council (Jan. 12, 1912) (on file at the Lawrence History Center, box 1, folder 11); BUREAU OF LABOR, *supra* note 203, at 35–36; Palmer, *supra* note 220, at 1695; Carberry, *supra* note 226, at 1.

[228] *When Labor Rules*, TEXTILE AMERICAN, Feb. 1912, at 13.

elected a delegate to meet with the other nationalities in a smaller space as a committee. This committee asked Angelo Rocco to telegraph his old contact at the Industrial Workers headquarters, Joseph Ettor, and ask for his assistance. Ettor received Rocco's telegram while he was sitting next to Elizabeth Gurley Flynn at Cooper Union, in New York City, while watching William Haywood debate the socialist Morris Hillquit about industrial unionism. The next day, Ettor and his friend, the poet Arturo Giovannitti, were on a train to Lawrence; Flynn and Haywood would follow them shortly after.[229]

Ettor was a stocky, Italian-American 26-year old with rosy cheeks and a Bohemian wardrobe; he regularly wore blue suits with big, flowing red ties. He grew up in Brooklyn, Chicago, and San Francisco where, during the 1906 earthquake, he and Jack London allegedly sat on a hillside across the bay and watched the city burn.[230] He became affiliated with the Industrial Workers while working in the San Francisco shipyard, and he soon became an organizer for the union up and down the Pacific Coast. He wrote that he was "familiar, from practical experience, with the company police, company stores, blacklist, stockades, and other methods used by the big corporations to keep their wage workers in slavery."[231]

As soon as Ettor arrived in Lawrence, he selected interpreters from each nationality "to bring order out of this veritable tower of Babel."[232] On Lawrence Common—the park originally gifted by the Essex Company in the 1850s—Ettor called for the election of a

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[229] HAYWOOD, *supra* note 2, at 245–46; EBERT, *supra* note 15, at 33; BUREAU OF LABOR, *supra* note 203, at 34; Interview by Theresa DePippo with Angelo Rocco, *supra* note 212.

[230] FLYNN, *supra* note 19, at 77–78; JOSEPH J. ETTOR, ETTOR AND GIOVANNITTI BEFORE THE JURY AT SALEM 6–10 (1913).

[231] ETTOR, *supra* note 230, at 12.

[232] FLYNN, *supra* note 19, at 117.

"strike committee" consisting of three people from each nationality. Ettor was elected chair of the committee, but its dozen other members were weavers, spinners, and other workers from the mills.[233] By Sunday, this committee adopted four demands that the rest of the strikers voted to approve: a 15-percent wage increase, double pay for overtime, the abolition of the "premium" system by which workers were paid bonuses for increased production, and a prohibition on future discrimination against people who participated in the strike.[234]

Monday morning was bitterly cold: around 0º Fahrenheit with snow on the ground. Large crowds of strikers gathered by the gates of the striking mills to dissuade other workers from entering. Later that morning, they marched to the Pacific Mills, which were separated from the rest of the mill district by a canal. As the strikers attempted to cross the bridge, officers of the Pacific Mills sprayed fire hoses at them to keep them away. Cold, saturated, and infuriated, the workers responded by throwing ice and coal at the mills' windows, shooting guns into the air, and attempting to force their way past the hoses. The police responded by clubbing the strikers, arresting thirty-six of them on charges such as "rioting," "carrying dangerous weapon," or "carrying dangerous weapon and rioting." The local court quickly convicted the arrestees, imposing a $1 fine for most cases. Ettor complained that such rushed "justice" was proof that the courts and the city were stacked against the strike, and further evidence that the only political power a worker possessed was his or her "vote in his own union to determine the affairs of the workers at work."

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[233] For more on the strike committee, see Clarisse A. Poirier, *The Committee of Ten: The Local Heroes Who Faced Lawrence's Mill Men and Won in 1912*, *in* THE GREAT LAWRENCE TEXTILE STRIKE OF 1912, at 37 (Robert Forrant & Jurg Siegenthaler eds., 2014).

[234] Palmer, *supra* note 220, at 1690–91; BUREAU OF LABOR, *supra* note 203, at 35–37.

William Wood of the American Woolen Company responded with a statement declaring "there is no strike here, but just mob rule." [235]

The mayor, evidently, agreed with both Ettor and Wood. He issued a call for the Massachusetts Volunteer Militia to send troops, writing that "it appears to the Mayor of the City of Lawrence that a tumult is threatened and that a body of men are acting together and threaten by force to violate and resist the laws of the Commonwealth in our City of Lawrence, and that Military force is necessary to aid the civil authorities in suppressing the same."[236] The Adjutant General of Massachusetts responded by sending thousands of soldiers to impose martial law in Lawrence's mill district. One of the troops he sent was a troop of students from Harvard University. This troop became something of a touchstone for how people felt about the strike. Reporters gawked over "A. 'Pete' Sortwell, forward on the hockey team," and "E.E. Merrihew, Harvard's crack runner."[237] The president of Harvard, Abbot Lawrence Lowell, revealed the bias suggested by his name when he declared that the Harvard troop would be exempt from taking midterm exams unless the students wanted to raise their grade with a make-up exam in March.[238] Socialists saw the "[i]nsolent, well-fed Harvard men" as evidence that capitalists were erecting a united front against the working class.[239] And even several less-socialistic alumni were severe in their

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[235] ADJUTANT GEN. OF THE COMMONWEALTH OF MASS., ANNUAL REPORT FOR THE YEAR ENDING DECEMBER 13, 1912, at 45 (1913); EBERT, *supra* note 15, at 52–53; *Two Hours, Reduced Wages, and a Strike*, *supra* note 225, at 1663–64; BUREAU OF LABOR, *supra* note 203, at 37–38; 2 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 1557 (testimony of Joseph Ettor).

[236] Mayor Michal Scanlon, Letter to Gardner W. Pearson, Adjutant Gen. of the Mass. Volunteer Militia (Jan. 15, 1912) (on file at the Lawrence History Center, box 1, folder 2).

[237] *Harvard Men on Guard*, N.Y. TIMES, Feb. 1, 1912, at 3.

[238] *Id.*; *see also Examinations*, HARV. CRIMSON, Apr. 2, 1912; *Make-Up Examinations in April*, HARV. CRIMSON, Mar. 22, 1912; *Interesting Facts of the Day*, HARV. CRIMSON, Mar. 12, 1912.

[239] Mary E. Marcy, *The Battle for Bread at Lawrence*, 12 INT'L SOCIALIST REV. 533, 542 (1912).

condemnation of the troop. One alum wrote that "the picture of Harvard students gaily donning uniforms and starting out as if on a picnic to aid in the oppression of the helpless people who are fighting as best they can for their rights is most distressing."[240] Another asked why "Harvard College, only twenty-five miles from Lawrence, did not concern itself with the strike except to add a rifle corps to the military regiment." He proposed instead that "that seat of learning, located on the road where so many Concord and Lexington 'minute men' lost their lives in the first conflict of the Revolution, organize companies of intellectual 'minute men' to hasten with aid at times of industrial danger."[241]

Over the next two weeks, militia patrolled Lawrence's mill district on 24-hour shifts, guided by instructors from the U.S. Army. (One of these instructors was George C. Marshall, the future secretary of state and Nobel laureate.[242]) Headquartered in the offices of the various textile mills, the militia prohibited parades and protests around the mill gates and otherwise followed directions "to guard and protect property and preserve law and order."[243] Despite their presence, the strike grew in size to include 20,000 of Lawrence's 28,000 millworkers. Haywood and Flynn arrived toward the end of January, and they were greeted at the train station by over 10,000 strikers together with three bands and two drum corps. On Lawrence Common, they spoke to the strikers in down-to-earth language about the lesson the strikers were sending to workers across the country. "My dream in life is to see all workers united in one big union," Haywood said, spreading his fingers wide before

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[240] *Rule by Brains, Not Bayonets*, BOS. DAILY GLOBE, Feb. 3, 1912, at 5; *see also Hope for Strike Settlement,* BALTIMORE SUN, Feb. 4, 1912, at 2.

[241] Percy Stickney Grant, *Brains Versus Bayonets*, N. AM. REV., Aug. 1912, at 183, 188.

[242] *See* Letter from Lieut. George C. Marshall to Capt. George Van Horn Moseley (Jan. 31, 1912), *reprinted in* 1 THE PAPERS OF GEORGE CATLETT MARSHALL 69 n.2 (Larry I. Bland ed., 1981).

[243] BUREAU OF LABOR, *supra* note 203, at 38–39; ADJUTANT GEN. OF THE COMMONWEALTH OF MASS., *supra* note 235, at 45, 123–24.

clenching them into a fist. "Soon I hope to see the workers so organized that when the mills in Lawrence go on strike, for instance, the mills in every city will go on strike. In this way you will lock the bosses out for once and all!" He emphasized that under the Industrial Workers' vision, "you will need no passports or citizenship papers to take part in the affairs in which you are directly interested. . . . There will be no divisions of race, creed, sex or color. Every person who is a factor in industrial activity will take a part in this industrial democracy."[244] As Haywood left to raise money for the strikers in other cities, he and Flynn encouraged the strikers to resist the militia's presence with nonviolence. "You can't weave cloth with bayonets," Haywood said. "I have never, in all my experience, seen a strike defeated by soldiers."[245]

During these two weeks, the mills continued to pay their employees. (Just as it took until January 12 for the workers' paychecks to reflect the January 1 wage reduction, it took until January 26 for the workers' paychecks to reflect the January 12 work stoppage.) As January 26 approached, the mill officials hatched an aggressive plan to end the strike. On January 20, city police "discovered" bundles of dynamite placed in a tenement house, near a cobbler shop, and by a crowded alley. As reporters went wild with accusations that the International Workers were "reckless, dangerous anarchists" who planned to blow up the city, the police arrested a dozen people and the militia prohibited any strikers from even approaching the mills. These accusations were quickly blown apart, however, to reveal "a clumsy plot to discredit the strikers." Detectives discovered that the dynamite had been

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[244] William D. Haywood, *Socialism the Hope of the Working Class*, 12 INT'L SOCIALIST REV. 461, 462 (1912).

[245] BUREAU OF LABOR, *supra* note 203, at 39–44; FLYNN, *supra* note 19, at 118–124; HAYWOOD, *supra* note 2, at 246–49; EBERT, *supra* note 15, at 58; Mary E. Marcy, *The Battle for Bread at Lawrence,* 12 INT'L SOCIALIST REV. 533, 537–38 (1912);

wrapped in newsprint torn from a trade magazine for undertakers. The local undertaker, John Breen, was the son of a former mayor, a member of the school committee, and a close associate of the owners of the American Woolen Company. He was quietly arrested and later prosecuted for criminal conspiracy—as were, eventually, several officers of the company. Breen ended up being convicted and paying a $500 fine.[246]

More damaging to the strike was a clash between strikers and the police on Monday, January 29, during which a bystander named Annie LoPizzo was shot and killed.[247] Although there was little evidence to say who fired the weapon, Joseph Ettor and Arturo Giovannitti were located on the other side of town and arrested for being accessories to murder. State prosecutors sought the death penalty on the theory that Ettor and Giovannitti had incited a riot with their fiery speeches calling for the workers to resist "the policeman's club and the militiaman's bayonet." Eugene V. Debs, who had spent time of his own in prison, sent Ettor and Giovannitti a telegram saying "Congratulations. Victory is in sight. . . . The slave-pens of Lawrence under protection of America's Cossacks are a disgrace to American manhood and a crime against civilization." The strike committee invited Haywood back to Lawrence, where he replaced Ettor as the committee's chairman. The militia, in turn, imposed martial law on the entire city of Lawrence, warning the Industrial Workers "that there would be no more parades or open-air meetings or gatherings of people on the street or the Common." This was a severe blow for a strike of 20,000 people, as it forced the strike committee to hold ten meetings in smaller places instead of one meeting

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[246] BUREAU OF LABOR, *supra* note 203, at 39; Interview by Theresa DePippo with Angelo Rocco, *supra* note 212; Maginnis, *supra* note 204, at 2; *William M. Wood, Indicted in Dynamite Case, Surrenders*, CHRISTIAN SCI. MONITOR, Aug. 30, 1912, at 1; Samuel Gompers, *The Lawrence Dynamite Conspiracy*, 19 AM. FEDERATIONIST 815, 821–22 (1912); Phillips Russell, *The Dynamite Job at Lawrence*, 13 INT'L SOCIALIST REV. 308, 309–11 (1912); Marcy, *supra* note 245, at 536; Palmer, *supra* note 220, at 1697.

[247] Various publications called her Anna La Pizza, too.

outside. "We were followed from place to place by the troopers," Elizabeth Gurley Flynn recalled. "Sometimes they rode their horses right up on the steps of the hall, shoving the strikers through the narrow doors. The horses would try not to step on people and became very unruly. The people would laugh at the arrogant riders and say: 'You see—horse I.W.W.!'"[248]

The Industrial Workers sought to make the best of a bad situation by demonstrating, in Ettor's absence, that the strike was run "so democratically, so much by the workers themselves, that no matter who was arrested, it'd go on." Indeed, the strike itself became the model for what a future "industrial democracy" might look like in Lawrence. Every morning, strikers and their families picketed the opening of the mills for two hours by walking in an "endless chain" along the streets. Each person in the chain wore a button from the Industrial Workers or a label reading "Don't be a scab," as they tried to dissuade or intimidate workers from going to the mills. After picketing, the crowds descended on eleven different kitchens the strikers established around the city. There, other strikers in charge of bookkeeping, distributed allotments of food, coal, and clothing to striking families. Later in the morning, the 48 delegates elected to the strike committee met to discuss strategy or consider a proposal from the city or the mill owners. During the rest of the day, the delegates met in meetings with other strikers of their nationality to exchange news with one another, give their own reports, and vote on any of the strike committee's recommendations. "Usually the proceedings finished with the singing of the *Internationale* and cheers for the strike and the I.W.W.," two sympathetic reporters wrote.

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[248] Minutes of the Lawrence City Council (Jan. 29, 1912) (on file at the Lawrence History Center, box 1, folder 11); FLYNN, *supra* note 19, at 118–20; HAYWOOD, *supra* note 2, at 247; EBERT, *supra* note 15, at 60–61; ADJUTANT GEN. OF THE COMMONWEALTH OF MASS., *supra* note 235, at 45, 124–25; Marcy, *supra* note 245, at 541.

It was the "completest democracy."[249] Another reporter saw in the organization of the Lawrence strikers a budding "social democracy in miniature," one that was "thoroughly democratic, powerful, and practicable" and which could "train leaders who will remain workingmen in their sympathies, yet will be able, as representatives of the people, to conduct all industries that should be collectively regulated or owned."[250]

At some of these meetings, Flynn, Haywood, or other organizers from the Industrial Workers arrived to talk to the strikers about socialism and industrial democracy. "The object of this labor trust is to improve labor's wages and conditions, while, at the same time, striving for the democratic control of industry by labor and for labor, instead of private capitalists, as at present," one organizer recalled discussing. "The shop is the workers' state."[251] Flynn recalled that "[m]any of the foreign-born workers, especially Belgian, Italian, German and English, had been members of unions in the old countries. The message of Socialism was not new to them." But for the workers for whom it was new, the organizers rhetorically asked them whether they came to the United States "[t]o be wage-slaves, hired and fired at the will of a soulless corporation, paid low wages for long hours, driven by the speed of a machine?" Flynn often spoke about how the corporate executives and American politicians "had ignored their plight because they could not vote. 'Just a bunch of foreigners'—the politicians said.'" By contrast, they all had a voice in the union and in the strike. "We talked to the strikers about One Big Union, regardless of skill or lack of it, foreign-born or native-born, color, religion or sex. We showed how all differences are

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[249] BUREAU OF LABOR, *supra* note 203, at 50, 67–68; VORSE, *supra* note 2, at 6–7; EBERT, *supra* note 15, at 75; Leslie H. Marcy & Frederick Sumner Boyd, *One Big Union Wins*, 12 INT'L SOCIALIST REV. 613, 620 (1912).

[250] James Ford, *The Co-Operative Franco-Belge of Lawrence*, THE SURVEY, Apr. 6, 1912, at 68–70.

[251] EBERT, *supra* note 15, at 33–34.

used by the bosses to keep workers divided and pitted against each other. We spoke to nationalities who had been traditionally enemies for centuries in hostile European countries, like the Greeks and Turks and Armenians, yet they marched arm-in-arm on the picket line."[252] One reporter from *Harper's Weekly* later recalled that "A good strike is a college for workers. When the workers listen to the speeches they are going to school. Their minds are being opened. They are learning history and economics translated into the terms of their own lives."[253] She noted that the "spiritual quality of the strike meetings were what impressed everyone. They were what made it a watershed of labor. You saw a great group of people who have been separated by language and by the terrible hours of work and by poverty—you saw them coming together in a common struggle that had no hate in it, and which had order, which had beauty. It impressed everybody."[254]

The officers of the American Woolen Company and their allies disputed this characterization. They portrayed the violence in Lawrence as evidence that the Industrial Workers were outside "anarchists" who were attempting to undermine the legitimate governments of both Lawrence and the mill corporations. For example, in the *Bulletin of the National Association of Wool Manufacturers*, John Bruce McPherson wrote of Ettor as a man who had "the cunning of the Syrian and the eloquence of the Italian." Because Ettor was "steeped in the literature of revolutionary socialism and anarchism," McPherson wrote, Ettor was able to "swa[y] the undisciplined mob as completely as any general ever controlled his disciplined troops . . . , [organizing] these thousands of heterogeneous, heretofore unsympathetic, and jealous nationalities into a militant body of class-conscious

[252] FLYNN, *supra* note 19, at 123–25.

[253] VORSE, *supra* note 2, at 6–7.

[254] Interview of Mary Heaton Vorse (Apr. 13, 1957), *supra* note 20, at 6.

workers" that believed that "all workers would become the real bosses in the mills."[255] The president of Tufts College, Frederick W. Hamilton, agreed, equating the strikers' goal of industrial democracy with "the rule of a despot, even though the despot were the people. . . . The mobs of Athens, of the French Revolution, and that which is being restrained by the citizen soldiery in Lawrence, are all alike, all acting in the name of the people . . . [to set] up a reign of terror in the name of liberty."[256] One high-school junior, John J. Maginnis, recalled that his parents told him to stay away from the "high living and loose morals of the strike leaders." His family "regarded the 'Dagos' and the IWW as an unholy combination of radicals bent on undermining our way of life."[257]

Interestingly, the executives of the mill companies described their corporations as the true democracies of Lawrence. Their main constituency was not their employees, however, but their shareholders. "I am an employee of the company as you are," William Wood of the American Woolen Company said in a statement on January 19. "As its president I am bound . . . to take proper care of the interests of 13,000 stockholders. Quite a number of them are employees, and most of them are not rich. Many of them necessarily depend on their dividends for their living just as you depend on your wages for yours." Although Wood recognized that he wanted his employees to receive a "square deal" too, he reminded them that they were also responsible for the people who invested in the company. "[Y]ou and I . . . are members of this organization," he said. "I therefore as the head of this

[255] John Bruce McPherson, *The Lawrence Strike of 1912*, 42 BULL. NAT'L ASS'N WOOL MFRS. 219, 241–43 (1912).

[256] *Tyranny Like That of Kings*, *supra* note 14, at 5.

[257] Maginnis, *supra* note 204, at 2.

organization of which we are all members, appeal to you to return to your work and faithfully discharge your duties."[258]

Franklin Hobbs, the president of the National Association of Cotton Manufacturers and the treasurer of one of the mills in Lawrence, elaborated on Wood's point the following night. He compared "the great number who have invested in textile shares [with] the still greater number of operatives who are vitally interested in the success of our industry," and concluded that "there should be no antagonism between them . . . [;] their interests are identical." Hobbs went on to analyze the population of shareholders in the mill companies to prove that Wood was not exaggerating when he said they were not rich. "Corporations are no longer controlled by a few men of great wealth," Hobbs said. "The contrary is true. In the last ten years it has been computed that the number of stockholders in the larger corporations in the United States has increased from 226,000 to 872,000 and the number is steadily increasing. The U.S. Steel Corporation now has over 200,000 stockholders, the American Telephone and Telegraph Company over 40,000, and other corporations in like proportion." Of the 106 textile mills in New England, Hobbs calculated that there were 35,635 shareholders and 148,350 employees. The average holding of one of these shareholders was $3,800. In addition, 45 percent of the textile shareholders were men, 41 percent were women, and 14 percent were trustees. These statistics, Hobbs emphasized, showed that "[t]he textile corporations really give large numbers of people a chance to make individually small investments and in that regard are a great benefit to the community and should be encouraged in all reasonable ways by local, state, and national legislation." They also showed that "individual holdings are small and often represent the savings of a

[258] Statement of William M. Wood, Pres. of the Am. Woolen Co. (Jan. 19, 1912), *quoted in* BUREAU OF LABOR, *supra* note 203, at 39–40.

lifetime by people, who, by thrift and economy, have accumulated a little money and then invested it in an enterprise, upon whose success their livelihood may depend." So it was unfair for the Industrial Workers to claim that they wanted to replace the mill companies with a democracy because one already existed: a shareholder democracy, in which the corporate executive is "a trustee in their interest."[259]

Through February, most of the self-described "right thinking" people inside and outside Lawrence agreed with the mill executives that the Industrial Workers of the World were, in the words of a front-page *New York Times* article, "the most serious menace the present system of society has ever been called upon to face."[260] But the tables turned for good on February 24. Earlier in the month, the Lawrence strikers decided to send their children to New York, Pennsylvania, Vermont, and other places where they could temporarily be cared for by sympathetic families. Margaret Sanger, then a trained nurse and chair of the women's committee of the Socialist Party, came to Lawrence to escort the first group of children to New York City. From the perspective of the mill executives, these children were being exploited for propaganda purposes, and in mid-February, the city prohibited any children from leaving Lawrence without a signed consent form from their parents. On February 24, as a large group of escorted children arrived at the Lawrence train station, the police descended on the crowd, arrested dozens of people, and hauled them into police court. There, a judge summarily convicted the adults of "neglect of

[259] Franklin W. Hobbs, *The Manufacturer's Responsibilities*, *in* BULL. NAT'L ASS'N WOOL MFRS. 41–49 (1912).

[260] Charles Willis Thompson, *The New Socialism That Threatens the Social System*, N.Y. TIMES, Mar. 17, 1912, at 1; Maginnis, *supra* note 204, at 2; *Socialism Behind the Lawrence Strike*, J. COM. & COM. BULL., Feb. 1, 1912, at 1; *see also, e.g.,* John Graham Brooks, *The Shadow of Anarchy*, THE SURVEY, Apr. 6, 1912, at 80; *Mass and Craft Unions*, THE SURVEY, Feb. 24, 1912, at 1793–94.

children" and put the children under the guardianship of social services.[261] The strikers called this a "day without parallel in American labor history," and the fallout was devastating for the mill companies. Although the companies announced that they were "in no way responsible for any detention of children," journalists reported on the front pages of their newspapers that women and children had been clubbed and stripped away from one another. These headlines brought even more reporters to point a spotlight on the Lawrence strikers and the miserable conditions they were fighting against. The strikers asked the United States Congress "to investigate whether Lawrence was still located in the United States of America," and the House of Representatives obliged, calling hearings at which more than fifty strikers from Lawrence testified about their lives. When asked why he had not tried to improve his situation through voting, one worker testified that he desperately wanted to become a citizen, but he would rather buy shoes for his children and bread for them to eat than pay the $4 fee that it cost to take out citizenship papers.[262]

At this point, it was only a matter of time before the mill companies gave into the strike committee's demands. In a negotiation facilitated by state senator Calvin Coolidge, the companies agreed to across-the-board wage increases, a reduction in the premium system, and reinstatement of all the workers who had gone on strike. Rather than accept the concessions on the spot, the strike committee put the concessions to a vote at a dramatic, March 14 meeting of several thousand strikers on Lawrence Common. As the Red

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[261] BUREAU OF LABOR, *supra* note 203, at 39–40; FLYNN, *supra* note 19, at 127;

[262] The Strike at Lawrence, Hearings Before the Comm. on Rules of the House of Reps., H. Doc. No. 62-671, at 99 (1912) (testimony of Samuel Lipson); FIRST ANNUAL REPORT OF THE DIRECTOR OF PUBLIC SAFETY OF LAWRENCE (1912) (on file at the Lawrence History Center, box 1, folder 5); FLYNN, *supra* note 19, at 128–29; McPherson, *supra* note 255 at 256; *The Lawrence Strike: A Review*, THE OUTLOOK, Mar. 9, 1912, at 531, 532–35. For more recent scholarship on the role of the children in the strike, see Lawrence Cappello, *In Harm's Way: The Lawrence Textile Strike Children's Affair*, *in* THE GREAT LAWRENCE TEXTILE STRIKE OF 1912, *supra* note 233, at 59.

Flag waved from the speaker's stand, Haywood asked to thunderous applause, "Shall all go back to work on Monday morning?" When thousands of hands shot into the air, Haywood celebrated their victory as "the first step in the direction of industrial freedom. It will pave the way for another increase, and if this is granted, it will put them in a position to ask for another, and so on, until there will be no more stockholders, no more grabbing. The workman and the employer will be on an equal footing."[263]

IV

That mass-meeting on the common would prove to be the high-water mark for the Industrial Workers in Lawrence. Seven months later, in October 1912, the organization was effectively dead in the city. It died from a self-inflicted wound. On September 30, Elizabeth Gurley Flynn organized a massive, one-day strike on behalf of Joseph Ettor and Arturo Giovannitti, whose trial still had not begun months after their January arrest. As fifteen thousand workers marched down Lawrence's Essex Street demanding Ettor and Giovannitti's release, reporters from across the country gathered to witness what the *New York Times* described as the country's first-ever "demonstration strike against the imprisonment of labor leaders." The strike seemed to represent a fulfillment of the Industrial Workers' dream of industrial democracy: disenfranchised immigrant workers might not be able to serve on juries, but they could certainly use their labor power to influence the courtroom, just as they had used their labor power to participate in corporate decisionmaking. The workers, surprisingly, were even successful. Ettor and Giovannitti were tried the next day and acquitted by a Salem jury that November.[264] "The Industrial

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[263] BUREAU OF LABOR, *supra* note 203, at 59; Marcy & Boyd, *supra* note 249, at 628–29; Frank P. Sibley, *Lawrence Strikers to Vote on Raise in Mass Meeting Today*, BOS. DAILY GLOBE, Mar. 14, 1912, at 1.

[264] EBERT, *supra* note 15, at 95–99; ETTOR, *supra* note 230; *The Salem Trial of the Lawrence Case*, THE OUTLOOK, Dec. 7, 1912, at 739; Phillips Russell, *The Second Battle of Lawrence*, 13 INT'L

Democracy Triumphs in Court," the Industrial Workers' publicist celebrated in his write-up of the trial. America had "developed the private corporation, a form of organization which has outgrown the control of the State, and is more powerful than it, by far." But in Lawrence, "[a] new governmental power has arisen. It is within this modern force that the new industrial democracy is conceived and is striving for emancipation."[265]

All those reporters and their cameras at the September 30 march, however, took pictures of some of the signs the strikers carried. One prominent sign read, "Arise!!! Slaves of the World!! / No God No Master / One for All & All for One." That statement, "No God No Master," was blasphemous in a city of Italian, Irish, Belgian, and French-Canadian immigrants—most of whom were devoutly Catholic. City leaders and the mill executives seized their opportunity to discredit the Industrial Workers as heretical, anti-American outsiders. Within days, the mayor and local church leaders organized a counter-march on Columbus Day. In the days before the holiday, mill and city executives handed out pins with the American flag and other expressions of patriotism. On October 12, tens of thousands of marchers saluted a banner stretched across Essex Street that read, "For God and Country / The Stars and Stripes Forever / The Red Flag Never! / A Protest Against the IWW Its Principles and Its Methods." Later that month, a spinner in one of the mills was even assaulted and killed for wearing an "I.W.W." pin on his jacket instead of one of the American flags. By 1913, the American Woolen Company was maintaining a blacklist with the names and descriptions of anyone still affiliated with the Industrial Workers.[266]

SOCIALIST REV. 417, 419–22 (1912); *Lawrence Demonstration Strike*, THE SURVEY, Oct. 12, 1912, at 52–53; *Fierce Fighting in Lawrence Riot,* N.Y. TIMES, Oct. 1, 1912, at 1; *One-Day Strike Voted at Lawrence*, N.Y. TIMES, Sep. 29, 1912,

[265] EBERT, *supra* note 15, at 154.

[266] Blacklist of I.W.W. Members (1913 or 1914) (on file at the Lawrence History Center, box 3, folder 14); Photograph of Essex Street (Oct. 1912) (on file at the Lawrence History Center); Interview by Theresa DePippo with Angelo Rocco, *supra* note 212; FLYNN, *supra* note 19, at 137–40; Carlo Tresca,

The national Industrial Workers did not fare much better. As World War I broke out in 1914, the Industrial Workers became outspoken opponents of a war they regarded as unnecessary and imperialistic. Their leaders and their tactics came under increasing scrutiny by the federal government, as did their large immigrant membership. As the United States entered the war in 1917, Congress passed acts that severely limited immigration and which outlawed "disloyal, profane, scurrilous, or abusive language" against the United States government. In a series of prosecutions that culminated in a massive 1920 raid led by Attorney General A. Mitchell Palmer and his assistant, J. Edgar Hoover, the federal government soon convicted Eugene V. Debs, William Haywood, and other leaders of the Industrial Workers for their actions opposing the war effort. Although Debs famously ran for president in 1920 from his prison cell, he did so while repudiating his involvement with the Industrial Workers.[267] Haywood, meanwhile, fled to the newly formed Soviet Union, where he died as a political refugee in 1928. Flynn managed to avoid prosecution for three decades, during which time she helped to found the American Civil Liberties Union, campaigned for the release of Nicola Sacco and Bartolomeo Vanzetti, and joined the Communist Party of the United States. She was eventually convicted in 1951 of violating the Smith Act's prohibition on advocating the overthrow of the government—a prohibition later declared a violation of the First Amendment by the Supreme Court.[268]

"God and Country": Why They Are Used to Attack the I.W.W.," *in* EBERT, *supra* note 15, at 159; Maginnis, *supra* note 204, at 2.

[267] SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM 105–06 (2006).

[268] *See* Smith Act, Pub. L. No. 76-670, 54 Stat. 670 (1940); Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553; Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217; Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874. *See generally* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES 23–90 (1990); PETER CARLSON, ROUGHNECK: THE LIFE AND TIMES OF BIG BILL HAYWOOD (1983); FLYNN, *supra* note 19; HAYWOOD, *supra* note 2; PAUL BRESSENDEN, THE I.W.W.: A STUDY OF AMERICAN

But while the Industrial Workers were suppressed by the federal government, their message of industrial democracy thrived—in large part thanks to the same federal government. In February 1912, while the Lawrence strike was ongoing, President William Howard Taft delivered a message to the United States Congress calling for the creation of a commission to conduct a "reexamination of our laws bearing on the relations of employer and employee."[269] The president's message was a victory for a group of progressive reformers, including Louis D. Brandeis, who had petitioned the president to cast a "light along [a] crucial boundary line—the borderland between industry and democracy." The reformers' petition channeled the Civil War in explaining the proposed commission's purpose. "Today, as fifty years ago, a house divided against itself cannot stand," it read. "We have yet to solve the problems of democracy in its industrial relationships and to solve them along democratic lines."[270]

This petition was evocative of Louis Brandeis's imprecise, pre-1912 understanding of what the Industrial Workers were calling "industrial democracy." Raised Jewish in antebellum Kentucky, Brandeis moved to Massachusetts in 1875 to study at Harvard Law School. When he graduated, he remained in Boston, whose Puritan values, he wrote, "came nearer my ideal than anything I had ever found anywhere else. . . . Early New England was built up on the Old Testament, and I think it was that a good deal which made me feel so

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SYNDICALISM (1919); ELIZABETH GURLEY FLYNN, SABOTAGE: THE CONSCIOUS WITHDRAWAL OF THE WORKERS' INDUSTRIAL EFFICIENCY (1916).

[269] Message of the President of the United States Transmitting Data of the Work of the Interior Department and Other Matters with Accompanying Papers, H. Doc. No. 62-504 (Feb. 2, 1912). The message was a victory for a group of progressives, including Louis D. Brandeis, that petitioned the president to create such a commission in December 1911.

[270] Petition to the President for a Federal Commission on Industrial Relations, THE SURVEY, Dec. 30, 1911, at 1430, 1431; see also Federal Industrial Commission Urged, THE SURVEY, Dec. 30, 1911, at 1407.

much at home." In the 1890s, Brandeis became interested in labor issues after reading about a local shoemakers' strike in Haverhill. By 1912, Brandeis had developed what the *Harvard Crimson* called "a national reputation as counsel for progressive causes," having been largely responsible for the Supreme Court's recognition of laws, like Massachusetts's 54-hour law, that set maximum hours for women.[271] Brandeis was also well known for his fierce but unsuccessful opposition to an attempt by the nation's wealthiest banker, J.P. Morgan, to merge Massachusetts's last remaining independent railroad with Morgan's New York, New Haven & Hartford Railroad. When the New Haven Railroad later collapsed into bankruptcy, Brandeis's opposition to the monopoly appeared prophetic.[272]

Although Brandeis was passionate about using the law to protect working people, he rarely expressed that passion using the term "industrial democracy." His agenda was not to increase workers' participation in corporate decisions, but to give workers a better minimum standard of living so that they would have more faith in America's democratic institutions. For example, in December 1911, weeks before the Lawrence strike, Brandeis testified before the Senate about a proposed bill to create a Federal Trade Commission. In his testimony, Brandeis argued that large corporations like the Pullman Palace Car Company tended to be unsuccessful, inefficient, and unfair. Brandeis's proposed solution was not to give workers in these companies a role to play in corporate decisionmaking,

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[271] Peter Scott Campbell, *Notes for a Lost Memoir of Louis D. Brandeis*, 43 J. SUP. CT. HIST. 27 (2018); *Mr. Brandeis to Lecture*, HARV. CRIMSON, Jan. 19, 1912; Muller v. Oregon, 208 U.S. 412 (1908). For more on Brandeis, see generaly DANIEL RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 121–98 (1998); THOMAS K. MCCRAW, PROPHETS OF REGULATION 80–152 (1984).

[272] *See* An Act to Incorporate the Boston Railroad Holding Company, Jun. 18, 1909, ch. 519, 1909 Mass. Acts 776; CHARLES FRANCIS ADAMS, JR., ET AL., REPORT OF THE COMMISSION ON COMMERCE & INDUSTRY 7–22 (1908). *See generally* HENRY L. STAPLES & ALPHEUS T. MASON, THE FALL OF A RAILROAD EMPIRE: BRANDEIS AND THE NEW HAVEN MERGER BATTLE (1947); Richard M. Abrams, *Brandeis and the New Haven–Boston & Maine Merger Battle Revisited,* 36 BUS. HIST. REV. 408 (1962).

however, but to redirect the companies' profits toward improving workers' standard of life. Brandeis argued that a paternalistic profit-sharing arrangement—like what Brandeis's friend, Edward Filene, was doing at his well-known department store—would instill in workers American values. "The problem of American citizenship and the problem of American industry are closely allied problems," Brandeis explained. If industrial corporations continued to exclude workers from their proceeds, "you will realize the perils to our institutions which attend the trusts: you will realize the danger of letting the people learn that our sacred Constitution protects not only vested rights but vested wrongs."[273]

Brandeis's understanding of the problems of corporations changed during the Lawrence strike. In progressive national magazines like *The Survey*, *The Outlook*, and *The Nation*, Brandeis's colleagues wrote about Lawrence using the Industrial Workers' language of industrial democracy. "We call our Government democratic; and so it is, substantially," wrote the editorial board of *The Outlook*, which in 1912 included former president Theodore Roosevelt. "But when we turn to the processes of industry" and see "so many shivering men without overcoats as are to be seen in the cloth-producing town of Lawrence," was it accurate to "say that America is democratic?" The editors wrote that when all corporate "power is exerted by an oligarchy that controls capital," that power is "hateful and must be destroyed." In its place, the country needed to "find some way of substituting for industrial oligarchy a prevailing industrial democracy."[274]

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[273] CONTROL OF CORPORATIONS, PERSONS, AND FIRMS ENGAGED IN INTERSTATE COMMERCE: REPORT OF THE COMMITTEE ON INTERSTATE COMMERCE 1146–67 (1913) (testimony of Louis D. Brandeis on Dec. 14, 1911). For more on Edward Filene, see Kim McQuaid, *An American Owenite: Edward A. Filene and the Parameters of Industrial Reform, 1890-1937*, 35 AM. J. ECON. & SOCIOLOGY 77 (1976); SANFORD JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1997).

[274] *Violence and Democracy*, THE OUTLOOK, Feb. 17, 1912, at 352.

Two weeks later, after news of the children arrested in the train station reached New York City, the same editors made their call for industrial democracy more explicit. "The day is surely coming when men and women in great masses will no longer have to work under conditions and for remuneration determined upon exclusively by those who happen to own the capital invested in the industry, but will have their fair share in determining what their remuneration and what their hours and conditions of labor will be," they wrote. "So long as the owners of capital and their managers fail to see that industrial oligarchy is out of date, and that no amount of benevolence or of good intention can supply the place of real democracy in industry, so long will the present social turmoil, of which this disturbance is merely one illustration, continue."[275] A former speaker of the Massachusetts House of Representatives, John N. Cole, responded to *The Outlook* editors by arguing that poverty was inevitable and that the "manufacturers at Lawrence are among the foremost industries of the Nation in helping to change these conditions." But the editors replied that mere "benevolence and discretion" was not enough. "What Mr. Cole describes is a state of industrial oligarchy," they wrote. [276]

The editors of *The Outlook* elaborated that the Lawrence oligarchy was run by "feudal barons living under feudalism and fighting to save it. We recognize the fact that in their personal relationships such men are good citizens and honorable gentlemen, but they are at fault because they do not recognize the tendency of their times." That tendency was towards "the establishment of industrial democracy—in which the workers shall participate with the employers and with the consumers, in determining the conditions of their work

[275] *The Real Question*, THE OUTLOOK, Feb. 24, 1912, at 385.

[276] *Id.*; John N. Cole, *The Issue at Lawrence: The Manufacturers' Point of View: A Reply*, THE OUTLOOK, Feb. 24, 1912, at 405.

and the share which shall be theirs of the products of their labor." They concluded, "The conditions under which workers in an industry are not allowed to have anything to say in regard to their conditions of work or their wages are undemocratic. . . . The Lawrence strike should call the attention of the country to those conditions."[277]

The editors of *The Outlook* were not alone in their call for industrial democracy after the Lawrence Strike. In March, two professors at Wellesley College courted controversy by calling for an end to corporate dividends until workers were allowed to participate in allocating them.[278] Although those professors faced an attempt to fire them, Wellesley's commencement speaker later argued that "Lawrence industrially . . . [is] speaking in no uncertain terms today. Unless we find the principle of application in democracy, darkening days will overcloud the republic."[279] Significantly, even people who were skeptical of the Industrial Workers recognized a need to give workers a greater voice in corporate decisionmaking. In *The American Magazine*, Ray Stannard Baker described the Lawrence strike as "far more than a revolt; it was an incipient revolution. It was revolutionary because it involved a demand for fundamental changes in the basic organization of industry." Even if one did not agree with the Industrial Workers that the "working class and the employing class have nothing in common," Baker wrote that it was hard to anticipate how the Lawrence movement would be stopped unless corporate executives made concessions toward worker participation. "At present industry is conducted upon a basis of open war," Baker wrote. "Any change in conditions means a revolt. Industrially, in the United States, we have arrived at just about the same stage that the Central American

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[277] *The Lawrence Strike: A Review*, THE OUTLOOK, Mar. 9, 1912, at 531.

[278] *Would Abolish Dividends—Prof. Ellen Hayes's Socialistic Views of Lawrence Strike*, N.Y. TIMES, Mar. 11, 1912, at 3.

[279] *Duty of Man is More Than Law*, BOS. DAILY GLOBE, Jun. 17, 1912, at 9.

republics have arrived at politically—a government by successive revolutions." But what the strike revealed was that the country needed "cooperation among all those concerned in industry so that the energy and treasure now lost in mere fruitless conflict may be turned into the swift and efficient production of woolen and cotton cloth for the people to use. No one can begin to imagine the possibilities of production when industry in this world is operated solely upon such a basis of cooperation and efficiency."[280]

Even the mill executives came to accept that if they did not want workers to take over their industries by force, they needed to give workers a voice. In the *Bulletin of the National Association of Wool Manufacturers*, John Bruce McPherson blamed the Lawrence strike on "the manufacturers, who did not encourage, or by their subordinates opposed, the organization of regular trade unions, one of the organized conservative forces in the country at the present time." He argued that "The way to prevent the demagogue from getting control of the labor movement is not to attempt to thwart organization and refuse to confer with local or national officers, but to deal with these officers and encourage these regular organizations."[281] Other allies of the mill executives, meanwhile, emphasized that corporations already *were* industrial democracies because ordinary people owned shares and voted to elect corporate boards. "In the depressing agitation against our great industry, every side of it is painted in glaring colors against the corporation and its managers in favor of the help," wrote the editors of *The Protectionist* magazine in their April volume. But "not a word is heard in favor of nearly as many shareholders as operatives, men and women who, in a great many cases, . . . deserve important consideration, as what they get in

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[280] Ray Stannard Baker, *The Revolutionary Strike: A New Form of Industrial Struggle as Exemplified at Lawrence, Massachusetts*, 74 AM. MAG. 19, 19–30C (1912); see also, e.g., Weyl, supra note 221, at 309; John Adams, Clod or Brother, THE SURVEY, Mar. 30, 1912, at 2015.

[281] McPherson, *supra* note 255, at 250–65.

dividends supplies bread and butter as much as the wage of the operative supplies the necessities of life."[282]

Meanwhile, Louis Brandeis's petition to William Howard Taft—the one calling for a commission on industrial relations—was making its way through Congress. In February 1912, a bill to create the commission was introduced in the House of Representatives. In March, the House's committee on labor heard Brandeis and other witnesses testify that such a commission might investigate experiments around the country in "industrial democracy," in which workers and employers were voluntarily cooperating to set terms of employment.[283] In May, the committee reported out the bill after connecting it to "the large number of trade disputes which have lately occurred or have recently been imminent."[284] And in August, Congress passed the Commission on Industrial Relations Act of 1912.[285] From April 1914 to August 1915, the commission interviewed 740 witnesses over 154 days of hearings—including John D. Rockefeller, Jr., Samuel Gompers, William Haywood, and many other titans of labor and industry. Out of all of them, the one witness who the commission quoted at length in its final report was Louis Brandeis.[286]

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[282] *Rights of Shareholders*, 23 THE PROTECTIONIST 711, 711–12 (1912). The rest of the volume was full of similar arguments. *See, e.g.*, *Misrepresentation of Conditions in Lawrence*, 23 THE PROTECTIONIST 698 (1912); *Teachers of Anarchy*, 23 THE PROTECTIONIST 689 (1912). In response to these arguments, Ray Stannard Baker conducted his own analysis of the shareholders and concluded that "[a]mong them are representatives of some of the strong old families of Massachusetts, such names as Lowell, Lawrence, Lyman, Coolidge, Amory, Ayer. It can almost be said that the aristocracy of Boston is based upon the profits of the textile mills of New England." Baker, *supra* note 280, at 28–29.

[283] Industrial Commission: Hearings on H.R. 21094 Before the H. Comm. on Labor, 62d Cong. 21 (1912) (statement of Dr. Henry Moscowitz).

[284] H. R. REP. NO. 62-726, at 2 (1912); HAYWOOD, *supra* note 2, at 283 ("The reason for this commission was the industrial unrest of the period: the woolen and cotton strike at Lawrence, the silk strike at Paterson, . . . etc.").

[285] Commission on Industrial Relations Act of 1912, Pub. L. No. 62-300, 37 Stat. 415.

[286] 1 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 63–64. For a comprehensive history of the background, members, and politics of this commission, see generally MCCARTIN, *supra* note 33;

By 1914, when the commission first interviewed him, Brandeis had become a firm believer in a de-radicalized version of the Industrial Workers' "industrial democracy." When Brandeis used the term, it was the same way the mill executives used it: corporations needed to give workers and citizens a voice in their enterprises or they risked a revolution in which workers and citizens would take over the enterprises by force. In his popular 1914 book, *Other People's Money and How the Bankers Use It*, Brandeis cast his experience fighting the New Haven Railroad as a fight against a "financial oligarchy" in which ordinary people—even shareholders—had no ability to "participate in management." He argued that the problem with large corporations was not just that they were unfair, but also that they were undemocratically run by unelected managers and financiers. "The American people have as little need of oligarchy in business as in politics," Brandeis wrote. He argued that "industrial democracy—true cooperation—should be substituted for industrial absolutism."[287]

As a witness, Brandeis elaborated on his new conception of industrial democracy—a compromise between the Industrial Workers' vision and the mill executives' vision, one of a piece with the nineteenth century idea promoted by Sidney and Beatrice Webb in their study of British trade unions and with the antebellum abolitionists who promoted industrial democracy in opposition to slavery. At its core was a belief that all American institutions, including its corporations, operated best when they were democratic: or in

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GRAHAM ADAMS, JR., AGE OF INDUSTRIAL VIOLENCE 1910–1915: THE ACTIVITIES AND FINDINGS OF THE UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS (1966).

[287] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 18–19, 207–11 (1914).

Brandeis's words, "we need democracy at all times no matter what the system is under which we work."[288]

"Unrest will be to a certain extent mitigated by anything which improves the condition of the work," Brandeis told the commission in April 1914, advancing his pre-1912 diagnosis of industrial problems. But this time, two years after the Lawrence strike, he added: "I can not see any real solution, ultimate solution, or an approximation of a solution of unrest as long as there exists in this country a juxtaposition of political democracy and industrial absolutism. To my mind, before we can really solve the problem of industrial unrest, the worker must have a part in the responsibility and management of the business, and . . . unrest will not be removed as long as we have that inconsistency."[289] Brandeis testified again before the commission in January 1915, again attributing the "fundamental cause" of labor unrest to the "necessary conflict between—the contrast between—our political liberty and the industrial absolutism." Thanks to a century of mergers and deregulation, corporations were now "so potent, so well organized, with such concentrated forces and with such extraordinary powers of reserve and the ability to endure against strikes and other efforts of a union . . . [that in] all cases of these large corporations the result has been to develop a benevolent absolutism—an absolutism all the same; and it is

[288] 1 U.S. COMM'N ON INDUS. RELATIONS, *supra* note 16, at 999 (testimony of Louis D. Brandeis). The relative conservatism of Brandeis's understanding of industrial democracy—but its radicalism compared to what other witnesses took away from the Industrial Workers—is consistent with the general ideology of Progressivism as a search for a "via media" between laissez-faire liberalism and revolutionary socialism, industrial evolution and political democratization. *See* JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920, at 3, 245–91 (1986); STROMQUIST, *supra* note 267, at 189–203.

[289] *Id.* at 1005.

that which makes the great corporation so dangerous. It is because you have created within the State a state so powerful that the ordinary forces existing are insufficient to meet it."[290]

Brandeis's solution to this economic problem was the same solution Americans had applied to politics: democratize the corporation. "[T]he end to which we must move is a recognition of industrial democracy as the end to which we are to work," Brandeis told the commission. He continued: "[A]nd that means this: It means that the problems are not any longer, or to be any longer, the problems of the employer. . . . [T]hey are the problems of the employer and the employee. . . . There must be a division not only of the profits, but a division of the responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business should be." Brandeis believed that when corporations were so powerful that labor unions could not force them to bargain, then the state had a responsibility to assist the unions: "Industrial democracy will not come by gift. It has got to be won by those who desire it . . . , and the State must in some way come to the aid of the workingmen if democratization is to be secured." Brandeis's ideal was different from Haywood's; he did not envision that workers would replace executives or shareholders atop the corporate ladder. But he did see workers as a relevant constituency that executives could no longer ignore: he dreamed of a world in which the worker had "not only a voice but a vote; not merely a right to be heard, but a position through which labor may participate in management . . . ; the power contributing to action—of participating in action."[291]

When the commission presented its findings in August 1915, its principal report included an extended quotation from Louis Brandeis. Its opening lines even parroted his recommendation: "The only hope for the solution of the tremendous problems created by

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[290] 8 *id.* at 7660.

[291] *Id.* 7662.

industrial relationship[s] lies in the effective use of our democratic institutions and in the rapid extension of the principles of democracy to industry." Haywood and Joseph Ettor also testified before the U.S. Commission on Industrial Relations, and they also explained the Industrial Workers' vision of industrial democracy. And the commission's conclusion perhaps reflected their testimony as well as Brandeis's: "Political freedom can exist only where there is industrial freedom; political democracy only where there is industrial democracy."[292]

Regardless of whether the commission was more influenced by Haywood or Brandeis, Brandeis's interpretation of the Industrial Workers' message eventually became federal policy. In January 1916, President Woodrow Wilson nominated Brandeis to become a member of the Supreme Court, where he served for over two decades. While on the Court, Justice Brandeis not only became a strong opponent of the sort of criminal syndicalism statutes that prosecutors were using against the Industrial Workers, but he also ruled in favor of efforts by states and the federal government to institute "industrial democracy" in the workplace.[293] Members of the U.S. Commission on Industrial Relations went on to serve on President Wilson's National War Labor Board, which inaugurated one of the first attempts by the federal government to support labor unions instead of handicap them. Two decades later, Congress passed the National Labor Relations Act of 1935 with the goal of "project[ing] into economic affairs the essence of true democracy, by outlining a system of checks and balances between industry and labor, crowned by governmental supervision and advice."[294]

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[292] 1 *id.* at 17–18, 63–64.

[293] *See, e.g.*, Louis K. Liggett Co. v. Lee, 288 U.S. 517, 565–67 (1933) (Brandeis, J., dissenting).

[294] To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Educ. & Labor, 73d Cong. 8 (1934) (statement of Sen. Robert Wagner).

Business leaders also accepted the recommendation to institute "industrial democracy" in their corporations.[295] In 1915, two months after the Commission on Industrial Relations issued its report, John D. Rockefeller, Jr., "marked the inauguration of democracy in industrial relations on a scale never before undertaken." Near the site of the infamous labor dispute in Ludlow, Colorado, Rockefeller's Colorado Fuel & Iron Company created an "Industrial Representation Plan" that put workers and company officials on a board to arbitrate grievances and nominally give workers a voice in corporate decisions.[296] Although Haywood privately called the announcement "nonsense about capital and labor being partners," Rockefeller and others lauded the plan as an effective method of demonstrating to workers that their interests were the same as stockholders' interests.[297] "The common stockholders have put $34,000,000 cash into this company in order to make it go, so that you men will get your wages, you officers have your salaries, and the directors get your fees," Rockefeller explained. Workers, directors, officers, and shareholders were four legs of a corporate table, Rockefeller concluded, and "[a]n effort to advance one interest at the expense of any other means loss to all."[298]

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[295] *See generally* GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916 (1965); ROBERT WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962); *see also* JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 (1968); THOMAS FERGUSON, GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS (1995); MARTIN SKLAR, THE UNITED STATES AS A DEVELOPING COUNTRY: STUDIES IN U.S. HISTORY IN THE PROGRESSIVE ERA AND THE 1920S (1992); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); ELLIS HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1995).

[296] *A Visit—and a Return*, COLO. FUEL & IRON CO. INDUS. BULL, Jul. 31, 1918, at 3.

[297] HAYWOOD, *supra* note 2, at 282–83.

[298] John D. Rockefeller, Jr., Address at the Joint Meeting of the Officers and the Representatives of the Employees of the Colorado Fuel and Iron Company, COLO. FUEL & IRON CO. INDUS. BULL, Oct. 2, 1915, at 11; see also Democracy in Industry, COLO. FUEL & IRON CO. INDUS. BULL, Jan. 31, 1916, at 3.

Even the companies in which Frederick Ayer had been involved got into the act. Observing the American Woolen Company, Albert Bushnell Hart wrote in 1930 that the corporation responded to the 1912 strike by instituting a similar program as Rockefeller, one that "made every possible concession to the worker consistent with the duties of the management to the stockholders."[299] A.T.&T., meanwhile, began a massive campaign to vindicate its monopolistic practices by referring to itself as an "investor democracy," one "owned by those it serves." Just as the mill executives in 1912 had highlighted their shareholders to prove that they were democracies, A.T.&T. described itself in its advertisements as "a new democracy of public service ownership—a democracy that now has more than 200,000 stockholders—a partnership of the rank and file who use telephone service and the rank and file employed in that service." Under pictures of storekeepers, mothers, and other examples of the "average man and woman . . . who with their savings have purchased a share in its ownership," the company boasted that "[n]o other great industry has so democratic a distribution of its shares; no other industry is so completely owned by the people it serves. In the truest sense, the Bell system is an organization 'of the people, by the people, for the people."[300]

All of this demonstrated that while corporations had dramatically changed since 1789, one thing that remained constant was viewing them as governmental institutions. Truly, corporations at the end of the long nineteenth century were different than they were at its beginning. Corporate executives no longer had to prove their public value to state

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[299] COMMONWEALTH HISTORY OF MASSACHUSETTS 438 (Albert Bushnell Hart ed., 1930)

[300] Advertisement, *The American Telephone and Telegraph Company*, LOUISVILLE COURIER-JOURNAL, Oct. 27, 1923, at 16; Advertisement, *Owned by Those It Serves*, THE OUTLOOK, Oct. 25, 1922, at 352; Advertisement, *Of the People, by the People, for the People*, THE OUTLOOK, Nov. 23, 1921 at 493. *See generally* JULIA C. OTT, WHEN WALL STREET MET MAIN STREET 153–56 (2011); ROLAND MARCHAND, CREATING THE CORPORATE SOUL 77 (1998).

legislatures every time they wanted to act. States could no longer amend corporate charters to restrain the power of the privileges those charters granted. Corporations that once were closely identified with the states that chartered them now all chartered themselves in the same deregulated places and operated with impunity around the globe. In a words, corporations had "privatized." But corporations remained far too powerful and comprised far too many people to ever be universally understood as the equivalent of private citizens. They remained governments, ones that could be "democracies" or something worse.

Chapter Four
Corporate Democracy, 1914–2010

On April 26, 1978, Mayor Kevin White of Boston puzzled over a complicated topic: the classification of property taxes. The mayor considered the topic so critical to the fiscal survival of Massachusetts's cities that he put it up for a statewide referendum that fall. But the mayor recognized that even the mention of property taxes could put ordinary people to sleep, and—until that morning—he still hadn't known how he was going to finance a PR campaign to make tax reform sound compelling.[1]

Then came 10 A.M. In Washington, D.C., the Supreme Court of the United States declared that the First Amendment's protection of free speech also protected the political expenditures of a corporation.[2] That decision, *First National Bank of Boston v. Bellotti*, struck down a Massachusetts law that had banned corporate political spending—a law passed after a decade in which corporations like the First National Bank had successfully opposed tax reforms that Mayor White supported.[3] The decision worried many of the mayor's allies, who grumbled that the First and other banks would use their financial might to dominate the political airwaves and "wipe out the effect of thousands of average people working their brains out to get their message across."[4]

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[1] Memorandum from Raymond G. Torto to Kevin H. White, Mayor (Apr. 12, 1978) (box 70, folder 1, Mayor Kevin H. White Records, City of Boston Archives and Records Management Division, Boston, Mass. [hereinafter White Records]).

[2] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

[3] *See* Act of Jun. 1, 1973, ch. 348, 1973 Mass. Acts 247; Robert Turner, *Fall's Referenda Could Change Everything from Trash to Taxes*, BOS. GLOBE, Aug. 22, 1976, at A1; Statement of Agreed Facts ¶¶ 24, 59, First Nat'l Bank of Bos. v. Attorney Gen. (*First Nat'l II*), 359 N.E.2d 1262 (Mass. 1976) (No. 76-653).

[4] David Rogers & Ray Richard, *We'd Spend Public Funds on Issues—White*, BOS. GLOBE, Apr. 28, 1978, at 1, 8.

But the mayor was thrilled. He thought the decision was a weapon he badly needed.

The next day, at a meeting of the Massachusetts Mayors Association, Mayor White explained that the Supreme Court had just apparently authorized any corporation to spend any amount of money on a political campaign.[5] Like most cities, Boston, Cambridge, Lowell, and the rest were all *municipal* corporations, with charters, elected boards of directors, and other features one might expect from a bank.[6] The assembled mayors, in other words, were a group of chief executives from some of Massachusetts's largest corporations—who could easily compete in an advertising battle with the First National Bank. Seconding Mayor White's call to arms, the mayors agreed to appropriate millions of public dollars and thousands of city employees to promote the tax referendum they were sure the banks would oppose.[7]

That 1978 referendum became one of the most expensive in the commonwealth's history.[8] Although it was nominally a fight over the classification of property taxes, it was billed a battle between the "million-dollar mayor" and the millionaire bankers; big government against big business.[9]

It also left a bad taste in people's mouths. For the first time, executives of municipal

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[5] *Id.* at 8.

[6] *Compare, e.g.*, Act of Feb. 7, 1784, ch. 2, 1784 Mass. Acts 54 (chartering the predecessor to the First National Bank as a "corporation and body politic"), *with* Act of Feb. 23, 1822, ch. 110, 1822 Mass. Acts 734, 734–735 (chartering the City of Boston as a "body politic" with all the rights of "a municipal corporation"); *see also*, *e.g.*, Act of June 3, 1948, ch. 452 §2, 1948 Mass. Acts 403, 403 ("The inhabitants of the city shall continue to be a municipal corporation . . . .").

[7] Memorandum from Antonio Mariano, First Vice President of the Mass. Mayors Ass'n, to Kevin H. White, Mayor (Jun. 28, 1978), *reprinted in* Record Appendix at 42–43, Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978) (No. 78-253).

[8] David Rogers, *Spending Will Soon Top $1m in Tax Classification Campaign*, BOS. GLOBE, Oct. 28, 1978, at 6.

[9] David Rogers, *White Seeks a Strategy for Tax Campaign Money*, BOS. GLOBE, Oct. 24, 1978, at 10.

corporations were spending millions of taxpayers' dollars to persuade those same taxpayers how to vote in an election. The executives of financial corporations were doing the same thing on the other side with shareholders' investments and customers' deposits. Supposedly, both sets of corporations were "speaking" on behalf of their financial backers. But a resident of Boston with a pension plan was more likely annoyed than grateful that she was involuntarily funding both campaigns.

This Chapter tells the story of how the banks and city justified their participation in a referendum in which only humans could vote. From the perspective of the bank, it's a story about the increased level of activism among business executives in the 1970s, one that complements Kim Phillips-Fein's research about how executives like General Electric's Lemuel Boulware and DuPont's Jasper Crane founded and funded the advocacy organizations that eventually launched the Reagan Revolution in 1980.[10] But where the activists and businessmen of Phillips-Fein's *Invisible Hands* developed their networks and ideologies behind closed doors, the executives of the First National Bank of Boston were forced to explain publically to shareholders, judges, and other skeptical audiences why they were doing what they were doing. The legal doctrines and conceptual metaphors the executives used in their public explanations can provide historians with a novel perspective about why the 1970s saw such a rapid increase in the number of corporate-funded political action committees and lobbying organizations compared to earlier decades.[11]

From the perspective of the city, this is a story about the conflicting impulses of

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[10] KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 156–203 (2009); *see also* JEROME HIMMELSTEIN, TO THE RIGHT (1990); DAVID VOGEL, FLUCTUATING FORTUNES (1989).

[11] *See generally* BRUCE SHULMAN & JULIAN ZELIZER, RIGHTWARD BOUND (2008); MATTHEW LASSITER, THE SILENT MAJORITY (2006); KEVIN KRUSE, WHITE FLIGHT (2005); LISA MCGIRR, SUBURBAN WARRIORS (2001); RICK PERLSTEIN, NIXONLAND (2000); DAN CARTER, THE POLITICS OF RAGE (1995), THOMAS EDSALL & MARY EDSALL, CHAIN REACTION (1991).

American liberalism. As Michael Graetz and Linda Greenhouse have written, liberal judges like William Brennan were largely responsible for the judicial doctrines that made *First National Bank of Boston v. Bellotti* possible—doctrines that protected the individual rights of black people and women by protecting the associational activity of large, corporate institutions like the National Association for the Advancement of Colored People or the National Organization for Women.[12] Once conservative business corporations began taking advantage of these doctrines, liberal scholars had a difficult time explaining why some corporate organizations should be constitutionally protected while others, such as banks or cities, should be silenced. In addition, as Lily Geismer explains in her recent book about the reorientation of modern liberalism in 1970s Massachusetts, politicians like Kevin White faced a real dilemma about how to maintain their political stature while traditional sources of Democratic Party power, such as labor unions, lost influence and members with the decline of manufacturing jobs during this period.[13] Mayor White's technocratic push toward running his city like a business—and demanding the same political opportunities for his city that business corporations were receiving—supplements Geismer's focus on how white-collar professionals in Boston's suburbs exerted more control over the direction of the Democratic Party.

At a higher level of generality, this is also a story about a question: What does it mean for a corporation to speak? Legal scholars writing about the issue of corporate political speech

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[12] Michael J. Graetz & Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 245–55 (2016); *see also* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? (Bernard Schwartz, ed., 1998); VINCENT BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (1983); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

[13] LILY GEISMER, DON'T BLAME US: SUBURBAN LIBERALS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY 251–80 (2014); *see also* JEFFERSON COWIE, STAYIN' ALIVE (2010); JEFFERSON COWIE & NICK SALVATORE, *The Long Exception: Rethinking the Place of the New Deal in American History,* 74 INT'L LABOR & WORKING CLASS HIST. 3 (2008).

don't always consider this question literally, and, as Adam Winkler has argued, opposition to corporate political speech has often taken the form of opposition to an abstract concept of "corporate personhood."[14] But thinking about the practical mechanism of how corporations "speak" is as relevant today as it was in 1978.

Today, when lawyers or First Amendment scholars think about corporate speech, they often have two types of corporation in mind: for-profit corporations, like the First National Bank, or non-profit corporations, like Citizens United. Associating these corporations with the political viewpoints of the people who run them, constitutional lawyers and scholars tend to ask whether it's appropriate to treat corporations differently from other civically engaged individuals—or, put another way, whether the First Amendment's protections should depend on the corporate identity of a speaker.[15] Occasionally, scholars with backgrounds in corporate, labor, or employment law will complicate this discussion by pointing out that the people who run corporations often have political or religious viewpoints that are diametrically opposed to the people who shop or work in them.[16] But constitutional law scholars often take it for granted that corporations generally have coherent political perspectives.

The problem with this assumption is that it overlooks a crucial detail about what

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[14] Adam Winkler, Citizens United, *Personhood, and the Corporation in Politics*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 359, 360 (Naomi Lamoreaux & William Novak eds. 2017).

[15] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); FCC v. AT&T, Inc., 131 S. Ct. 1177 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 115 (2014); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 619 (2011); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 130 (2010).

[16] *See, e.g.*, John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 124 CONST. COMMENT. 223 (2015); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 806–09 (2012); Douglas Nejaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2542 (2015).

makes a corporation a corporation: its pluralism.[17] A corporation isn't some single-minded organism that a perceptive zoologist could identify on the streets of Manhattan. It's a metaphor, one that describes political relationships among groups of human beings.[18] Historically, the term *corporation*—derived from a Latin term meaning "political body"[19]—has described almost every kind of group relationship, from members of a church or residents of a city to shareholders of a trading ship or subjects of a kingdom.[20] In all these cases, the corporation refers to an entire community as something distinct from its individual members.

When a corporation "speaks," therefore, what's literally going on is that one person is doing something on behalf of a community. (Or, to use Louis Brandeis's memorable phrase, one person is spending "other people's money."[21]) When framed in this light, the normative

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[17] I use the word "corporation" throughout this Chapter to refer to corporations *aggregate*, as opposed to corporations *sole*. For more on the distinction, see 1 WILLIAM BLACKSTONE, COMMENTARIES *468–69.

[18] This chapter's focus on metaphors borrows from the work of linguist George Lakoff and legal historian Morton Horwitz. In *Metaphors We Live By* (1980), Lakoff and coauthor Mark Johnson contend that people conceive of abstract ideas using concrete metaphors; elections and arguments, for example, are often discussed in the language of war. These conceptual metaphors are not mere figures of speech, Lakoff and Johnson write, but descriptive illustrations of how people structure their interactions with those ideas: "We can actually win or lose arguments. We see the person we are arguing with as an opponent." *Id.* at 4–6. In *The Transformation of American Law, 1870–1960* (1992), Horwitz adds that the legal metaphors people use in particular contexts are not "random or accidental." *Id.* at 65. Rather, they are the products of how "history and usage" have shaped the metaphors' "deepest meanings and applications." *Id.* at 181–86. *See also* LON FULLER, LEGAL FICTIONS 114–18 (1967) (writing that "[a] metaphorical element taints all our concepts").

[19] *Corpus reipublicae*, more often translated as a "body politic." For more on the medieval origins of the term, see ERNST KANTOROWICZ, THE KING'S TWO BODIES 207–11 (1957); OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 97–100 (Fredric William Maitland trans., Cambridge, U.K.: Cambridge University Press, 1900); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 490–92, 502–511 (2d ed., 1898).

[20] *See, e.g.*, 1 BLACKSTONE, *supra* note 17, at *469–71; *see also* ANDREW SCHOCKET, FOUNDING CORPORATE POWER IN EARLY NATIONAL PHILADELPHIA (2007); RONALD SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855 (1982); ALFRED CHANDLER, THE VISIBLE HAND (1977); BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (1957); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT (1948); OSCAR HANDLIN & MARY HANDLIN, COMMONWEALTH (1947).

[21] LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1913). This normative issue was a theme in the scholarly analysis of Boston and the First National Bank's political

issue presented by corporate speech transforms. The question is no longer just whether the speech of a corporation should be treated the same as that of an individual. It also becomes whether an individual speaking on behalf of a corporation is a representative of the people he or she purports to stand for.

This sort of normative transformation is exactly what happened in 1978 Boston. The first part of this Chapter tells a little-known chapter of what is becoming a well-known story: the rise of corporate political speech in the 1970s. From 1971 to 1976, Ephron Catlin and his fellow executives at the First National Bank of Boston decided to spend the bank's money to oppose two referenda that would raise their personal income taxes but lower the taxes of most of the bank's shareholders and employees. To justify their actions, Catlin spoke of the bank using metaphors that obscured the uncomfortable distinction between his views and those of the rest of the people who owned or worked for the corporation. He argued that the bank was practicing "corporate good citizenship" by announcing its opposition to the tax, and that corporations should have "the same First Amendment rights as individuals."[22] These arguments were well received by the Supreme Court, particularly Justice Lewis Powell, who before joining the bench had forcefully advocated for business executives to use their corporations' resources to fight a culture war against leftist academics and journalists. Although the Court wasn't willing to treat the bank as if it were a single individual, it reached

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advocacy in the years immediately following the referendums. *See, e.g.*, Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535, 543–544 & n.48 (1980) (discussing Boston); Francis H. Fox, *Corporate Political Speech*, 67 KY. L. J. 75, 97–98 (1979) (discussing the bank).

[22] FIRST NAT'L BOS. CORP., A REPORT ON CORPORATE CONCERN 1–2 [hereinafter REPORT ON CORPORATE CONCERN], *inserted in* FIRST NAT'L BOS. CORP., 1975 ANNUAL REPORT (1976) [hereinafter 1975 Annual Report]; FIRST NAT'L BOS. CORP., 1978 ANNUAL REPORT 3 (1979) [hereinafter 1978 ANNUAL REPORT]. The bank restructured itself in 1970 as a subsidiary of the First National Boston Corporation, but the difference between the two is immaterial to this paper. *See* FIRST NAT'L BOS. CORP., 1970 ANNUAL REPORT 18 (1971).

Catlin's desired result by pointing out that shareholders indirectly elected executives like Catlin through the procedures of "corporate democracy," thus tacitly approving whatever political views the executives thought the bank should promote.

The second part discusses what happened when the mayor of Boston tried to take advantage of this ruling. Taxpayers were immediately skeptical of the idea that he spoke on the entire city's behalf.[23] It was obvious to everyone that a city doesn't necessarily have a single perspective, and that the individual interests of the mayor might conflict with the corporate interests of Boston's residents as a whole.[24] Even though the city's elections for mayor were even more democratic than the bank's elections for directors, the existence of "corporate democracy" in Boston didn't relieve residents' anxiety. The mayor still had to explain why residents, and voters, should trust that he truly had the city's interests at heart.

The Chapter concludes by arguing that, despite the many obvious differences between a municipal corporation and a financial corporation, the city of Boston's intervention in the 1978 referendum made it intuitive for a wide audience that all corporations, even banks, are representative institutions. It showed that the legitimacy of corporate speech shouldn't turn only on how similar the corporation is to an individual, but also on whether the person who decides what the corporation stands for has the consent of his or her constituency. This lesson was broadly applicable, as it was not hard for residents who were suspicious of municipal speech to realize that business speech posed an even greater risk of unaccountability. As the *Boston Globe* editorialized, "Corporate democracy will not be a restraint on political spending by corporations. In fact, the only place it might work is in a municipal corporation—like

[23] *See, e.g.*, Editorial, *Spending and Speaking*, BOS. GLOBE, Nov. 8, 1978, at 22.

[24] *See, e.g.*, Alan Eisner, *White to Spend $1M Promoting Tax Referendum,* BOS. HERALD AMERICAN, May 26, 1978 (box 22, folder 39, White Records).

Boston."[25]

I don't pretend to be the first author to discuss the issue of municipal speech. Boston's campaign inaugurated a decade of literature, led by Professor Mark Yudof's 1979 article "When Governments Speak."[26] This literature has generally been critical of municipal speech as tyrannical, corrupting, and unrepresentative. It has also been embraced by courts: while Mayor White ended up winning the 1978 referendum, in 1979 the Supreme Court decided not to overturn a state ban on the city's political participation going forward.[27] As a result, the issue of municipal speech has largely faded from view.[28]

Since the 1980s, however, two developments have made Boston's speech more relevant than ever. First, in 2010's *Citizens United v. FEC*, the Supreme Court cited *Bellotti* over thirty times in striking down a federal ban on corporate political spending. The Court drew on the same arguments that the First used, holding that any disagreement between a corporation's leadership and the rest of its members could be corrected "'through the

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[25] Editorial, *The Costs of Free Speech*, BOS. GLOBE, Oct. 24, 1978, at 18.

[26] See Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment,* 57 TEX. L. REV. 863, 870 (1979); see also Leigh Contreras, *Contemplating the Dilemma of Government as Speaker*, 27 N.M. L. REv. 517 (1997); David P. Haberman, Note, *Governmental Speech in the Democratic Process,* 65 WASH. U. L. Q. 209 (1987); David Morgan, *Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 37 VAND. L. REV. 433 (1984); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions,* 29 UCLA L. REV. 505 (1982); Carol F. Lee, *Federal Courts and the Status of Municipalities*, 62 B.U. L. REV. 1 (1982); Edward H. Ziegler, Jr., *Government Speech and the Constitution*, 21 B.C. L. REV. 578 (1980); Steven Shiffrin, *Government Speech,* 27 UCLA L. REV. 565 (1980); Note*, The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, *supra* note 21, at 543–544 & n.48; Gerald T. Anglin, *Governmental Referendum Advocacy*, 29 CASE W. RES. L. REV. 886 (1979); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Charles E. Ryan, *Municipal Free Speech: Banned in Boston?,* 47 FORDHAM L. REV. 1111 (1979).

[27] *See* City of Boston v. Anderson, 439 U.S. 1060 (1979).

[28] The few recent exceptions tend to focus more broadly on the Supreme Court's modern "government speech" doctrine. *See, e.g.*, Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013); Steven J. Andre, *Government Election Advocacy*, 64 ADMIN. L. REV. 835 (2012); Helen Norton, *Campaign Speech Law with a Twist,* 61 EMORY L. J. 209 (2011).

procedures of corporate democracy.'"[29] Second, in part thanks to arguments raised by Boston's 1978 lawyer, Professor Laurence Tribe, the Supreme Court has developed a so-called government-speech doctrine in which it insulates the decisions of cities and public-sector employees from First Amendment challenges by dissenting taxpayers.[30] Increasingly, in states that don't expressly ban municipal corporations' political participation, cities are taking advantage of this doctrine to engage in political advocacy just as Boston did.[31]

Both of these developments confirm that the story of the 1978 referendum has much to offer modern responses to corporate speech. The story shows that it is not enough to declare that cities shouldn't be allowed to "speak" but business corporations should—the normative issue behind all corporate speech is connected. The story reorients the question from an abstract one about whether corporations should be allowed to speak to a specific one about whether corporate leaders who purport to represent a corporation's membership do so with their consent. And it shows that a corporate democracy that might legitimate a corporate leader's decision to speak on behalf of a corporate community often requires more than just a simple election.

I

The story of the 1978 referendum begins with a man named Ephron Catlin. In 1971, Catlin was an executive vice president of the First National Bank of Boston, the oldest and largest bank in New England, with $5 billion in assets and 5,000 employees.[32] More

[29] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–362 (2010) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

[30] *See, e.g.*, Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

[31] *See, e.g.*, Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008); Kidwell v. City of Union, 462 F.3d 620 (6th Cir. 2006).

[32] FIRST NAT'L BANK CORP., 1971 ANNUAL REPORT 2 (1972) (hereinafter 1971 ANNUAL REPORT); Statement of Agreed Facts ¶ 45, First Nat'l Bank of Bos. v. Attorney Gen. (*First Nat'l II*), 359 N.E.2d

importantly, he was also a member of "the Vault," a group of fourteen executives around Boston who, since 1959, met twice a month by an old bank vault to give the mayor in-person policy advice.[33] He was the group's "propagandist to the business community," as ready as the others "to take over the city and run it."[34] Like other Vault members, Catlin was a socially liberal Midwesterner who had gotten into Harvard, married a Boston Brahmin (specifically, a Saltonstall), and liked the area enough to stay after graduating.[35] Unlike the others, Catlin was outspoken, a little tasteless, and militant about organizing businessmen to fix the city's financial problems. "When ya' turn on the faucets aroun' here, ya' can get things done," Catlin explained, and Boston needed "a thorough municipal hysterectomy."[36]

Boston Magazine recently named Catlin one of the "ten most powerful men" in Massachusetts thanks to his work on behalf of the Vault over the previous decade.[37] He had led the charge to build a "slick, shiny" New Boston out of the ashes of what he had seen as a decaying city.[38] Catlin had a hand in the creation of virtually every public-private partnership

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1262 (Mass. 1976) (No. 76-653). The bank has since changed its name to Bank of Boston, BankBoston, and FleetBoston Financial, and it is now a subsidiary of Bank of America.

[33] Carol Liston, *The Vault: Boston's Elite Committee of 14 Keeps a Canny Eye on the City*, BOS. GLOBE, Sep. 3, 1967, at A4. For more on the Vault, see THOMAS H. O'CONNOR, THE HUB 220–223 (2001) [hereinafter O'CONNOR, THE HUB]; THOMAS H. O'CONNOR, THE BOSTON IRISH: A POLITICAL HISTORY 231–243 (1985) [hereinafter O'CONNOR, THE BOSTON IRISH]; ALAN LUPO, LIBERTY'S CHOSEN HOME: THE POLITICS OF VIOLENCE IN BOSTON 89 (1977); Robert Healy, *Collins Confers with the "Vault,"* BOS. GLOBE, Nov. 23, 1966, at 9.

[34] Robert Lenzner, Prophets of Doom Wrong: Still Real Problems but Time Ripe for Economic Action, BOS. GLOBE, Mar. 19, 1973, at 30, 31.

[35] Liston, *supra* note 33, at A4; John Value, *Vision Comes Easy to 'Yankee Irishman,'* BOS. GLOBE, Mar. 26, 1964, at 20.

[36] Robert Lenzner, *Portrait of a Boston Banker*, BOS. GLOBE, Sep. 2, 1973, at C6.

[37] *Id.*

[38] O'CONNOR, THE HUB, *supra* note 33 at 221; Lenzner, *supra* note 34, at 31. For instance, after President John F. Kennedy announced his plan to put a man on the moon, Catlin led the committee to convince the administration to build its multi-billion-dollar Project Apollo in Massachusetts. The Kennedy administration decided to put it in Houston—appalling Catlin, who couldn't believe that any rocket scientist would actually want to live in a "Jim Crow civilization" like Texas. *14-Man*

in Greater Boston, from the Prudential Center to the Massachusetts Bay Transit Authority and the home stadium of the New England Patriots.[39] The *Boston Globe* editorialized that "a bridge [had been] built between the financial community and Boston's political administration," across which came "the money to build the New Boston."[40]

Catlin was pessimistic, however, about the 1970s. Boston elected a new mayor in 1967, Kevin White, who was not as interested as his predecessors in receiving policy advice from some bankers.[41] In the State House, Governor Francis Sargent began promoting unemployment benefits, environmental reforms, and other social service programs.[42] Even President Richard Nixon was signing into law departments like the Environmental Protection Agency.[43] The net result was an increase in taxes to build new bureaus instead of new buildings—from Catlin's perspective, a disaster.

What angered Catlin the most, however, was the "sea of apathy" he witnessed among other business leaders who shared his concerns.[44] A 1973 *Globe* poll and a 1974 national survey revealed that over 95 percent of corporate executives believed government was no longer "attuned to business and industry problems."[45] They believed government was instead

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Group Formed to Seek Bay State Site for Moon Lab, BOS. GLOBE, Aug. 8, 1961, at 16; *Moon Lab to Lack Hub Brains; Catlin*, BOS. GLOBE, Oct. 4, 1961, at 1.

[39] Value, *supra* note 35, at 20; Liston, *supra* note 33, at A4.

[40] Editorial, *Kevin White for Mayor*, BOS. GLOBE, Nov. 6, 1967, at 16.

[41] Lenzner, *supra* note 36, at 31; *see also* JOHN H. MOLLENKOPF, THE CONTESTED CITY 188 (1983).

[42] *See* Governor Francis W. Sargent, Address to the Boston Citizens Seminar: The Economic Development of Massachusetts (Mar. 13, 1972), *published in* THE MASSACHUSETTS MIRACLE 25 (David Lampe, ed. 1988).

[43] *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. (1966–1970), *published as amended* 5 U.S.C. app. (2012).

[44] Rachelle Patterson, *First's Howell: Taxpayers' Man?*, BOS. GLOBE, Dec. 20, 1972, at 33.

[45] Lenzner, *supra* note 36, at 31; VOGEL, *supra* note 10, at 214.

dominated by "special interest groups" of environmentalists, welfare-rights organizations, and consumer activists like Ralph Nader.[46] But rather than fight this "sock-it-to-business climate," the executives were adopting what Catlin called a "defeatist attitude."[47] "We don't have a business community. Just a fragmented bunch of self-interested people," one complained.[48] "The businessman has a lower credibility in Washington than that of any other group," said another.[49] "If one doubts this," a third observer wrote in 1971, "let him undertake the role of 'lobbyist' for the business point of view. . . . [I]n terms of political influence . . . the American business executive is truly the 'forgotten man.'"[50]

That 1971 observer was a man named Lewis Powell, an accomplished lawyer from Virginia whose response to the problem foreshadowed Catlin's own. Powell was a partner in a prestigious law firm, a former president of the American Bar Association, and a director on the board of eleven corporations.[51] He was also among a handful of intellectuals who were actively lobbying business executives to take more aggressive stands against regulation.[52] Powell regularly gave speeches asking businessmen to defend the "free enterprise system" from a "corrosive attack" by Nader, "New Leftists," the Black Panthers, academics,

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[46] Lenzner, *supra* note 36, at 31; VOGEL, *supra* note 10, at 214; *see also* HIMMELSTEIN, *supra* note 10, at 136; BENNETT HARRISON, THE ECONOMIC DEVELOPMENT OF MASSACHUSETTS 29 (1974).

[47] Lenzner, *supra* note 36, at 31; *Businessmen in Region Think Defeat, Bank Executive Says*, HARTFORD COURANT, Feb. 22, 1973, at 7.

[48] Leonard Silk & David Vogel, Ethics and Profits: The Crisis of Confidence in American Business 178 (1976).

[49] *Id.* at 44.

[50] Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce 24–25 (Aug. 23, 1971) (box 118, folder 10, Lewis F. Powell, Jr., Archives, Wash. & Lee Univ. School of Law, Blacksburg, Va. [hereinafter Powell Archives]).

[51] WOODWARD & ARMSTRONG, *supra* note 12, at 194.

[52] *See* PHILLIPS-FEIN, *supra* note 10, at 157.

journalists, and other so-called opponents of capitalism.[53] Eventually, Powell summarized these speeches in a memo to his friend in the U.S. Chamber of Commerce called "The Attack on the Free Enterprise System."[54]

Powell's memo, which by 1972 had become infamous,[55] lamented the fact that members of the New Left had access to influential institutions—universities and media conglomerates—with which to promote new regulations. He called on business executives to enlist their own institutions—business corporations—to respond using "guerrilla warfare" against the regulatory state. "The day is long past when the chief executive officer of a major corporation discharges his responsibility by maintaining a satisfactory growth of profits, with due regard to the corporation's public and social responsibilities," Powell wrote.[56] "If our system is to survive, top management must be equally concerned with protecting and preserving the system itself" without "the reluctance which has been so characteristic of American business."[57]

Powell's memo was significant, not just because of its militant tone, but also because of his expansion of the corporate-law theory known as "corporate citizenship." Fifty years earlier, corporate-law scholars had been nervous about the power of large corporations. Theoretically, corporations were groups of shareholders who invested their money together

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[53] *E.g.*, Lewis F. Powell, Jr., Address to the Southern Industrial Relations Conference: The Attack on American Institutions (Jul. 15, 1970) (box 118, folder 1, Powell Archives).

[54] Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., *supra* note 50, at 1; *see* Letter from Eugene B. Sydnor, Jr., to Lewis F. Powell, Jr. (Aug. 25, 1971) (box 19, folder 39, Powell Archives); PHILLIPS-FEIN, *supra* note 10, at 157.

[55] News of the memo arrived after he had been confirmed to the Supreme Court. Jack Anderson, *Chief Justice Lobbies Against Bill*, WASH. POST, Oct. 5, 1972, at H7; Jack Anderson, *Powell's Lesson to Business Aired*, WASH. POST, Sept. 28, 1972, at F7; Jack Anderson, *FBI Missed Blueprint by Powell*, WASH. POST, Sept. 29, 1972, at C27.

[56] *Id.* at 10.

[57] *Id.* at 10, 26.

and elected slates of directors to manage their investments and supervise the day-to-day work of executives.[58] But some directors, like Henry Ford, operated with virtual autonomy from the scores of ordinary people who owned stock in their corporations. At Ford Motor Company, the Michigan Supreme Court recognized in 1919, "No plan of operations could be adopted unless he consented, and no board of directors can be elected whom he does not favor."[59] To ensure that directors kept shareholders' interests above their own, judges regularly second-guessed corporate expenditures made for charitable or other causes that weren't directly tied to shareholders' interests.[60] But as the Great Depression hit, directors and executives began arguing that they had a "social responsibility" to more than just shareholders; if capitalism were to survive, they also had to be able to donate money to care for workers, customers, and neighbors.[61] Eventually, this idea of "corporate citizenship" took hold, and by the 1970s judges allowed directors to spend corporate dollars on schools and charities; to improve the standard of living of employees; and, in Powell's words, "generally to be good citizens."[62]

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[58] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 139–40 (1933).

[59] Dodge v. Ford Motor Co., 170 N.W. 668, 682–685 (Mich. 1919).

[60] *See, e.g.*, Brinson Ry. v. Exchange Bank of Springfield, 85 S.E. 634 (Ga. 1915); People *ex rel.* Maloney v. Pullman's Palace Car Co., 68 N.Y. Supp. 335 (1900); Hutton v. W. Cork Ry., 23 Ch. D. 654, 673 (1883).

[61] *See, e.g.*, Address of Owen D. Young (Jan. 1929), *published in* JOHN HAROLD SEARS, THE NEW PLACE OF THE STOCKHOLDER 208–210 (1929); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145, 1154–63 (1932).

[62] Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., *supra* note 50, at 8; *see, e.g.*, Union Pac. R.R. Co. v. Trustees, Inc., 329 P.2d 398 (Utah 1958); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953). For more on the development of corporate citizenship between 1932 and 1971, see generally THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane et al., eds. 2008); THEODORE LEVITT, THE THIRD SECTOR (1973); Thomas L. Hazen & Bren L. Buckley, *Models of Corporate Conduct: From the Government Dominated Corporation to the Corporate Dominated Government*, 58 Neb. L. Rev. 100 (1978); Adolph Berle, *Modern Functions of the*

But what Powell was calling for was more than this "traditional role of a business executive."[63] He wanted executives to go further, marshaling the "*resources* of American business" toward "paid advertisements" and "direct political action."[64] "A significant first step by individual corporations could well be the designation of an executive vice president," Powell wrote, "whose responsibility is to counter—on the broadest front—the attack on the enterprise system."[65]

As the executive vice president of the First, Catlin couldn't have been in a better position to respond to Powell's plea. Catlin began in 1971 by transforming the *New England Letter*—a staid pamphlet the bank had long circulated to about 35,000 business executives, government officials, and academics.[66] Catlin convinced the chairman and president of the First to replace the *Letter*'s editor with a man named James Howell, an economist who shared Catlin's contempt for "stubborn politicians and apathetic business people."[67] Between 1971 and 1972, Catlin and Howell published livid critiques in the *Letter* and gave speeches across New England calling upon corporate executives to steer their corporations to oppose what the bank called a "strong anti-business environment." The bank's annual reports editorialized that liberal politicians needed "to face up to economic reality and fiscal

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Corporate System, 62 COLUM. L. REV. 422 (1962); Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821 (1960).

[63] Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., *supra* note 50, at 8.

[64] *Id.* at 9, 23, 25 (emphasis added).

[65] *Id.* at 10–11.

[66] THE MASSACHUSETTS MIRACLE, *supra* note 42, at 19.

[67] Susan Trausch, The First's Jim Howell: Love Him or Hate Him . . . He Gets Things Done, Jun. 1, 1975, at 88; Lenzner, supra note 36, at C6; The Dilemma of a Mature Economy and Excessive Government Spending, NEW ENG. LETTER, Dec. 1971, at 1, 3–4 (on file at Baker Library, Harvard Business School, Boston, Mass.); Laurence Collins, Howell Sounds the Alarm Again, BOS. GLOBE, Oct. 18, 1972, at 30; FIRST NAT'L BANK OF BOS., LOOK OUT, MASSACHUSETTS!!! (1972), reprinted in THE MASSACHUSETTS MIRACLE, supra note 42, at 59.

responsibility," arguing that "well-intentioned" social programs were "crippl[ing] the very economic forces—productivity and employment—which generate the tax money without which these programs would soon collapse."[68] The bank soon made a name for itself across the country. The editorial boards of the *Wall Street Journal* and the *American Banker* began hailing the First for sounding "a remarkable alarm" and breaking "sharply with the usual banking practice."[69]

In 1972, Catlin had the opportunity to practice what he was preaching, leading the First into the middle of a controversial statewide referendum. At issue was a constitutional amendment that would permit Massachusetts to tax high incomes at a higher rate than low incomes, a proposal known as a "graduated income tax," or "grad tax."[70] Even though the federal government had used a grad tax since 1913,[71] Massachusetts was one of a dozen states whose constitution still prohibited it.[72] This was the third time in a decade that Massachusetts was voting on the issue—in 1962 and 1968 opponents badly outspent and outvoted supporters.[73] What made supporters in 1972 optimistic was a new law that

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[68] 1971 ANNUAL REPORT, *supra* note 32, at 2; NEW ENG. REPORT, Dec. 1972, at 1–3 (on file at Baker Library, Harvard Business School, Boston, Mass.); *see* David R. Palmer, *Financiers Cite What's Right with State*, BOS. GLOBE, Nov. 24, 1972, at 66; FIRST NAT'L BANK CORP., 1976 ANNUAL REPORT 2 (1977) [hereinafter 1976 ANNUAL REPORT].

[69] *See* Editorial, *Realism Arriving?*, WALL ST. J., Sep. 21, 1972, at 20. The *American Banker* editorial is quoted in *Economic Maturity*, NEW ENG. LETTER, Jan. 1972, at 1–2 (on file at Baker Library, Harvard Business School, Boston, Mass.).

[70] *Mass. to Vote on Graduated Income Tax*, BOS. GLOBE, Feb. 6, 1972, at 13.

[71] *See* Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114 (1913).

[72] MASS. CONST. pt. 2, ch. 1, § 1, art. 4; *id.* pt. 1, art. 10; *see* Bettigole v. Assessors of Springfield, 178 N.E.2d 10, 14–15 (1961) (listing cases); *see also* Statement of Agreed Facts ¶48, First Nat'l Bank of Bos. v. Attorney Gen. (*First Nat'l I*), 290 N.E.2d 526 (Mass. 1972) (No. 72-653) (listing the minority of states without a grad tax).

[73] *See* Rachelle Patterson, *Graduated Tax Funds Reported*, BOS. GLOBE, Oct. 13, 1972, at 4. In 1968, opponents spent $44,000. In 1962, they spent $190,000, with most of the money coming from

prohibited corporations from spending any money against them.[74]

The authors of the 1972 law, including Governor Sargent, were annoyed that in 1962 and 1968, corporations had spent hundreds of thousands of dollars opposing the grad tax even though it didn't affect their bottom lines.[75] The grad tax would raise the *personal* income taxes for the top 10 percent of earners and lower taxes for everyone else—meaning the only people who stood to benefit from its defeat were the corporations' highly paid top executives.[76] One legislator complained that these executives "ought to be giving out of their own wallet, not out of corporate treasuries."[77] A writer for the *Globe* agreed that the law would "stop the flow of corporate funds into a kitty that is obviously for the personal benefit of executives, not the corporation."[78]

Indeed, even some shareholders of major corporations agreed that legislation was necessary to stop corporate executives from spending shareholder dollars on ideological or personal causes. To see why, consider the example of Ferdinand Lustwerk, who in 1962 complained when the directors of Lytron, Inc., decided to spend $500 against the first grad

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corporations. *See id.*; Rachelle Patterson, *Graduated Tax Issue Divides Labor*, BOS. GLOBE, Sep. 12, 1972, at 6.

[74] Before 1972, corporations could spend money opposing referenda that "materially affected" corporate property. *See* Act of June 13, 1946, ch. 537, 1946 Mass. Acts 544. The new law declared that a grad tax did not materially affect corporate property. Act of Jun. 20, 1972, ch. 458, 1972 Mass. Acts 274, 275. For a longer discussion of this legal history, see Fox, *supra* note 21, at 76–80.

[75] *See* David Nyhan, *Battle Rages over Grad Tax*, BOS. GLOBE, May 10, 1972, at 31.

[76] *See* Rachelle Patterson, *Sargent Says 'Lies' Used to Fight Grad Tax*, BOS. GLOBE, Nov. 2, 1972, at 1, 24.

[77] Rachelle Patterson, *Supreme Court Redefines Law: 4 Companies Permitted to Finance Tax Campaigns*, BOS. GLOBE, Oct. 14, 1972, at 3.

[78] A.A. Michelson, *Is Business Opening a Fight Against a Graduated Tax?*, BOS. GLOBE, Apr. 15, 1972, at 7.

tax.[79] Even though the directors were subject to annual elections by shareholders like Lustwerk (who owned 15 percent of Lytron), there was virtually nothing he could do to stop the expenditure. In most corporations at the time, the directors chose for themselves who would be nominated at the next election.[80] Moreover, the directors could use the company's money to post written communications to shareholders, solicit their votes, and otherwise finance their reelections in campaigns that Ralph Nader derisively called a "'Communist ballot'—that is, a ballot which lists only one slate of candidates."[81] This meant that Lustwerk could only vote Lytron's directors out of office if he nominated his own candidates, paid for their election materials, and convinced the geographically dispersed owners of 35 percent of Lytron's shares to vote his way—all to stop a $500 donation.[82] Unsurprisingly, Lustwerk thought it might be easier—and cheaper—to sue the directors. But the Supreme Judicial Court of Massachusetts shot down his case, holding that unless the Massachusetts legislature intervened, corporate directors were authorized to spend company money on the grad tax.[83]

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[79] Lustwerk v. Lytron, Inc., 183 N.E.2d 871, 871 (Mass. 1962).

[80] *See, e.g.,* JOSEPH A. LIVINGSTON, THE AMERICAN STOCKHOLDER 35–38 (Collier rev. ed. 1963); Robert N. Shwartz, *A Proposal for the Designation of Shareholder Nominees for Director in the Corporate Proxy Statement*, 74 COLUM. L. REV. 1139, 1140–42 (1974); Melvin Aron Eisenberg, *Access to the Corporate Proxy Machinery*, 83 HARV. L. REV. 1489, 1489–94, 1504–06 (1970).

[81] Ralph Nader, Mark Green & Joel Seligman, *Who Rules the Giant Corporation?*, BUS. & SOC'Y REV., Jun. 1, 1976, at 40, 42. *But see* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (invalidating an election after "finding that management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office"); ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 52 (1979) (objecting to Nader's conclusions and "*political metaphor*").

[82] *See GENERALLY* EDWARD ROSS ARANOW & HERBERT A. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 260–66 (2d ed. 1968); *see also* JOHN KENNETH GALBRAITH, THE AGE OF UNCERTAINTY 258–259 (1977); SEC Reg. 14A, 17 C.F.R. § 240.14a-11 (1969).

[83] *See Lustwerk*, 183 N.E.2d, at 874; *see also Euphemia Donahue v. Rodd Electrotype Co. of New Eng., Inc.*, 367 N.E.2d 505, 589–90 (Mass. 1975) (discussing the reluctance of modern courts to second-guess the decisions of corporate directors).

Nevertheless, when the Massachusetts legislature did ban corporations from making similar donations in 1972, "[t]he possibility of a more severe personal income tax hit a visceral nerve" with the executives and directors of the commonwealth's corporations.[84] Catlin, for his part, called the ban "typical of the undue harassment to business that takes place on Beacon Hill." On behalf of the First, he retained a law firm to sue the commonwealth for violating the bank's constitutional rights.[85]

Catlin filed the First's lawsuit directly in the Supreme Judicial Court. The First's lawyer, Francis Fox, wrote of the bank as if it were literally a corporate citizen. He wrote that the First and other corporations were "artificial persons" who "reasonably believe[d]" that a grad tax would "discourage [human] persons of high ranking executive ability from settling or remaining in Massachusetts."[86] As a bank with billions of dollars in loans and deposits, the First had a responsibility to "communicate" these beliefs to voters; but in order to do so, the bank needed "the intervention of some medium of expression," such as a newspaper ad.[87] Prohibiting the bank from spending money on political ads therefore violated its ability to speak.

Analogizing a bank to a person was a sound legal strategy at the time. The Fourteenth Amendment to the U.S. Constitution declares that no state may deprive any "person" of "life, liberty, or property without due process of law."[88] In a series of decisions at the turn of the

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[84] Lenzner, *supra* note 34, at 31.

[85] Patterson, *supra* note 77, at 3; David Nyhan & Rachelle Patterson, *Graduated State Income Tax: Businessmen Spend Big to Kill It*, BOS. GLOBE, Oct. 31, 1972, at 3.

[86] Plaintiffs' Brief at 59, 82, First Nat'l Bank of Bos. v. Attorney Gen. (*First Nat'l I*), 290 N.E.2d 526 (Mass. 1972) (No. 72-653); Statement of Agreed Facts ¶ 18, *First Nat'l I*, 290 N.E.2d 526.

[87] Plaintiffs' Brief at 59, *First Nat'l I*, 290 N.E.2d 526.

[88] U.S. CONST. amend. XIV., § 1.

twentieth century, the Supreme Court of the United States, perhaps inadvertently, interpreted the term "person" to include a corporation. (The first opinion to assume that a corporation was a "person" for purposes of the Fourteenth Amendment contained the assumption in a summary of the opinion drafted by the Supreme Court's reporter, not in the text of the opinion itself.)[89] Decades later, in another context, the Court interpreted the term "liberty" to include the First Amendment's protection of "freedom of speech, and of the press."[90] Putting this all together, the bank's lawyer argued that the First was therefore "a 'person' within the meaning of the Fourteenth Amendment, and as such has First Amendment rights of communication."[91] Indeed, members of the Court's liberal wing, such as Justice William Brennan, had recently signed on to landmark First Amendment decisions protecting advocacy corporations like the NAACP and media corporations like the *New York Times* Company.[92]

Writing of the bank as if it were a person also obscured the thousands of people who composed "the First." Only the top ten percent of Massachusetts earners—4 percent of the First's employees—would see their taxes go up if the grad tax passed.[93] The rest would see their taxes go down. Thinking of the bank as a single individual, however, made it sound like

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[89] Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1640–49 (1988); HORWITZ, *supra* note 18, at 223; *see* Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889); Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888); Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 396 (1886).

[90] U.S. CONST. amend. I; *see, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).

[91] Plaintiff's' Reply Brief at 14, 62–63 & n.11, *First Nat'l I*, 290 N.E.2d 526 (citing Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936)).

[92] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[93] *See* Patterson, *supra* note 76, at 24. The grad tax would raise taxes for people who made more than $20,000; only 212 of the First's 5,500 employees made that much. Statement of Agreed Facts ¶ 12, *First Nat'l I*, 290 N.E.2d 526.

Catlin's perspective was the only one that mattered. The Massachusetts attorney general later emphasized this point, arguing that the First's "decision to spend corporate money to oppose a graduated income tax was made by the corporate management and did not involve any stockholder input by the corporation's members who disagreed with its management's positions on public issues."[94] As with Ferdinand Lustwerk in 1962, many shareholders and employees would surely object had Catlin solicited their opinion.

The First ended up winning its lawsuit on a minor technicality.[95] Catlin and his allies celebrated, calling their win a defeat of corporate "disenfranchisement" and a vindication "of the rights of corporations as citizens to participate in the political life."[96] The supporters of the grad tax, meanwhile, recognized immediately that the decision would lead corporations to overwhelm their "poor people's" movement.[97] Before the court's decision in October, Catlin's campaign spent only $7,000 dollars on ads.[98] After the decision, with donations from the First and other businesses, it spent more than ten times as much as the referendum's supporters, winning in November by a 2–1 margin. [99]

Over the next few years, Catlin continued to lead the First into new areas of political advocacy. In 1973 and 1974, the First published studies demonstrating that "our most liberal

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[94] Brief for the Appellee at 38, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (No. 76-1172).

[95] Patterson, *supra* note 77, at 3. The court held that the referendum was so poorly written that it could authorize both a graduated *personal* income tax and, unintentionally, a graduated *corporate* income tax. *See First Nat'l I*, 290 N.E.2d, at 530–31; *id.* at 541 (Quirico, J., concurring in the result). Under state law at the time, that meant the First could spend money in opposition to the tax. *See*, *supra*, note 74.

[96] Patterson, *supra* note 77, at 3.

[97] *Id.*

[98] Patterson, *supra* note 73, at 4.

[99] Rachelle Patterson, *Corporations Big Donors in Tax Battle*, BOS. GLOBE, Nov. 22, 1972, at 26; Statement of Agreed Facts ¶ 27, 60, *First Nat'l II*, 359 N.E.2d 1262.

elected officials" were incapable of the sort of professional fiscal management required by modern governments.[100] In a 1975 report to shareholders, the First's leadership explained that the First's "increasingly demanding role as a good corporate citizen" required it "to resist governmental encroachment" and "combat strongly the idea that more government is necessarily better government."[101] Under Catlin's direction, the First helped to promote a new kind of politician for Massachusetts—one like Democratic candidate Michael Dukakis.[102] Like Catlin, Dukakis and other New Democrats were social liberals with political bases in Boston's increasingly white and professional suburbs; politicians who ran on platforms of running government professionally, efficiently, and without catering to traditional constituencies who depended on unions or government aid.[103]

Not everyone was excited about a group of bankers participating in politics—or the new direction of the Democratic Party. Nancy McDonald, the chairwoman of a local nonprofit corporation, United Peoples, Inc., was particularly alarmed. Like Catlin, McDonald

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[100] 1975 ANNUAL REPORT, *supra* note 22, at 4; Rachelle Patterson, *Business Leaders Organize to Lobby for State Efficiency*, BOS. GLOBE, Sep. 5, 1973, at 1, 62; HARRISON, *supra* note 46, at 30; Rachelle Patterson, *Group Spent $235,000 to "Economize,"* BOS. GLOBE, Feb. 24, 1974, at 33; Letter to the Editor, Henry S. Lodge, Chairman, Citizens for Econ. in Gov't, BOS. GLOBE, Jan. 21, 1974, at 18; Advertisement, Citizens for Econ. in Gov't, *You Live on a Tight Budget*, BOS. GLOBE, Jan. 16, 1974, at 19; Advertisement, Citizens for Econ. in Gov't, *Swineherders*, BOS. GLOBE, May 13, 1974, at 6; Robert Healy, *Business Versus Sargent?*, BOS. GLOBE, Jun. 13, 1973, at 1; Rachelle Patterson, *Quinn's Friend at the First Authored Impartial Survey*, BOS. GLOBE, Jul. 28, 1974, at A5; John Robinson, *Study Predicts Deficit*, BOS. GLOBE, Jul. 3, 1974, at 1.

[101] 1975 ANNUAL REPORT, *supra* note 22, at 4; REPORT ON CORPORATE CONCERN, *supra* note 22, at 1.

[102] For more on the rise of Dukakis and other New Democrats during this period, see Geismer, *supra* note 13, at 251.

[103] Trausch, *supra* note 67, at 88; *Deficit Prediction Brings Rhetorical Surplus*, BERKSHIRE EAGLE, Aug. 6, 1974, at 4. It may seem ironic from the perspective of today that the Democratic candidate was supported by business while the Republican candidate was derided as too liberal. For more on the complicated and shifting dynamics of the Democratic party in 1970s Massachusetts, see generally LILY GEISMER, DON'T BLAME US: SUBURBAN LIBERALS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY (2014).

considered her corporation to be a "people's advocate."[104] Unlike Catlin, United Peoples incorporated in 1971 with the express goal of giving families on welfare a "political voice."[105] McDonald was herself a welfare recipient—as were her corporation's 1,800 members.[106] "The poor have absolutely no political clout," she explained. "Anything that gets done politically around here for the poor is done by making a lot of noise."[107] In the face of the First's political activism, the board of United Peoples successfully lobbied the state legislature to hold a new referendum on the grad tax and modify its ban on corporate political spending to ensure that the First could not spend money in opposition.[108]

"Believing that corporations have the same First Amendment rights as individuals," the First once again "led the fight" "to assert the First Amendment rights of corporations to speak out on political issues which affect business."[109] United Peoples intervened on the side

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[104] U.S. CATHOLIC CONFERENCE, CAMPAIGN FOR HUMAN DEVELOPMENT PROGRESS REPORT 11 (1979).

[105] Grant Proposal from United Peoples to the Haymarket People's Fund 2 (1976) (box 7, folder 439, Haymarket People's Fund Records, Univ. Archives and Special Collections, Univ. of Mass., Boston, Boston, Mass.)

[106] Marian Poverman, The Liberated Lady Sings the Lower-Class Blues—And Does Something About Them, BOS. GLOBE, Jul. 7, 1974, at A5.

[107] Nick King, Robert Rosenthal & Benjamin Taylor, *Poverty in the Suburbs*, BOS. GLOBE, Jul. 16, 1974, at 1.

[108] *See* Motion to Intervene of Coalition for Tax Reform, Inc., and United Peoples, Inc. ¶ 2, First Nat'l Bank of Bos. v. Attorney Gen. (*First Nat'l II*), 359 N.E.2d 1262 (Mass. 1976) (No. 76-653); Act of Jun. 1, 1973, ch. 348, 1973 Mass. Acts 247. The ban prohibited corporations from spending money on questions "other than one materially affecting" corporate property, and added that no question "solely" concerning personal taxes "shall be deemed materially to affect" such property. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1978). The grad tax proposal authorized the legislature to modify only "the personal income tax laws of Massachusetts." Plaintiffs' Brief app. B, *First Nat'l II*, 359 N.E.2d 1262 (emphasis added).

[109] FIRST NAT'L BOS. CORP., 1977 ANNUAL REPORT 10 (1978) [hereinafter 1977 ANNUAL REPORT]; 1978 ANNUAL REPORT, *supra* note 22, at 3. Catlin retired in 1975, but the First and four other corporations filed a lawsuit nearly identical to the one he oversaw in 1972. Also as in 1972, the lawsuit was driven primarily by the corporations' executives—only three of the five boards of directors even voted on whether to file the action. *See* Ken Hartnett, *Is the Face of Power Really Changing in Boston?*, BOS. GLOBE, Dec. 14, 1975, at J10, J35.

of the commonwealth, claiming that the First had no right to participate in a referendum that benefitted only its executives.[110] What the banks "offered as the dispassionate economic opinions of certain business interests may more accurately represent the personal but highly interested views of the high-paid executives and directors who control those corporations and who would probably have to pay higher *personal* taxes if a [grad tax] were enacted," its lawyer wrote.[111] The Supreme Judicial Court agreed: "It seems clear to us that a corporation does not have the same First Amendment rights to free speech as a natural person."[112]

The First's leadership appealed to the Supreme Court of the United States, which agreed to hear the First's case in 1977.[113] And when the First's lawyers argued before the Court, one of the Justices was particularly attentive to their arguments: Lewis Powell. Two months after writing his 1971 memo, Powell was asked by President Richard Nixon to join the Supreme Court. As a Justice, Powell was no ideologue; he developed a reputation as a swing vote comfortable in the majorities of both *Roe v. Wade*[114] and *Gregg v. Georgia.*[115] But

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[110] *See* Motion to Intervene of Coalition for Tax Reform, Inc., and United Peoples, Inc. ¶ 4, *First Nat'l II*, 359 N.E.2d 1262.

[111] *Id.* Ironically, the bank's allies fought back in the press, claiming that United Peoples had no right to participate in the referendum, either, because its members were too poor to pay taxes and because it was funded by federal grant, which meant that federal taxpayers were unwittingly taking sides in a state referendum. *See* Shirley Scheibla, *Bar Sinister: The Legal Services Corporation Stretches Its Mandate*, BARRON'S, Jan. 24, 1977, at 5; *Law Reform Institute Defends Tax Campaign*, BOS. GLOBE, Oct. 9, 1976, at 3.

[112] *First Nat'l II*, 359 N.E.2d, at 784.

[113] *High Court to Hear Tax Ballot Case*, BOS. GLOBE, Apr. 19, 1977, at 7. In the meantime, as the 1976 referendum proceeded without corporate donations, the First's leadership also appealed to "every bank officer in the state" for a "massive increase in personal contributions." With the support of individual bankers, opponents of the referendum raised over $115,000, almost equaling the amount Catlin raised in 1972 with corporate donations. Voters again rejected the referendum by a 3–1 margin. A.A. Michelson, *Grad Tax Needs Long Slumber Before New Try*, BOS. GLOBE, Nov. 6, 1976, at 7; R.S. Kindleberger, *Graduated Tax—4th Test in 14 Years*, BOS. GLOBE, Oct. 31, 1976, at 44.

[114] 410 U.S. 113 (1973) (recognizing a constitutional right to an abortion).

[115] 428 U.S. 153 (1976) (reinstituting the death penalty after a temporary ban).

Powell did provide a consistent vote for the increased rights of corporations.[116]

At the time, the Supreme Court's interpretation of the First Amendment was in flux. The decade earlier, under Chief Justice Earl Warren, liberal members of the Court had interpreted the First Amendment's protection of free speech capaciously. They struck down various restrictions on politically marginalized groups, from communists to civil rights demonstrators to antiwar protestors.[117] In *NAACP v. Alabama*,[118] for example, the Court prohibited a state from banning a civil-rights corporation from operating there; and in *New York Times Co. v. Sullivan*,[119] the Court overturned a libel case against a media corporation for its publication of a controversial civil-rights advertisement.

At the same time, the Court continued to tolerate bans on speech in a variety of contexts, from prohibitions on "obscene" pornography to laws prohibiting the burning of draft cards to restrictions on commercial advertisements.[120] Legal scholars and the Justices offered a catalog of explanations for the Court's inconsistent First Amendment jurisprudence: it protected "freedom of expression" only when it assured "individual self-fulfillment"[121]; it protected the free exchange of truthful information only when it contributed to consensual

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[116] *See* Bernard Schwartz, *Freedom of Speech*, *in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?, *supra* note 12, at 93, 95 ("Justice Powell was the primary author of the Burger Court jurisprudence covering commercial speech.").

[117] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (*per curiam*) (restricting states' power to criminalize incitement); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) (protecting the right of students to protest the Vietnam War).

[118] 357 U.S. 449 (1958).

[119] 376 U.S. 503 (1964).

[120] *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (holding that burning a draft card is not protected); Roth v. United States, 354 U.S. 476 (1957) (holding that obscenity is not protected); *see also* Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding that commercial advertisements are not protected).

[121] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

"self-government"[122]; it protected the pursuit of truth only by opening pathways for thoughts to get themselves "accepted in the competition of the market."[123] No matter which explanation the Justices selected, however, none was ever entirely predictive; each required the Justices to subjectively weigh their chosen "individual and societal interests" in protecting particular speech against the interests on the other side in restricting it.[124]

As Justice Powell and other Nixon appointees joined the Court, the Justices began weighing the individual and societal interests of business-friendly speakers more heavily than the Warren Court had. In the language of constitutional doctrine, they began viewing more types of expenditures as protected "speech" that states could abridge only if the bans were narrowly tailored to serve a compelling government interest. In a series of cases culminating in 1976's *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, for example, Justice Powell joined liberal Justices William Brennan and Thurgood Marshall in striking down restrictions on commercial advertisements.[125] Where the liberal Justices and the American Civil Liberties Union believed the advertisements protected the associational interests of poor people and women seeking abortions—whom the

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[122] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 3–4 (1948).

[123] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[124] *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 9 (1965) ("[A]ll schools of thought, and I include Dr. Meiklejohn, are in substantial agreement with Mr. Justice Black that government has some power to regulate the 'how' and 'where' of the exercise of the freedom."); *see also* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 57 (1975) ("The First Amendment is no coherent theory that points our way to unambiguous decisions but a series of compromises and accommodations confronting us again and again with hard questions to which there is no certain answer."). Doctrinally, this balancing has developed into a three-part test: First, is the speech protected by the First Amendment? If so, does the government have a sufficiently compelling reason to restrict it? Finally, is the restriction calibrated to restrict as little speech as possible? *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

[125] 425 U.S. 748, 762–65 (1976); *see* Schwartz, *supra* note 116, at 95–96 (discussing Powell's contribution).

advertisements at issue targeted—Justice Powell believed that the companies who produced these advertisements should be as protected as the NAACP or *New York Times*.[126] That same year, in a lawsuit brought by Powell's ideological ally Senator James Buckley, the Court struck down various post-Watergate campaign-finance restrictions, narrowing the government's latitude to regulate any "expenditure of money" when it financed political ideas.[127] That decision, *Buckley v. Valeo*, also authorized corporations to create an unlimited number of "responsible citizenship program[s] for political activities"—also known as political action committees, or PACs.[128] Although *Buckley* nominally freed both corporations and unions to set up and solicit contributions for these PACs, in *Abood v. Detroit Board of Public Education*, the Court prohibited public-sector unions from requiring the employees they represented to contribute to their PACs.[129] It remained an open question whether the managers of private corporations had free latitude to require their companies' employees or shareholders to contribute to their political activity.

These decisions were undoubtedly on the Justices' minds when the First's lawyers filed their briefs arguing that business corporations were "persons" who had First

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[126] *Va. State Pharmacy Bd.*, 425 U.S., at 761; *see also* Bigelow v. Virginia, 421 U.S. 809 (1975).

[127] *Buckley v. Valeo*, 424 U.S. 1, 15–16 (1976) (*per curiam*).

[128] That phrase comes from a 1975 advisory opinion by the Federal Election Commission that authorized corporations not only to solicit donations from employees, but also to use a wage-checkoff system. Fed. Election Comm'n, Advisory Opinion 1975-23, 40 Fed. Reg. 56584 (1975). A footnote in *Buckley* cited that opinion with approval and also authorized businesses to create a new PAC for each of their subsidiaries or divisions. 424 U.S. at 28 n.31. The effect was immediate: in 1974, there were only 89 corporate PACs compared to 201 labor PACs. News Release, Fed. Election Comm'n, Number of Federal PACs Increases (Mar. 9, 2009), http://www.fec.gov/press/press2009/20090309PACcount.shtml. By the end of 1976, corporate PACs outnumbered union PACs 433 to 224. (By 2009, the ratio was 1,598 to 272). *Id.* The First National Bank created its first PAC in 1978. Jonathan Fuerbringer, *Office Giving Puts Clout in Political Action*, BOS. GLOBE, Oct. 11, 1978, at 1.

[129] 431 U.S. 209 (1977).

Amendment "rights of freedom of expression."[130] The lawyers described the largest bank in New England as a "corporate speaker," one who had the same interest in contributing to the marketplace of ideas as the *New York Times*, NAACP, or any other civic-minded individual.[131] "The ebb and flow of the economic and financial tides in Massachusetts form its life blood," they wrote.[132] And in light of the commercial-advertising cases, the lawyers argued that an interested public had a societal interest in hearing whatever the corporations had to say.[133]

Writing in opposition, the attorney general of Massachusetts[134] fought the corporate personhood metaphor by distinguishing between the First and the real-life people who were actually leading its fight against the grad tax. Under his preferred metaphor, the First was not a "citizen" or "person," but a "legal fiction[]" created by the commonwealth that possessed "only those properties which the charter of its creation confers upon it."[135] Legal fictions do not possess the "peculiarly personal rights" of their "human owners and managers," he wrote.[136] "Corporations cannot have opinions. In fact, because of the dispersion of stock ownership and shareholder apathy, opinions purportedly expressed on behalf of a corporation tend to be the personal opinions of its management."[137] Indeed, in the case of the First, the

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[130] Brief for Appellants at 16, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (No. 76-1172).

[131] *Id.* at 42.

[132] *Id.*

[133] *Id.* at 16, 62.

[134] Although United Peoples was permitted to intervene before the Supreme Judicial Court of Massachusetts, only the attorney general argued before the Supreme Court.

[135] Brief for the Appellee at 13–14, *Bellotti*, 435 U.S. 765 (quoting Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819)).

[136] *Id.* at 14.

[137] *Id.* at 13.

corporate management didn't solicit "any stockholder input."[138] Just as the Supreme Court in *Abood* had held that the First Amendment protected public-sector employees from having to subsidize union leaders' political activities, the attorney general argued that the ban was narrowly tailored to serve the compelling interest of protecting shareholders from having to subsidize corporate leaders' political activities.

Ultimately, a majority of the Court agreed with the First. Justice Powell received the assignment to explain why the Massachusetts ban was unconstitutional. Initially, he felt that the Court's recent cases had gone "a long way toward recognizing First Amendment rights of corporate entities."[139] But at his clerk's suggestion, he avoided holding that corporations "have" First Amendment rights,[140] instead writing in his opinion that political "speech" should be protected regardless of where it originates. Political speech is "indispensable to decisionmaking in a democracy," he wrote. "[T]his is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[141]

Doctrinally, it was not enough for Justice Powell to hold that the First Amendment protected the First's political speech; he also had to explain why the ban was not narrowly tailored to serve a compelling societal interest. To do this, Justice Powell had to acknowledge the attorney general's argument that Massachusetts was interested in protecting the First's

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[138] *Id.* at 38.

[139] Memorandum from Justice Lewis F. Powell, Jr., 8 (1977) (box 76-1172, folder 1, Powell Archives) [hereinafter Summer Memorandum].

[140] *See* Bench Memorandum from Nancy Bergstein to Mr. Justice Powell 2–3 (Sep. 13, 1977) (box 76-1172, folder 1, Powell Archives).

[141] *Bellotti*, 435 U.S., at 777.

shareholders. Privately, the Justice thought that such an interest was "close to frivolous"[142] given that the ban "would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure."[143] Publicly, the Justice agreed with the First's lawyers that if dissenting shareholders *really* were upset by the First's political activity, they could always vote the directors out of office "through the procedures of corporate democracy."[144] "Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests," Justice Powell wrote. If the First started spending money "merely to further the personal interests of management," shareholders should resort to the corporate ballot box, not the state legislature.[145]

Just as Powell's 1971 memo was significant for its expansion of "corporate citizenship," his 1978 opinion is noteworthy for its conclusion that "corporate democracy" would check corporate citizenship's abuses. This conclusion was so optimistic that it sounded almost naïve. As discussed earlier, the idea behind corporate democracy is that in any business corporation, shareholders are responsible for electing the company's board of directors, who in turn appoint executives like Ephron Catlin.[146] Theoretically, when an executive does something selfish, the shareholders can elect a new board. But as Ferdinand Lustwerk learned in 1962, this ideal had long been considered a "myth" in a world in which

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[142] Summer Memorandum, *supra* note 139, at 7.

[143] *Bellotti*, 435 U.S., at 794.

[144] *Id.* at 794–95.

[145] *Id.* at 794–95.

[146] *See* BERLE & MEANS, *supra* note 58, at 69–118.

directors could nominate themselves and use shareholder dollars to finance their reelection campaigns.[147] In the early twentieth century, corporate theorists from Louis Brandeis to Adolph Berle and Gardiner Means found that "the usual stockholder has little power over the affairs of the enterprise and his vote, if he has one, is rarely capable of being used as an instrument of democratic control."[148] In 1960, an editor of the *Yale Law Journal* observed that "present day commentators . . . tend to regard the notion of corporate democracy as obsolete."[149] And in 1977, when Chief Justice Warren Burger considered the First's case, he noted in a memo that "[c]orporations rarely, if ever, consult stockholders on expenditures and indeed a great many expenditures are made without consulting with the directors, even though management is accountable to both."[150]

In this respect, the First was typical. Ephron Catlin never solicited shareholders' opinions about the bank's political activism. And the annual meetings of shareholders were not a serious source of regulation. In the bank's 1977 meeting, for example, only three people said anything critical about the First. One of them told the chairman, "Look, I'm the employer here and you're the employee. Maybe we ought to ask for your resignation."[151] The guards were "told that when the word came we were to remove them very diplomatically."[152]

But if corporate democracy was a myth, it was a useful myth. Just as calling a corporation a "person" made it seem like a monolithic entity, calling it a "democracy"

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[147] Bayless Manning, *The American Stockholder*, 67 YALE L. J. 1477, 1489 (1958) (book review); *see*, *supra*, notes 80–82.

[148] BERLE & MEANS, *supra* note 58, at 84, 89; *see* BRANDEIS, *supra* note 21, at 7–8.

[149] Note, *Corporate Political Affairs Programs*, *supra* note 62, at 95.

[150] Memorandum from Chief Justice Warren E. Burger to Justice William J. Brennan, Jr. (Dec. 6, 1977) (box 76-1172, folder 1, Powell Archives).

[151] Laurence Collins, *It Was Quite a Meeting at the First*, BOS. GLOBE, Apr. 1, 1977, at 26.

[152] *Id.*

"create[d] an impression in the public mind . . . that a degree of shareholder supervision exists which in fact does not."[153] In a memo to Justice William Rehnquist, Justice Powell made it clear that managerial autonomy was precisely what he wanted to protect. "Although no prior decision has expressly recognized corporate speech generally as explicitly as my opinion does, I view the trend of our decisions over the past century as supporting the proposition that artificial entities are treated as 'persons' for purposes of exercising and relying upon constitutional rights," he wrote.[154] By protecting "corporate expression," he indicated that he was protecting the "management [who] believes the corporation must speak out to protect the long term viability of its business," the "free enterprise system," and "our educational, cultural, and—yes—even political affairs."[155] Justice Powell concluded by calling himself a "Jeffersonian from Virginia," one who views "with increasing concern the ever burgeoning power of government over the lives of people."[156] The man who had called for executives to wield their corporations in guerrilla warfare against the New Left was continuing to assist the counterrevolutionaries he had armed.

II

There *was* one nearby corporation for which "corporate democracy" was alive and well: The city of Boston. The municipal corporation's response to *First National Bank v. Bellotti* drove home for ordinary people what Justice Powell's ruling entailed.

Few people regard Boston as a "corporation" today, but when it was incorporated as a city in 1822, corporations were precisely what residents had in mind. At the time, the term

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[153] Manning, *supra* note 147, at 1489.

[154] Memorandum from Justice Lewis F. Powell to Justice William Rehnquist 2 (Apr. 17, 1978) (box 76-1172, folder 3, Powell Archives).

[155] *Id.* at 2–3.

[156] *Id.* at 3.

corporation was used to describe any bank, trading company, or other organization that had its rights and governing structure specified in a written charter granted by the sovereign.[157] Americans had a long history with these sorts of institutions—seven of the thirteen colonies were originally governed by trading corporations such as the Massachusetts Bay Company—and by the 1820s corporate charters were seen as "constitutions" for organizations.[158] Like the Federal Constitution, charters gave corporations enumerated powers, such as the ability to tax members, which corporations could exercise so long as they abided by particular restrictions. When the Massachusetts legislature chartered the city of Boston in 1822 and the official bank of Massachusetts in 1784, both corporations were essentially privately run government agencies, which the legislature treated as it would a public university or department of revenue.[159]

In an 1819 decision called *Dartmouth College v. Woodward*, however, the Supreme Court began a century-long campaign to distinguish between government-like "public" corporations, such as the city of Boston, and person-like "private" corporations, such as the Massachusetts Bank.[160] This lasted through 1907's *Hunter v. City of Pittsburgh*.[161] By then,

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[157] *See* JOSIAH QUINCY, A MUNICIPAL HISTORY OF THE TOWN AND CITY OF BOSTON 1–2 (Boston: Charles C. Little & James Brown, 1852); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY L.J. 51, 60 (1993). *See generally* ERNEST GRIFFITH, HISTORY OF AMERICAN CITY GOVERNMENT 21–26 (1938); BEATRICE WEBB & SIDNEY WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE MANOR AND THE BOROUGH 271 (1908).

[158] Pauline Maier, *The Debate over Incorporations: Massachusetts in the Early Republic*, *in* MASSACHUSETTS AND THE NEW NATION 73–117 (Conrad Edick Wright, ed., 1992).

[159] HORWITZ, *supra* note 18, at 109–26; HANDLIN & HANDLIN, *supra* note 20, at 100–14.

[160] *See* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819). *See generally* GERALD FRUG, CITY MAKING (1999); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977).

[161] 207 U.S. 161, 178.

the Supreme Court declared that "municipal corporations" were still "agencies" of government whose exercise of power had to be clearly granted by state legislatures and closely guarded by state courts.[162] But it gave private corporations like the bank of Massachusetts Bank—now known as the First National Bank of Boston—the same discretion and constitutional protection from state regulations that individuals received.

Many Bostonians still considered their city a corporation, however, and politicians often analogized the city to a private corporation when discussing the city's corporate charter.[163] For example, in the early 1900s, Yankee Republicans in the legislature voted to eliminate partisan elections in the city. They argued that political parties made as little sense in a municipal corporation as they did in, say, a meatpacking corporation.[164] Irish Democrats in the city—who were winning these partisan elections—objected, calling the city "a political and not a business corporation." Unlike the sham of corporate democracy, they argued, municipal elections comprised "a great number of people, each with a single vote," for whom parties were absolutely necessary.[165]

By the 1960s, these charter fights resulted in a municipal corporation whose nonpartisan "strong mayor" wielded enormous power relative to other city officials but who

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[162] *Id.*; *see* JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 25–26 (Chicago, James Cockcroft & Co., 1872) (calling on courts "*to lean against constructive powers* and, with firm hands, to hold them and their officers within chartered limits").

[163] Boston was not the only city whose leaders thought of themselves as corporate executives. For criticism of this cultural trend, see FRUG, *supra* note 161, at 52–53.

[164] *See* O'CONNOR, THE BOSTON IRISH, *supra* note 33, at 234–35; Andrew D. White, *The Government of American Cities*, 10 FORUM 357, 357–72 (1890).

[165] MAYOR NATHAN MATTHEWS, JR., THE CITY GOVERNMENT OF BOSTON 179–81 (Boston: Rockwell & Churchill, 1895).

was subject to strict financial oversight by a state-appointed finance commission.[166] As one critic observed, "Under the present system the Legislature is the real Board of Directors of the Corporation known as the City of Boston. The Mayor is the President of the corporation, the citizens are the stockholders who had the privilege of choosing the President and paying the bill but, the operating policies are dictated by the Board of Directors who have no direct responsibility as a group to the stockholders."[167]

In 1967, when Kevin White ran for mayor of Boston, he inherited this disconnect between the "stockholders" of the corporation, its "president," and its "directors." The scion of a prominent Irish Democratic family, White was elected as someone "who knows that what Boston needs is good business management that can attract bright people."[168]

As mayor, White effortlessly navigated a decades-long trend in Massachusetts in which suburbanization and a declining manufacturing base transformed the Democratic Party from a machine-like organization dominated by urban, blue-collar unions into a technocratic organization dominated by suburban, white-collar professionals.[169] A graduate of Williams College, White attempted to surround himself with "a new managerial class all throughout government."[170] He appointed college graduates and Harvard MBAs; he brought "generally accepted accounting procedures" and "modern management techniques to the

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[166] *See* Philip B. Heyman & Martha Wagner Weinberg, *The Paradox of Power: Mayoral Leadership on Charter Reform in Boston*, *in* AMERICAN POLITICS AND PUBLIC POLICY 280, 292–93 (Walter D. Burnham & Martha Wagner Weinberg, eds. 1978).

[167] John Anthony Breen, Radio Address (1945–1946), *reprinted in Historical Perspective on Boston Charter*, BEACON HILL TIMES, May 1, 1977, at 6–7.

[168] Editorial, *Kevin White for Mayor*, *supra* note 40, at 16; LUPO, *supra* note 33, at 99.

[169] *See* Geismer, *supra* note 13, at 149–50.

[170] Martha Wagner Weinberg, *Boston's Kevin White: A Mayor Who Survives*, *in* BOSTON 1700–1980: THE EVOLUTION OF URBAN POLITICS 215, 221 (Ronald P. Formisano & Constance K. Burns, eds. 1984).

city"; he even added computers.[171] In other words, like Ephron Catlin, White wanted to run government "like a private business."[172] As one reporter quipped, "People have little faith in governments run like governments."[173]

There were, of course, problems with running a municipal corporation like a business corporation. For one thing, the state legislature allowed Boston to collect only one form of revenue: a tax on real estate.[174] This prevented the mayor from charging people who used his city's roads, shopped in its businesses, or called its police.[175] It also became a problem as white professionals fled the city in response to a 1974 court decision ordering Boston to desegregate its public schools.[176] Mayor White survived Boston's busing crisis by positioning himself as a professional administrator who cared only about the safety of Boston's children—but by 1976, he was taxing the homeowners who remained in the city at one of the highest rates in the country.[177] "Obviously a government isn't going to go out of business, the way, say, the Buggy Whip Manufacturing Co. might," one observer said.[178] But Boston "could

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[171] Robert Lenzner, *Boston's Improved Financial Condition Praised*, BOS. GLOBE, Jan. 29, 1979, at 8.

[172] Liz Roman Gallese, *Boston's Battling Treasurer*, BOS. GLOBE, Apr. 17, 1977, at 1.

[173] Neil Roiter, *Battle Lines Drawn on Classification*, BOS. LEDGER, Sep. 22, 1978, at 9.

[174] *See* LUPO, *supra* note 33, at 86–87; BOS. MUNICIPAL RES. BUREAU, THE BOSTON PROPERTY TAX (1973) (box 39, folder 15, White Records).

[175] *See* First Nat'l Bank of Bos., *Older Urban Areas in America: The Case for Metropolitan Government*, NEW ENG. REPORT, Spring 1976, at 6 (on file at Baker Library, Harvard Business School, Boston, Mass.); Editorial, *The City's Balance Sheet*, BOS. GLOBE, Nov. 22, 1976, at 18.

[176] *See* RONALD P. FORMISANO, BOSTON AGAINST BUSING 173 (1991); J. ANTHONY LUKAS, COMMON GROUND 433–436 (1985). *Cf.* KENNETH T. JACKSON, CRABGRASS FRONTIER 284–286 (1985) (discussing a similar pattern elsewhere); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS, at xxii, 139–140 (2005).

[177] *See* Office of the Mayor, City of Boston, Boston's Tax Strategy: The Fiscal Experience of the City 25–27 (1974) (box 20, folder 52, White Records).

[178] Gary McMillan, *Pension Costs Choking Boston*, BOS. GLOBE, Oct. 17, 1976, at A3.

bankrupt" if it couldn't find a way to keep its spending in line with revenue.[179]

The other thing keeping Mayor White from running the city like a business was the persistent expectation of residents that they would participate in the decisions he made on their behalf. In 1976, for example, Mayor White announced a well-liked plan to amend the city's charter and impose new oversight over what he called "the richest and fattest and least accountable school system in the country."[180] He also slipped in an unrelated provision to bring back partisan elections, virtually guaranteeing his reelection in a city in which Democrats outnumbered Republicans 10–1.[181] Rather than put the package to a referendum, the mayor pushed it through the city council over Christmas, at 2 a.m., with abbreviated hearings.[182] When residents discovered what had happened, they found it "outrageous" that they were "inexplicably excluded from the process."[183] The state legislature rejected the plan after weeks of hearings in which residents called the process an "affront to democracy," "secretive, exclusive, and elitist," "a joke," "autocratic," and "a contemptuous and cynical

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[179] *Id.*

[180] David Rogers, *Hub Gets Bad News: Tax Rate Up $56.20*, BOS. GLOBE, Sep. 17, 1976, at A3; OFFICE OF THE MAYOR, CITY OF BOSTON, CHARTER REFORM BRIEFING 3 (Undated, 1977?) (box 21, folder 42, White Records); Press Release, Office of the Mayor, City of Boston (Dec. 3, 1976) (box 21, folder 37, White Records).

[181] Press Release, Comm. for Responsible Charter Reform (Jan. 19, 1977) (box 69, folder 30, White Records); Carol Surkin, *Charter Reform an Abuse Act*, BOS. GLOBE, Jan. 11, 1977, at 12; Editorial, *The Charter Package*, BOS. GLOBE, Dec. 30, 1976, at 22. For more on the charter reform effort, see Heyman & Weinberg, *supra* note 166, at 287–89.

[182] The mayor lost a similar referendum in 1974. *See* Robert A. Jordan, *White Rules Out Seeking School Reforms*, BOS. GLOBE, Nov. 7, 1974, at 3.

[183] Office of the Mayor, City of Boston, Testimony of State Reps at Joint Committee on Local Affairs 1–2 (Feb. 9, 1977); Fin. Comm'n of the City of Boston, Report to the Great and General Court on the Boston Charter Reform Act of 1977 2–6 (Feb. 7, 1977) (box 44, folder 37, White Records); Office of the Mayor, City of Boston, Finance Commission Hearings on Charter Reform 1 (Jan. 27, 1977) (box 44, folder 27, White Records) [hereinafter Office of the Mayor, Jan. 27 Hearing Summary]; Combined Neighborhood Groups & Interested Parents of Bos., Outline Plan for Combined Neighborhood Groups and Interested Parents of Boston 1 (Jan. 1977) (box 69, folder 30, White Records);

disregard for the people of the City."[184]

Despite these difficulties, Mayor White survived the early 1970s on good terms with Ephron Catlin and his band of technocratic, anti-welfare, fiscally restrained New Democrats like Governor Michael Dukakis. But the peace between the mayor and the bankers fell apart after New York City nearly defaulted in 1975. In January 1976, national credit agencies worried about the next New York made a surprise drop in Boston's credit rating.[185] That drop hurt Boston's ability to sell bonds on the national market, a practice it relied on to cover its operating expenses through the months preceding its spring tax collections.[186] In November 1976, Mayor White and James Young, the city's chief financial officer, found themselves begging the First and other regional banks for help with purchasing and underwriting the city's bonds.[187] The First agreed to help—publicly out of a "sense of social responsibility," privately because it allowed the bank to impose various conditions on the city, such as a requirement that the city reduce its spending and undergo independent audits by the bank's accounting firm, Coopers & Lybrand.[188] "There were people around the time who felt letting the city go bankrupt was a good idea," Young later recalled. "Some people said dealing with the banks was a loss of democracy. We said, 'Hey, bankers lend out money and expect to get

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[184] OFFICE OF THE MAYOR, CITY OF BOSTON, FINANCE COMMISSION HEARING ON CHARTER REFORM 1 (Jan. 25, 1977) (box 44, folder 37, White Records) (summarizing testimony); FIN. COMM'N OF THE CITY OF BOSTON, *supra* note 183, at 3.

[185] *See* Robert Lenzner, *That Cut in Boston's Rating*, BOS. GLOBE, Jan. 29, 1976, at 22.

[186] *See* Jonathan Fuerbringer, *How'd We Get into This Fiscal Mess*, BOS. GLOBE, Nov. 21, 1976, at 1.

[187] *See id.*; Jonathan Fuerbringer & Robert L. Turner, *Banker Expects Boston Will Get Short-Term Loans*, BOS. GLOBE, Nov. 23, 1976, at 1.

[188] *See It Can't Happen Here or Could It?*, BOS. GLOBE, May 6, 1979, at M9; Jonathan Fuerbringer, *That Beast, The Bond Market*, BOS. GLOBE, Dec. 25, 1976, at 26; Kay Longcope, *Boston Crisis Helps Business, Professor Says*, BOS. GLOBE, Dec. 9, 1976, at 8; Letter to the Editor, Richard D. Hill, Chairman, First Nat'l Bank of Bos., *First National Bank Clarifies Loan Position*, BOS. GLOBE, Dec. 1, 1976, at 26.

it back.'"[189] But the mayor was not keen on allowing the First to run his municipal policy ever again.

The one form of leverage the mayor had to push back against the bankers was his ability to effectively set the property-tax rate for new business development—a rate that the bankers needed his approval to keep low.[190] Under the Massachusetts Constitution, cities were supposed to send around assessors once a year to assess the market value of all property and tax it all at the same percentage of that value, whether the property was an old home, new construction, or a business.[191] But cities routinely flouted this requirement by assessing new business development at an artificially low value or by refusing to reassess the homes of established residents after the market value of their homes had increased.[192] This politically expedient practice had the effect of keeping taxes low for desirable development or for residents who didn't move. But out-of-favor business owners and new residents paid higher taxes on their correctly valued property. In a 1961 lawsuit, the Supreme Judicial Court held that a city's refusal to assess the market value of all its property and tax it all at the same rate was unconstitutional.[193] And on Christmas Eve 1974, after only half the commonwealth's cities had revalued their property, the court ordered the remaining cities, including Boston, to do so as well.[194]

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[189] *It Can't Happen Here or Could It?*, *supra* note 188, at M9.

[190] *See* LAWRENCE DICARA, TURMOIL AND TRANSITION IN BOSTON 58 (2013).

[191] *See generally* Office of the Deputy Mayor for Fiscal Affairs, City of Boston, Plain Speaking: 100% Valuation, Property Classification, and You (1978) (box 44, folder 10, White Records); *Some Questions and Answers on Classification*, Bos. Globe, Nov. 5, 1978, at 14.

[192] See John O'Keefe, *Only Half of Bay State Cities, Towns Use "Full and Fair" Valuations for Taxes*, BOS. GLOBE, Aug. 6, 1973, at 14.

[193] *See* Bettigole v. Assessors of Springfield, 178 N.E.2d 10 (Mass. 1961).

[194] *See* Town of Sudbury v. Comm'r of Corps. & Taxation, 321 N.E.2d 641 (Mass. 1974).

Mayor White thought this decision was "the worst disaster the city has faced for 50 years."[195] Revaluing some of the city's old residential property for the first time in decades had the potential to raise residents' taxes to unaffordable levels, kicking them out of their homes. Taxing new development at market-value could discourage construction and eliminate the mayor's main form of leverage against bankers at the First. Established business owners, who in general would pay lower taxes, would reap the rewards: a member of the mayor's staff estimated that "100% valuation," as it was known, would shift $250 million in property taxes from businesses to homeowners.[196] This outcome was politically intolerable for the mayor, who proposed a constitutional amendment "that would allow assessment of property at different percentages of valuation according to their use."[197] The mayor hoped to constitutionalize the now-illegal practice of "classification": taxing some businesses at a higher rate than residences. His critics in the business community called this plan a "graduated property tax."[198]

The mayor began his campaign in January 1975, lobbying other mayors, legislators, and even business owners to support his proposed classification amendment.[199] The mayor did not do this by himself. An investigation by the state finance commission revealed a "systematic and widespread assignment of city employees from various departments to

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[195] Michael Ansara, *Unfair Property Tax Must Give Way to a Graduated State Income Tax*, BOS. GLOBE, Jan. 13, 1975, at 23.

[196] Raymond G. Torto, Estimating the Impact of 100% Valuation and Taxation by Classification in Massachusetts (1978) (box 22, folder 43, White Records).

[197] Press Release, Office of the Mayor, City of Boston (Dec. 27, 1974) (box 22, folder 49, White Records).

[198] [Untitled], BOS. GLOBE, Apr. 8, 1978 (box 44, folder 13, White Records).

[199] Press Release, Office of the Mayor, City of Boston (Jan. 7, 1975) (box 22, folder 49, White Records); Press Release, Office of the Mayor, City of Boston (Jan. 14, 1975) (box 22, folder 49, White Records); Press Release, Office of the Mayor, City of Boston (Jan. 13, 1975) (box 22, folder 49, White Records).

assist, during working hours, in the mayor's effort to obtain constitutional or legislative repeal of 100% valuation."[200] The mayor responded brusquely: "The public has the need to be informed and the right to be informed and it is the government's obligation to meet this need. Neither the media nor the Chamber of Commerce, nor any other civic or quasi-governmental agency can speak for the government. It must speak for itself."[201]

Nevertheless, the mayor laid low until the referendum was finally scheduled in 1978. As that year began, the chamber of commerce and the real estate board began "marshalling business leaders across the state to campaign against the amendment," pledging an "[a]ll-out fight."[202] The mayor responded by mobilizing the Massachusetts Mayors Association. "As you know, there will be a single agenda item," he wrote in his invitation for them to meet: "the Classification Amendment, and what we as Mayors can do to help assure its passage."[203]

"[A]nticipating a major battle with the Massachusetts business community," Mayor White prepared for the March meeting as if he were preparing for combat.[204] An advisor suggested that the mayor might be able to even the playing field if he could allocate "public money" from "various cities and towns."[205] In March 1978, one of the mayor's aides followed up on this suggestion by contacting Laurence Tribe, a young professor at Harvard Law School

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[200] *See* Fin. Comm'n of the City of Boston, Report on Rent Control Commission Employees' Contributions to the Kevin H. White Democratic Unity Committee 1–2 & n.* (1976).

[201] Press Release, Office of the Mayor, City of Boston (May 29, 1975) (box 22, folder 49, White Records);

[202] Jak Miner, *Guns Roll up for Classification Amendment Battle*, CHRISTIAN SCI. MONITOR (box 44, folder 13, White Records).

[203] Letter from Kevin H. White, Mayor of Boston, to Thomas Early, Mayor of Worcester (Feb. 15, 1978) (box 94, folder 68, White Records).

[204] Peter Cowen, *White Plans Public Battle on Valuation*, BOS. GLOBE, May 10, 1978, at 7.

[205] *Id.*

who had recently published a highly praised treatise on American constitutional law.[206] Tribe responded with a memo suggesting that Boston probably could spend money in support of the referendum.[207] He noted that Massachusetts had a statute permitting cities to lobby the legislature, implying that cities could spend at least some public dollars on political advocacy.[208] At the same time, Tribe warned the mayor that "[t]he precise issue" had "not been addressed in Commonwealth courts" and had been expressly rejected in other states.[209] Tribe concluded that a public expenditure would have the highest chances of being upheld if it served the "vital needs of the municipality's residents" and didn't help the mayor personally.[210]

Later that month, the mayors met and unanimously elected Mayor White to run the campaign.[211] They approved his battle plan calling for a statewide "speakers bureau" of "well-informed administration members, citizens, and other mayors"; a "bumper sticker blitz"; neighborhood hearings; and a fundraising drive to build "a $200,000 private war fund."[212] The mayors also agreed to take advantage of their public offices to support the campaign.[213]

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[206] Memorandum from Micho F. Spring to Kevin H. White, Mayor (May 25, 1978) (box 70, folder 1, White Records); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

[207] Laurence H. Tribe, Memorandum of Law on the Power of a Municipality to Expend Public Funds to Urge Adoption of an Amendment to the State Constitution (1978) (box 70, folder 1, White Records).

[208] *Id.* at 3.

[209] *Id.* at 2–3.

[210] *Id.* at 2.

[211] Letter from Kevin H. White, Mayor of Boston, to Mass. Mayors Ass'n 1 (Apr. 27, 1978) (box 44, folder 13, White Records).

[212] *Mayors Map Battle Plans*, WORCESTER TELEGRAM, Mar. 11, 1978, at 1, 10; Memorandum from Office of the Mayor, City of Boston (Jan. 1978) (box 70, folder 1, White Records).

[213] Memorandum from James Sullivan, Chairman, Legislative Comm., Mass. Mayors Ass'n, to Mass. Mayors Ass'n (Apr. 27, 1978) (box 44, folder 13, White Records); *Committee Formed to Fight Revaluation*, W. ROXBURY TRANSCRIPT, Mar. 22, 1978 (box 44, folder 13, White Records).

Mayor White took things further. He pledged to put some of his city's 12,000 employees to work on the issue, despite past criticism. "I don't think we'll be able to spend what they can, but we've got bodies," he explained.[214] Mayor White also enclosed a leaflet in the city's tax bills promoting the amendment—a request his opponents complained wasn't "a fair expenditure of taxpayers' dollars" unless they got "equal time."[215] Most controversially, Mayor White promised to spend $800,000 in taxpayer money to prepare "educational material for the public."[216] In private, however, the mayor and his aides admitted that "we have no present capability" to fund a political campaign.[217]

The mayor gained some confidence on April 26, when Justice Lewis Powell announced the Supreme Court's decision in *First National Bank v. Bellotti*.[218] Reading the opinion, the mayor realized how he would pay for his campaign. The Court appeared to have declared that the First Amendment protected all political speech—even if the speaker was a corporation, and even if some shareholders objected. As someone familiar with Boston's corporate status, Mayor White was ready to capitalize.

The next day, in a meeting of the Massachusetts Mayors Association, Mayor White told the other mayors that it was time to appropriate funds to support a campaign on the referendum. *Bellotti*, he said, was "one of the most significant happenings in American life in the last 10 years. . . . You talk about the Vietnam War. Well, that was the Tet Offensive."[219]

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[214] Cowen, *supra* note 204, at 7.

[215] Miner, *supra* note 202; Cowen, *supra* note 204, at 7.

[216] Letter from Kevin H. White, *supra* note 211, at 1; *Mayors Map Battle Plans*, *supra* note 212, at 10.

[217] Letter from Kevin H. White, *supra* note 211, at 3; Memorandum from Raymond G. Torto, *supra* note 1, at 3–4.

[218] 435 U.S. 765 (1978).

[219] Rogers & Richard, *supra* note 4, at 8.

The mayor and his allies anticipated that banks would spend "tax-deductible money" to fight the classification amendment, and he had no intention of laying down his own tax-powered arms.[220] "It's a critical issue to everyone," the mayor told the group. "And we'll all have to have the guts to go before our councils and ask for help."[221]

With an announcement that sounded like a declaration of war, Mayor White asked Boston's city council to appropriate $1.8 million for the campaign. Calling his request "the most important single budget request of the last decade," the mayor asked the council to fight "the most serious threat to the well-being of our constituents since I've been in office: 100% valuation."[222] "Although it is clearly in the voters' interest to approve" the classification amendment, the mayor said, "the forces of opposition are numerous and well-armed."[223] In particular, thanks to *Bellotti*, he expected business corporations to spend $15 million to reap the $250 million tax shift that revaluation promised business owners.[224] "Someone must speak for the city," he said. "No one else will adequately represent the public."[225]

The city council—which had lived with Mayor White's shenanigans for a decade—was alarmed. "I don't think we should be using public funds for an effort that I sincerely believe

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[220] *Id.*

[221] *Id.*

[222] Mayor Kevin H. White, Address to the Boston City Council 1 (May 31, 1978) (box 70, folder 1, White Records).

[223] *Id.* at 4.

[224] *Id.* at 5.

[225] *Id.* at 6. Before the city council could act on his request, the mayor authorized his staff to spend $1 million in public funds on a new Office of Public Information on Classification, whether or not he received council approval. Alan Eisner, *White to Spend $1M Promoting Tax Referendum,* BOS. HERALD AMERICAN, May 26, 1978 (box 22, folder 39, White Records). In contrast with the more staid *Globe*, the *Herald American* has long been a relatively conservative tabloid whose tone was generally critical of the White administration. *See* PROJECT FOR EXCELLENCE IN JOURNALISM, HIDING IN PLAIN SIGHT 19 (2010).

is an effort to reelect the mayor," said Councilwoman Rosemarie Sansone.[226] Councilman Lawrence DiCara added, "If the mayor is allowed to spend money as only he sees fit, then it'll set a precedent that we will regret until hell freezes over."[227] Councilman Raymond Flynn asked, "If we spend money on this issue, why not spend it to promote abortion, busing, birth control?"[228] The three councilors all supported classification, but feared the mayor would exploit their approval for his personal ends.

In an editorial titled "It's Your Money, Not His," the *Boston Herald American* called the request an "outrageous ploy," the best example yet of the mayor's "I-know-what's-good-for-you-and-the-hell-with-what-anyone-else-thinks" attitude.[229] "Whether [classification] is a good idea or a bad one is beside the point. Obviously it is very controversial. . . . But the mayor plans to spend nearly $2 million in tax money collected from proponents and opponents alike to underwrite a one-sided propaganda and lobbying campaign to buy votes for the amendment. That is wrong and unfair."[230] In response to White's claim that public funds would offset private business money, the *Herald* was dismissive. "[T]hat is their money, and presumably it won't be spent without the approval of the owners or stockholders."[231]

Of course, the mayor's opponents were absolutely planning to spend "private business money" without the approval of owners or shareholders, just as they had in the past. The

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[226] Mitch Keller, *Sansone Believes White's PR Plan is a Crafty Ruse*, BOS. HERALD AMERICAN, Jun. 4, 1978 (box 22, folder 39, White Records).

[227] Eisner, *supra* note 225.

[228] Alan Eisner & Mitch Keller, *Referendum Spending Still Divides White, Council*, BOS. HERALD AMERICAN, Jun. 1, 1978 (box 22, folder 39, White Records).

[229] Editorial, *It's Your Money, Not His*, BOS. HERALD AMERICAN, May 31, 1978 (box 22, folder 39, White Records).

[230] *Id.*

[231] *Id.*

First, for example, contributed $15,000 to the newly formed Committee Against Property Tax Discrimination without ever notifying shareholders that it had done so.[232] The bank's shareholders only learned about the contribution after the press publicized the committee's campaign finance filings. And even then, there was not much anyone could do about it. One group of protestors tried to crash a board meeting but were turned away by guards.[233] When a "senior vice president" agreed to meet with the group the following week, he "pleaded ignorance" to the bank's contributions.[234]

None of this stopped members of the business community from criticizing the mayor. "Obviously we're not very happy with what we perceive to be the impact of classification to begin with, so the mayor's use of tax funds to lobby a supportive position on classification really is something of an anathema to us," said William Chouinard of the chamber of commerce.[235] Herbert Roth, the chairman of the Committee Against Property Tax Discrimination, was more optimistic. "The more he spends, the less I think I have to spend because I think, quite frankly, people are going to see the abuse in the use of public money and personnel," he said. "Maybe if we get him up to $2 million, he'll win the campaign for us."[236]

Despite the negative publicity, on May 17, members of the city council voted 6–3 to approve the "concept" of spending public dollars on a statewide referendum. "I'm frightened

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[232] Al Larkin, Business Raises $100,000 to Oppose Classification Bill, BOS. GLOBE, Sep. 14, 1978, at 27.

[233] Mitch Keller, *Mass. Fair Share Marchers Close Down a Bank—Briefly*, BOS. HERALD AMERICAN, Sep. 29, 1978 (box 22, folder 40, White Records).

[234] Lonnie Isabel, *Taxpayer Groups and Bank Officials Fail to Resolve Classification Dispute,* BOS. GLOBE, Oct. 5, 1978, at 3.

[235] Peter Cowen, Council Authorizes $975,000 to Push for Tax Amendment, BOS. GLOBE, Jun. 9, 1978, at 3.

[236] Peter Cowen, *Mass. Drive Launched to Beat Varied-Tax Plan*, BOS. GLOBE, Jul. 8, 1978, at 14.

by the idea of spending taxpayers' money," one of the councilors who voted in favor of the bill explained. "But if we don't spend anything, we'll be defenseless against the business interests. I think we owe it to taxpayers to put up a creditable fight."[237] The mayor's principal supporter, Councilman James Michael Connolly, agreed that without public funding, the opponents of the amendment would "win by default."[238] But on May 24, the council reconsidered its approval, deciding to hold neighborhood hearings on the issue.[239]

Mayor White's office took these hearings seriously, organizing nearly one hundred homeowners and civic leaders to testify at what opponents called an "orchestrated performance on behalf of the mayor."[240] "There is no way we're going to win this amendment without the use of public funds," one homeowner testified.[241] "For God's sake, give us an equal chance with the big money interests to wage a decent battle on this thing," said another.[242] "I care not what the mayor of Boston intends to do," said a third. "We're trying to save our homes."[243]

The hearings proved successful. After negotiating an "iron clad guarantee" that the mayor wouldn't use any public dollars "for the promotion of any individual,"[244] on June 8 the

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[237] David Rogers, *White Gets Council OK on Tax Ads*, BOS. GLOBE, May 18, 1978 (box 22, folder 39, White Records).

[238] Peter Cowen, *White Vows All-Out Drive for Property Tax Change*, BOS. GLOBE, Jun. 1, 1978, at 21.

[239] Alan Eisner, *Council Asked to Spend $1.8M on Tax Curb Fight*, BOS. HERALD AMERICAN, May 31, 1978 (box 22, folder 39, White Records).

[240] Peter Cowen, *Council Urged to Back White Tax Amendment*, BOS. GLOBE, Jun. 6, 1978, at 7.

[241] *Id.*

[242] *Residents to Council: "Back Tax Amendment,"* BOS. HERALD AMERICAN, Jun. 6, 1978 (box 22, folder 39, White Records).

[243] Cowen, *supra* note 240, at 7.

[244] Eisner, *supra* note 239; Joint Appendix, at A, Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978) (No. 78-253).

city council voted to appropriate $975,000 toward the classification campaign.[245] On June 14, at a meeting of the Massachusetts Mayors Association, the mayor pledged $112,000 as Boston's share toward a statewide "information campaign."[246] The other mayors agreed to contribute similar amounts on a "prorated, population-formula basis."[247] The mayor kept his earlier promise to enlist public employees, asking 10,000 staff members to "volunteer" three hours each workday—and more on days off.[248] One of the mayor's aides privately conceded that his use of city resources "sounded like the Mayor is only after power."[249] But there was a "method to the Mayor's madness," an "underlying moral vision for the City . . . that at least he is using power in [residents'] interests."[250]

Meanwhile, the opponents of classification escalated their attack. One of Ephron Catlin's old allies organized ten taxpayers, including an employee of the First, to sue the city.[251] Led by the executive director of the Committee Against Property Tax Discrimination, Richard Anderson, the plaintiffs argued that the city's political spending violated state law and their First Amendment rights as dissenting taxpayers.[252]

At a June 30 preliminary hearing before the Supreme Judicial Court, the city's new attorney, Laurence Tribe, promised that the city wouldn't spend any more public funds to

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[245] Cowen, *supra* note 235, at 3.

[246] *Id.* at C.

[247] *Id.*

[248] Alan Eisner, *No Holiday for White's Tax Troops*, BOS. HERALD AMERICAN, Jun. 17, 1978 (box 22, folder 39, White Records).

[249] Memorandum from Mark to Micho Spring 1–2 (Jul. 21, 1978) (box 95, folder 39, White Records).

[250] *Id.*

[251] Peter Cowen, *Tax Suit Plaintiffs Show Corporate Profile*, BOS. GLOBE, Jul. 13, 1978, at 10.

[252] Cowen, *supra* note 236, at 14.

promote the amendment's passage while the suit was pending.[253] That same day, however, the mayor sent the city's $112,000 contribution to the Massachusetts Mayors Association.[254] He also spent $123,000 on a consulting firm to train campaign workers and $100,000 on a California advertising firm that had recently convinced taxpayers there to support Proposition 13, the notorious referendum that had slashed that state's property taxes.[255]

The fact that the mayor's first expenditure was for the same firm that successfully promoted Proposition 13 was no coincidence.[256] Tax reform had become a front-page issue across the nation in 1978, the latest wave in an extended backlash to the post–New Deal consensus that governments, unions, corporations, and other large institutions could cooperate to resolve persistent social problems.[257] But where Democratic politicians typically feared Proposition 13 as a sign that white, homeowning taxpayers were becoming uncomfortable with large institutions like government, Mayor White saw classification and tax reform generally as an opportunity to emphasize that large municipal corporations were much more responsive to constituent concerns than large business corporations; and if taxpayers had to choose sides, they should pick the side that was actively soliciting their viewpoint. He also saw the campaign as a chance to help himself: a modern, technocratic civic

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[253] Alan Eisner, *White Gives City Funds to Tax Campaign*, BOS. HERALD AMERICAN, Jul. 6, 1978 (box 22, folder 39, White Records).

[254] *Id.*

[255] Peter Cowen, *White's New Spending Plan Fought in Court*, BOS. GLOBE, Jul. 7, 1978, at 3.

[256] *See* Memorandum from Jerry Mechling, Director, Office of Management & Budget, to Kevin H. White, Mayor, and James V. Young, Deputy Mayor (Sep. 11, 1978) (box 117, folder 21, White Records).

[257] *See generally* LARA KALMAN, RIGHT STAR RISING (2010); JEFFERSON COWIE, STAYIN' ALIVE (2010); Jefferson Cowie & Nick Salvatore, *The Long Exception: Rethinking the Place of the New Deal in American History,* 74 INT'L LABOR & WORKING CLASS HIST. 3 (2008).

leader.[258] In the words of Jack Lew, a member of the mayor's staff who would later serve as Secretary of the Treasury under President Barack Obama, "an aggressive campaign for classification, combined with an aggressive campaign to articulate the Mayor's long held commitment to progressive social values and goals, especially at a time when others are abandoning those goals, will sit well with the public, at least by 1979."[259]

In court, the mayor's lawyer, Professor Laurence Tribe, made a spirited argument for why "the public voice of the Amendment's proponents" should not be silenced while the "privately financed opponents" of the classification campaign proceeded under *Bellotti*.[260] Unlike the First National Bank's lawyers, Tribe emphasized the people the mayor represented, and argued that the municipal corporation was the only medium through which they could speak as a coherent community. Tribe called the city a "body politic composed of the individual inhabitants within its corporate confines," an "aggregate" of individuals who elect representatives to advance and protect their interests.[261] The municipality provided "a *voice* for the people of Boston" to express themselves to the rest of the commonwealth.[262] The reason the city had a First Amendment right to spend taxpayer dollars on a political issue, Tribe wrote, was because its residents had that same right, which they did not give up by

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[258] Alex McPhail, *White's Tax Classification Push Called Re-election Ruse*, BOS. HERALD AMERICAN, Aug. 18, 1978 (box 22, folder 39, White Records); Memorandum from Maureen Schaffner to Mayor Kevin H. White 3 (Aug. 7, 1978) (box 22, folder 47, White Records); *see also* Office of the Mayor, City of Boston, Classification Training Session Closing Remarks (Aug. 16, 1978) (box 70, folder 1, White Records).

[259] Memorandum from Jack Lew to Jerry Mechling, Director, Office of Management & Budget 3–5 (Jun. 16, 1978) (box 117, folder 23, White Records).

[260] Jak Miner, *Tax Money for Ballot Campaign? Boston Tests the Idea*, CHRISTIAN SCI. MONITOR, Jul. 11, 1978, at 11.

[261] Brief for the Defendants at 10, 22–24, Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978) (No. 78-253) (quoting County of Bergen v. Port of N.Y. Auth., 160 A.2d 811 (N.J. 1960); City Affairs Comm. v. Bd. of Comm'rs, 46 A.2d 425, 426–27 (N.J. Ct. of Errs. & App. 1946)).

[262] *Id.* at 25.

forming a city.[263] And while it was imaginable that a mayor could abuse this right—with retaliation, coercion, or self-perpetuation—"the political process itself can police excess; blatant abuses will win little favor when incumbents seek re-election."[264]

In other words, without using the term "corporate democracy," Tribe was arguing that the city's shareholders would police the mayor just as Justice Powell had declared that shareholders would police the executive vice president of the First National Bank. But Tribe's optimism was a little more rooted in reality. After all, where Ephron Catlin had spent thousands of dollars in secrecy without consulting even the First's board of directors, Mayor White had made speeches, held public hearings in neighborhoods, and convinced the city council to approve his spending decisions multiple times.

The taxpayer opponents also focused on Boston's citizens. They argued that the city's public spending unfairly benefitted one group of residents (homeowners) at the expense of another (business owners). It "str[uck] at the heart of the electoral process" for the city to spend resources advancing "the political views of one group of taxpayers over the other," they argued, especially when it was done in a manner that "gives the dissenters no opportunity to present their side."[265] Echoing the Supreme Court's decision in *Hunter v. City of Pittsburgh*, the taxpayers argued that the city was not just any corporation, but part of the commonwealth's "government"—and government had a constitutional "duty of impartiality."[266]

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[263] *Id.* at 23.

[264] *Id.* at 33–34.

[265] Plaintiffs' Brief at 19, *Anderson*, 380 N.E.2d 628.

[266] *Id.* at 17–21.

The court agreed with the taxpayers.[267] In its opinion, *Anderson v. City of Boston*, the court assumed that the city had a First Amendment right to spend money on a political campaign, but thought the commonwealth had several compelling reasons to silence the city's speech. The most intuitive of these was the same as in *First National Bank v. Bellotti*: protecting a dissenting minority of taxpayers when the "affected citizenry are not in unanimity."[268] The court conceded that there are "a variety of instances in which government funds are used lawfully to express views on matters of importance where various taxpayers may disagree with those views and conclusions."[269] But the court thought that spending money on a political referendum went too far. In particular, the court thought it would be coercive to make "real estate taxpayers such as the plaintiffs" literally flee the city to "avoid the financial consequences of the city's appropriation of funds."[270]

Mayor White appealed to the Supreme Court, and once again, Professor Tribe framed the issue in terms of the representative relationship between the city and the people who composed it.[271] The residents of the city were "members of an organized society, united for their common good, to impart and acquire information about their common interests" he explained.[272] In this respect, the people of Boston were no different from the members of the NAACP, the editorial board of the *New York Times*, or the shareholders of the First National Bank—all of whom the Supreme Court had allowed to "speak" through an institutional

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[267] David Rogers, *Court Rules Out City Funds for Tax Amendment*, BOS. GLOBE, Jul. 20, 1978, at 1.

[268] *Anderson*, 380 N.E.2d, at 638–39.

[269] *Id.*

[270] *Id.* at 639–40.

[271] *See* David J. Barron, *The Promise of Tribe's City*, 42 TULSA L. REV. 811 (2007).

[272] Jurisdictional Statement at 21, City of Boston v. Anderson, 439 U.S. 1389 (1978) (Nos. A-355, 78-649) (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936)).

voice.[273] But if anything, the people of Boston had an even greater right than those corporate members to elect a representative who could articulate their "public voice."[274] As the mayor put it during a (mandatory) three-day staff retreat to Thompson's Island,[275] his corporation was acting in "the public interest," while those corporations represented "mass power," with "*no* nerve cells—no roots" and no accountability "to the public." [276]

Tribe's most significant argument was his response to the intuitive idea that it was unfair for a city to spend taxpayers' money on issues that many taxpayers disagreed with. He wrote that this idea was actually *counterintuitive*, because governments simply could not operate if dissenting taxpayers were "entitled by the First Amendment to silence government advocacy with which they disagree."[277] Seeking to turn a liability into an asset, Tribe rattled off a list of examples in which it would "prescribe paralysis for modern government" to prohibit it from taking one side in a public debate:

> The essence of rule by temporary majorities, in a system financed by taxation, is that all must share in the costs of government choices—including government-sponsored messages—with which many may disagree. Legislative committees routinely use public funds to print reports advocating passage of controversial legislation; the President spends funds to persuade the Congress and the Nation to enact his program; a mayor is paid from public funds as he addresses the city; opinions of courts, often non-unanimous, are published at taxpayers' expense. . . . The fact that some of the taxpayers whose funds are used to disseminate it, disagree with the views expressed therein or stand to lose if those views prevail no more relieves them as taxpayers of a duty to share in the costs of dissemination than it denies them as citizens and voters a right to share in the benefits of more informed participation in the democratic

[273] See id.

[274] *Id.* at 19.

[275] *See* Alex McPhail, *City Workers' Island Weekend—A Command Performance?*, BOS. HERALD AMERICAN, Aug. 17, 1978 (box 95, folder 51, White Records).

[276] Memorandum from Micho F. Spring to Kevin H. White, Mayor 4 (Aug. 17, 1978) (box 95, folder 51, White Records).

[277] Jurisdictional Statement at 12, City of Boston v. Anderson, 439 U.S. 1389 (1978).

process.[278]

In short, all governments have to be able to compel dissenting taxpayers to subsidize messages that only a majority agrees with. Funding ideas you don't like is part of what it means to be a member of a democracy: you win some, sure, but you lose some too. Crucially, unlike Catlin or Powell, Tribe wasn't simply offering the existence of democracy as a check on an otherwise uninhibited leadership. He was arguing that democracy *itself* required allowing the mayor of Boston to speak on behalf of the pluralistic institution he represented.

The Supreme Court finally weighed in on October 20, a week and a half before the November referendum. In a one-Justice order, William Brennan ordered Massachusetts to allow Boston to spend public funds for the remainder of the campaign. "In light of *Bellotti*, corporate, industrial, and commercial opponents of the referendum are free to finance their opposition," Justice Brennan wrote. "[U]nless the stay is granted, the city is forever denied any opportunity to finance communication to the statewide electorate of its views in support of the referendum as required in the interests of all taxpayers, including residential property owners."[279]

Justice Brennan's stay changed the tenor of the campaign. Before, the city was fighting a battle between the "little people against the big Boston corporations."[280] Suddenly, the proponents of classification had a lot more money than the $400,000 raised by the Committee Against Property Tax Discrimination. By November, classification "one of the

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[278] *Id.* at 33–34.

[279] City of Boston v. Anderson, 435 U.S. 1389, 1389–90 (1978) (in chambers opinion of Brennan, J.). The following week, the Court rejected the taxpayers' attempt to vacate Justice Brennan's stay—over a strong dissent by Justice John Paul Stevens, who quoted *Hunter v. City of Pittsburgh* to argue that Massachusetts "may do as it will" with its cities. City of Boston v. Anderson, 439 U.S. 951, 951–52 & n.2 (1978) (Stevens, J., dissenting).

[280] David Rogers, *White Seeks a Strategy for Tax Campaign Money*, BOS. GLOBE, Oct. 24, 1978, at 10.

most expensive referendum questions ever put before the voters of Massachusetts," with a "media blitz that is dwarfing the races for senator and governor in the campaign's final weeks."[281] The issue was now a contest between the "million dollar" mayor and the millionaires; "big government against big corporations."[282] As a reporter for the *Washington Post* observed, "[T]here's an unusual wrinkle to the Massachusetts brand of tax rebellion. . . . [T]he consumer side has nearly all of the troops and, surprisingly, most of the money."[283]

The final days of the classification campaign became a referendum not over taxes, but over the legitimacy of Mayor White's public spending. "Mayor White is spending a million dollars of taxpayers' money," one ad said. "Are you going to let him stampede you into voting for it?"[284] Richard Anderson, the lead plaintiff in the lawsuit against Boston's public spending, argued that the mayor "should state in his advertising that they have been paid for by White with public money from Boston taxpayers."[285] For their part, Mayor White's supporters also attacked his opponents more than they discussed the nuances of classification. "When the banks are donating money to protect us, that will be the final day

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[281] David Rogers, *Question 1 Piles up Big Margin in Cities*, BOS. GLOBE, Nov. 8, 1978, at 1; Bob Kuttner, *Turning Tax Rebellion into Tax Reform*, WASH. POST, Nov. 5, 1978, at D1, D3.

[282] Rogers, *supra* note 280, at 10.

[283] Kuttner, *supra* note 281, at D1, D3. In the wake of Proposition 13's passage in California, other national observers called the classification campaign an unusually liberal variation on "Prop. 13 fever." *See, e.g.*, James M. Perry, *Sons of Prop. 13*, WALL ST. J., Nov. 9, 1978, at 4; *Rebellion Seeks Tax Reform*, HARTFORD COURANT, Nov. 5, 1978, at 33; *Revolt of the Homeowners*, TIME, May 8, 1978, at 13.

[284] Advertisement, Comm. Against Property Tax Discrimination, *Don't Play Mayor White's Property Tax Shell Game*, BOS. GLOBE, Nov. 3, 1978, at 19.

[285] David Rogers, *Classification Foes Zero in on White*, BOS. GLOBE, Nov. 2, 1978, at 36; *see also* Letter to the Editor, Richard Anderson, Exec. Director, Comm. Against Property Tax Discrimination, *Classification Would Jeopardize Economic Future*, BOS. GLOBE, Nov. 2, 1978, at 22.

of judgment," one homeowner said. "So just ask yourself, who's for it and who's against it?"[286]

In the end, the mayor won the referendum by a landslide. In his victory speech, he celebrated defeating "a general distrust of politicians, a four-year process of initiating constitutional amendments that invited voter apathy, 10 taxpayers who gagged us until the last week and a half of the campaign, and a massive opposition media campaign."[287] He also made it clear that the city's "voice" was louder than his own.[288] It was the people, "band[ed] together," who spoke through the city.[289] The mayor was a mere advocate, one who made it "possible for the *people's* case to be heard."[290]

III

After the campaign was over, when residents, journalists, and legal scholars had a chance to reflect on what had just happened, there was a sense that "troubling issues raised during the battle remain[ed] unresolved."[291] If Boston could continue spending money on political campaigns, the *Globe* editorialized, a Boston property owner could soon "find his own tax money used to fight against his own interests."[292] His only recourse would be either to move or to vote Mayor White out of office. And as difficult as moving sounded, voting Mayor White out of office could be even harder if the mayor used "public funds for all kinds of

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[286] Mike Barnicle, *Question One: Businesses vs. the People*, BOS. GLOBE, Nov. 6, 1978 (box 22, folder 40, White Records).

[287] Mayor Kevin H. White, Boston Victory Speech 5 (Nov. 7, 1978) (box 95, folder 139, White Records).

[288] *Id.* at 5, 8.

[289] *Id.* at 8.

[290] Mayor Kevin H. White, State of the City Address 7 (Jan. 2, 1979) (box 96, folder 35, White Records).

[291] Editorial, *Spending and Speaking*, BOS. GLOBE, Nov. 8, 1978, at 22.

[292] Editorial, *The Costs of Free Speech*, *supra* note 25, at 18.

partisan ends, including self-perpetuation."[293] "For instance, an incumbent administration could use public money to win changes in local government charters favorable to its political interests"—no idle threat in light of Mayor White's charter-reform campaign of 1976.[294] Or the incumbent might "mold[] city workers into a campaign organization"—as Mayor White had just done.[295] The editorial board was pleased with the mayor's classification victory. But it feared that his conduct "could establish unfortunate precedents and invite future abuses."[296]

At the same time, the *Globe*'s editors were not ready to write off public spending completely. After all, thanks to *First National Bank v. Bellotti*, that same Boston property owner could find his investments or bank account being used to fund a business corporation's attempt to raise his taxes.[297] Although he could try to move his investment portfolio or do business with another bank, he couldn't realistically influence the content of the bank's advertisements.[298] "Corporate democracy" was a "fairy tale," the *Globe* wrote.[299] "[W]ith much of the nation's corporate stock held by pension funds and insurance companies, and with most of the stock in any national corporation held by persons residing outside any given state, it's hard to see how such a system would work, even in theory."[300] "In fact, the only place it might

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[293] *Id.*

[294] Editorial, *Spending and Speaking*, *supra* note 291, at 22.

[295] Editorial, . . . *And White's*, BOS. GLOBE, Nov. 1978 (box 22, folder 46, White Records).

[296] *Id.*

[297] Editorial, *Spending and Speaking*, *supra* note 291, at 22.

[298] Editorial, *The Costs of Free Speech*, *supra* note 25, at 18.

[299] *Id.*

[300] *Id.* One of the mayor's advisors estimated that 73 percent of the owners of Massachusetts corporations lived outside the commonwealth. *See* Letter from Joseph Slavet, Dir., Bos. Urban Observatory, to Kevin H. White, Mayor 2 (Sep. 6, 1978) (box 22, folder 42, White Records).

work is in a municipal corporation—like Boston."[301] Even the opponents of classification "would have to acknowledge they have more control over city spending on political questions than do foes of political spending by private corporations.[302]

As the *Globe*'s editorial board recognized, despite the many differences between the city of Boston and the First National Bank of Boston, they both posed the same problem. The First Amendment protects "the freedom of speech," a right that protects *voluntary* self-expression, *consensual* self-government, and *deliberate* participation in the marketplace of ideas. But the bank and the city were both corporations. Neither could speak or express themselves—at least not literally. Instead, their speech involved one person spending other people's money without first receiving their express consent.[303] The challenge for everyone, from the residents of Boston to the Justices of the Supreme Court, was to figure out whether that consent was implied or whether the absence of consent was forgivable.

S. Prakash Sethi, a business professor writing in the *Wall Street Journal*, framed the problem well. He argued that the referendum presented two independent issues. The first was "a corporation's right to political speech"—that is, whether it was appropriate for a group of people to take advantage of incorporation in order to effect political change. The second was "the management's right to speak on such issues on behalf of the shareholders"—that is, whether it was appropriate for a few people among that group to spend the group's resources to advance their own political views. [304] He considered the second issue more important—as did an anonymous editor of the *Harvard Law Review* the following year. "When corporations

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[301] Editorial, *The Costs of Free Speech*, *supra* note 25, at 18.

[302] *Id.*

[303] *Cf.* BRANDEIS, *supra* note 21.

[304] S. Prakash Sethi, *Let Shareholders Vote on Corporate "Free Speech,"* WALL ST. J., Jan. 5, 1979, at 10.

'speak,'" the editor wrote, there was a difference between "those situations where a corporate body communicates a political message on behalf of all of its members with their specific and immediate consent, and those situations in which a few individuals commanding an organization use other people's money and labor to amplify their own voices."[305]

In other words, the central normative question underlying Ephron Catlin's attempt to spend the First's money and Mayor White's attempt to spend Boston's money was whether the executives were acting in a representative capacity when they purported to speak on others' behalf. In a corporation like the NAACP, the *New York Times*, or even Citizens for Economy in Government, the answer was intuitively yes: each of these corporations had been chartered for the purpose of amplifying the political voices of their membership. No one had any doubt that contributors gave these organizations money with faith that the corporate executives' political perspectives would, for the most part, match their own.[306] But this intuition was weaker in a business corporation like the First National Bank, whose "membership" could be said to include its many stockholders, employees, customers, and creditors who did not have a meaningful say in choosing the bank's official political perspective.[307] And it was perhaps weaker still in a municipal corporation like the city of Boston, whose residents did vote for the mayor--but not so he could spend their dollars on a political project that appeared to benefit himself as much as it did taxpayers.

What Boston did show, however, was that this normative issue of consensual

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[305] *Id.*

[306] As the board of United Peoples wrote in a grant application, "Each member of the staff received help from United Peoples and became strongly interested in the goals and ideals of the organization. . . . Our working style is characterized by the involvement of low-income members and staff. As a staff group we don't have to guess at how it may feel to be evicted, rejected, insulted, etc.; we are all still there where it is happening." Grant Proposal from United Peoples to the Haymarket People's Fund, *supra* note 105, at 2–3.

[307] See First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 805 (White, J., dissenting).

representation exists across all corporations. It was easy for observers to see that Mayor White had approximately the same relationship with people who lived and worked in Boston as Ephron Catlin had with the shareholders and customers of the First National Bank. It also became easy to see that just because both were elected--however indirectly--to lead their respective corporations, the elections did not mean that voters trusted them to wield unlimited power and uninhibited discretion. As critics familiar with Mayor White's attempts to entrench himself recognized, "there is no assurance that governments truly represent majorities in the absence of informed consent to governmental policies." Crucially, this was true for "corporate democracy" in business corporations as well.[308]

This lesson has been largely forgotten among constitutional scholars in the years since 1978--perhaps because Boston's victory before the Supreme Court was short-lived.[309] When Justice William Brennan issued his October 1978 order allowing Boston to spend public funds on the referendum, he expected that four other Justices would vote to exercise the Court's discretion and hear the city's appeal the following year.[310] But in January 1979, six of the nine Justices flouted Justice Brennan's prediction and, over his dissent, voted to dismiss Boston's appeal on the ground that it failed to raise a "substantial federal question."[311] Such a dismissal was ambiguous—the Court did not give a reasoned opinion, and it could have

[308] Yudof, *When Government Speaks*, at 870.

[309] For examples of recent responses that do analyze the representative nature of business corporations, see generally ADAM WINKLER, WE THE CORPORATIONS (2018); Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Adam Winkler, *The Corporation in Election Law*, 32 LOYOLA L.A. L. REV. 1243, 1260–66 (1999); Adam Winkler, *Beyond Bellotti*, 32 LOYOLA L.A. L. REV. 133, 138 (1998).

[310] City of Boston v. Anderson, 435 U.S. 1389, 1390 (1978) (in chambers opinion of Brennan, J.).

[311] City of Boston v. Anderson, 439 U.S. 1060, 1060 (1979). Justices Brennan, Blackmun, and Powell voted to hear the case. Linda Greenhouse, "Wedding Bells," N.Y. TIMES (Mar. 20, 2013), http://nyti.ms/1rvdIfy (explaining that such a dismissal "was the formulaic way of saying the equivalent of 'there is so little to this case that we don't even have to bother hearing it.'").

decided that the issue was "moot," or no longer relevant, because the campaign was over.[312] But in practical terms, the dismissal let stand the decision of the Supreme Judicial Court of Massachusetts, which had prohibited Boston from spending money on future political campaigns.

In the four decades since then, two things have made the issue of consensual representation in business corporations just as important as it is for cities. First, in 2010's *Citizens United v. FEC*, the Supreme Court cited *First National Bank v. Bellotti* over thirty times to strike down a federal ban on corporate political expenditures.[313] The decision overruled a half dozen cases in the 1980s and 1990s that had upheld bans on corporate spending because states like Massachusetts had offered compelling interests in "ensur[ing] that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity."[314] In *Citizens United*, by contrast, Justice Anthony Kennedy quoted *First National Bank* to write that the corporate "identity" of a speaker should not determine whether its speech is protected by the First Amendment: "Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"[315]

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[312] In the early 1990s, after Justice Brennan retired from the Supreme Court, he and Professor Tribe co-taught a seminar at the University of Miami Law School. Professor Tribe recalls "that he confirmed my hunch that the Court's final ruling was based on mootness." Email from Laurence Tribe to Nikolas Bowie (Aug. 1, 2017, at 10:31 AM) (on file with the author).

[313] See, e.g., 558 U.S. 310, 349 (quoting *Bellotti*, 435 U.S. at 777).

[314] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 663 (1990). The Court had allowed Congress and states to regulate business corporations differently from labor unions or ideological corporations such as the NAACP, in which "the contributors obviously like the message they are hearing from these organizations." FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 495 (1985); see FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 260 (1986); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210–11 (1982); Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 296 (1981); Calif. Med. Ass'n v. FEC, 453 U.S. 182, 196 (1981).

[315] *Citizens United*, 558 U.S., at 349 (quoting *Bellotti*, 435 U.S. at 777).

And when Justice Kennedy confronted the same argument that Massachusetts had made in defense of dissenting shareholders, he again quoted Justice Powell: There is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[316]

Second, drawing on Laurence Tribe's argument that cities and other governments require wide latitude to spend taxpayer dollars on controversial messages,[317] the Supreme Court has developed a "government speech" doctrine, holding that "government would not work" were it constitutionally prohibited from compelling citizens to do or pay for things they might not like.[318] This rule makes sense; just think of the consequences if taxpayers philosophically opposed to recycling could sue a city government for violating the First Amendment whenever it passed an ordinance urging people to reuse paper bags.[319] But the rule has also led numerous cities to engage in political advocacy similar to Boston's, and a split has developed among state and federal courts over how to interpret *City of Boston v. Anderson* in light of this "recently minted" government-speech doctrine.[320] A few courts have

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[316] *Id.* at 361–62.

[317] A point Professor Tribe developed further in law review articles. See, e.g., Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 245 (1978).

[318] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015); see also, e.g., Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009); Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234–35 (2000); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598–99 (1998); Rosenberger v. Rector & Visitors, 515 U.S. 819, 833 (1995); Rust v. Sullivan, 500 U.S. 173, 196 (1991). For historical context on Johanns and the development of this doctrine, see generally Sarah Milov, "Promoting Agriculture: Farmers, The State, and Checkoff Marketing," 90 BUS. HIST. REV. 505 (2016).

[319] See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 8–9, 68 (1948); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17–18, 708–17 (1970); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1273 (1995); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 258–62 (1992); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

[320] See Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008); Kidwell v. City of Union, 462 F.3d 620 (6th Cir. 2006); Cook v. Baca, 12 F. App'x 640 (10th Cir. 2001); D.C. Common Cause v. District of Columbia, 858 F.2d 1 (D.C. Cir. 1988); Campbell v. Joint Dist. 28-J, 704 F.2d 501

held that public spending in support of one side of an election is antidemocratic and presumptively unconstitutional. But most have accepted arguments similar to the ones Tribe made, holding that taxpayer-funded advocacy is not only constitutional but also pretty ordinary. After all, it's hard to distinguish between ordinary political advocacy, like a taxpayer-funded press conference, and unconstitutional entrenchment.[321]

As state and local governments consider how to respond to this increased advocacy by both business and municipal corporations, the story of the 1978 referendum remains as relevant as ever. It shows that the question presented by corporate speech is not limited to "should corporations be allowed to speak?" It also must include "what does it mean for a corporation to speak?" Answering that question makes it clear that corporations are fundamentally representative institutions, ones in which a vocal person purports to represent a silent group. This is obvious in a municipal corporation like Boston. But, as it happens, a bank like the First might have just as much use for checks and balances as any other democracy.

(10th Cir. 1983); Adams v. Maine Mun. Ass'n, No. 1:10-CV-00258-JAW, 2013 WL 9246553 (D. Me. Feb. 14, 2013); Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814 (N.D. Ala. 1988); Mountain States Legal Found. v. Denver Sch. Dist., 459 F. Supp. 357 (D. Colo. 1978); Daims v. Town of Brattleboro, 148 A.3d 185 (Vt. 2016); Fraternal Order of Police v. Montgomery County, 132 A.3d 311 (Md. 2016); Burt v. Blumenauer, 699 P.2d 168 (Or. 1985); Young v. Red Clay Consol. Sch. Dist., 122 A.3d 784 (Del. Ch. 2015); Peraica v. Riverside-Brookfield High Sch. Dist. No. 208, 999 N.E.2d 399 (App. Ct. Ill. 2013); Kromko v. City of Tucson, 47 P.3d 1137 (Ct. App. Ariz. 2002); Carter v. City of Las Cruces, 915 P.2d 336 (Ct. App. N.M. 1996). Many cases also preceded the Supreme Court's 1979 decision. See Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978); Stanson v. Mott, 551 P.2d 1 (Cal. 1976); Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673 (N.J. 1953) (Brennan, J.); City Affairs Comm. v. Bd. of Comm'rs, 46 A.2d 425 (N.J. 1946); Sims v. Moeur, 19 P.2d 679 (Ariz. 1933); Elsenau v. City of Chicago, 165 N.E. 129 (Ill. 1929); Mines v. Del Valle, 257 P. 530 (Cal. 1927); State *ex rel.* Port of Seattle v. Superior Court, 160 P. 755 (Wash. 1916); Stern v. Kramarsky, 84 Misc. 2d 447 (Sup. Ct. N.Y. 1975); Porter v. Tiffany, 502 P.2d 1385 (Ct. App. Or. 1972).

[321] See JOHN HART ELY, DEMOCRACY AND DISTRUST 75–104 (1980); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 411 (2015).

Conclusion

"Corporations are people, my friend."[1]

When former Massachusetts governor Mitt Romney told a crowd of hecklers during his 2011 campaign for president that corporations were people, he seemed to reinforce a centuries-long legal and cultural trend toward equating corporations with human beings. A year earlier, in *Citizens United v. Federal Election Commission*, the Supreme Court of the United States struck down a federal ban on corporate political expenditures, reaffirming its 1978 holding that the First Amendment protects the political "speech" of corporations.[2] The First Amendment is far from the only clause of the Constitution that the Supreme Court extended to corporations. Since 1819, when the Court first applied the Contracts Clause to protect so-called private corporations in *Dartmouth College v. Woodward*, the Court interpreted the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, along with various other structural clauses of the Constitution, to protect the rights of corporations.[3] The Court has developed such a strong reputation for protecting corporate rights that corporations have begun making "personal" demands that even the Court has found laughable. In March 2011, for example, the Chief Justice Roberts rejected AT&T's argument that "corporations have 'personal privacy,'" deadpanning, "We trust that AT&T will not take it personally."[4]

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[1] Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry over His Tax Policy*, N.Y. TIMES, Aug. 12, 2011, at A16.

[2] 558 U.S. 310 (2010).

[3] *See* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 115 (2014)

[4] FCC v. AT&T Inc., 562 U.S. 397, 409 (2011).

Indeed, by the time of Romney's comments in August 2011, the idea of "corporate personhood" had become a cultural touchstone. In December of that year, Senator Bernie Sanders introduced a constitutional amendment declaring that "[t]he rights protected by the Constitution of the United States are the rights of natural persons and do not extend to for-profit corporations."[5] Supporting such an amendment has since become a plank of the Democratic Party platform.[6]

The full text of Romney's remarks received less publicity than his famous soundbite, but they perhaps reveal more about the cultural status of corporations in the twenty-first century than his quote. Romney was in Des Moines, at the Iowa State Fair, giving a question-and-answer session to a hostile crowd. He was responding to a question about deficit spending, concluding, "We have to make sure that the promises we make in Social Security, Medicaid, and Medicare are promises we can keep, and there are various ways of doing that. One is we could raise taxes on people—"

"Corporations!" interrupted a member of the audience. "Big-time breaks! Corporations!"

The audience member seemed to be suggesting that the government could raise taxes on "corporations" as opposed to "people." Smiling, and raising his own voice over the shouts of other hecklers, Romney delivered his famous line, "Corporations are people my friend." He attempted to continue: "We could raise taxes on—"

But another member of the audience again interrupted him: "No they're not!"

"Of course they are," Romney persisted. "Everything corporations earn ultimately goes to people."

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[5] S.J. Res. 33, 112th Cong. §1 (2011).

[6] DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM 25 (2016).

This response caused the first protestor to erupt into a belly laugh. Romney was undaunted. "Where do you think it goes?" he asked.

"It goes into their pockets!" a third person in the audience responded.

"Whose pockets? People's pockets!" Romney said, proving his point and ending the dialogue.[7]

As the full dialogue suggests, Romney's intention was not to argue that a corporation was the same thing as a person. Just the opposite: his point was that to raise taxes on a corporation would ultimately raise taxes on various human beings, whether those humans were the people who ran the corporation, people who worked in the corporation, people who owned shares in the corporation or people who shopped in the corporation. To take from a corporation's "pockets" was to take from "people's pockets!" Romney was making a roundabout argument that corporations are, at their core, not discrete entities but relationships between real-life people.

Romney's point suggests that while corporate personhood may seem like a dominant ideology today, it is perhaps less widely held than many think. Romney did not believe that corporations were individuals: he believed that they are collections of individuals. His hecklers agreed that corporations were not individuals: they argued that they are something different. Corporate statehood is the name for one of these different conceptions. In contrast to the idea that corporations are the same things as individuals and therefore deserve the same rights as individuals, corporate statehood is the idea that corporations are representative institutions—states in miniature—for whom people have similar expectations as they do for other governmental bodies.

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[7] CNN, *Romney: Corporations Are People Too*, YOUTUBE (Aug. 12, 2011), https://www.youtube.com/watch?v=FxUsRedO4UY.

While corporate statehood may not be as resonant an idea today as corporate personhood, it is just as old. In the seventeenth century, when corporations first arrived on American shores, they brought with them government. The Virginia Company of London, the Virginia Company of Plymouth, and the Massachusetts Bay Companies were the vehicles by which the edicts of the crown and the laws of Parliament travelled across the Atlantic Ocean. More than that, the corporations were also, quite literally, the initial governments of their respective colonies. The chief executive of the Massachusetts Bay Company, elected by the company's shareholders, was also the company's "Governor." The bylaws the company passed to govern itself and its territory were also the legislation for the entire colony. And, significantly, the corporate charter that marked the fundamental limits of the company's power eventually became the first written constitution—the "Constitution by Charter"—of Massachusetts. The legal and cultural experiences of corporations in seventeenth century America set precedents for the legal and cultural expectations of how American governmental institutions would function. What began as a "body corporate and politic" evolved until it became a literal "commonwealth."

This governmental conception of corporations did not change in the eighteenth century, particularly in Massachusetts. Even though the Massachusetts Bay Company no longer existed, the corporations the royal province chartered continued to be explicitly governmental in their purpose and structure. Toward the end of the century, the history of the Massachusetts Bay Company supplied the fodder for political debates about the ideal relationship between the colonial government and crown and Parliament. Supporters of revolution saw themselves as fighting to preserve the same sets of legal relationships as had existed in the seventeenth century; opponents of revolution saw themselves as defending the subordinate role of English corporations relative to the more-powerful central government. After the descendant of the Massachusetts Bay Company's charter was

nullified, colonists went to war demanding a replacement for their "antient Constitution." The constitution they adopted—one strikingly similar in form to the corporate charter they longed for—codified the contemporary understanding of corporations as intrinsically governmental. After the war, as the new commonwealth of Massachusetts began chartering its own corporations, it applied its political innovations to its commercial innovations. All American institutions, from cities and banks to states and the federal government would be organized "on the same principle": with written constitutions that regulated "a delegation of power from, and dependant upon the people."[8]

Things changed in the nineteenth century, when states around the country began to loosen restrictions on the powers of the corporations that chartered in their territory. Although Massachusetts attempted to resist this "privatization" by maintaining an attitude of supervision toward its corporations, it found itself losing its largest corporations to its southern neighbors in New York and New Jersey. Eventually, the commonwealth deregulated its corporate charters, abandoning the premise that these charters were as important for limiting corporations as constitutions were for limiting states. But the death of corporate charter regulations did not mean that the idea of corporate statehood died with it. Workers in Massachusetts's industrial corporations saw their own relationship toward corporate executives as one of absolutism: they had no say in electing a board of directors, setting their own wages, or otherwise participating in corporate decisionmaking. They began demanding "industrial democracy": the right to participate in corporate governance and, perhaps, control it. With the strike by the Industrial Workers of the World in 1912, people around the country grew to appreciate that the same norms that applied to political institutions should also apply to economic institutions. In the words of the U.S. Commission

[8] Friend to Good Order, *For the Centinel*, COLUMBIAN CENTINEL, Feb. 15, 1792, at 178.

on Industrial Relations: "The only hope for the solution of the tremendous problems created by industrial relationship[s] lies in the effective use of our democratic institutions and in the rapid extension of the principles of democracy to industry."[9]

In the twentieth century, corporations began accumulating more and more constitutional rights, including the same right that individuals possessed to spend money on political campaigns. In *First National Bank of Boston v. Bellotti*, the Supreme Court reaffirmed a legal principle that continues to guide constitutional law: most rights do not depend on the corporate identity of the rights bearer. The common perception of this principle is that it has codified corporate personhood into the Constitution. Despite that perception, the Court based its holding on the premise that corporations are governments: they are "corporate democracies" in which shareholding voters are a better source of checks and balances than elected legislators. This premise was made evident when the mayor of Boston attempted to take advantage of the ruling by acting as if there were no difference between an explicitly governmental corporation like the city of Boston and a financial corporation like the First National Bank of Boston. The voters who were skeptical of the mayor's political participation—and the idea that just because he was elected that meant he had their consent to do whatever he wanted—also became skeptical of the bankers' political participation, which was legally and morally based on the same idea. But, for the same reason, even though members of the Court may not have anticipated that cities would take advantage of their ruling, it was difficult to explain what made a municipal corporation like Boston ineligible for the protections the Court had granted other corporations.

[9] 1 U.S. COMM'N ON INDUS. RELATIONS, FINAL REPORT AND TESTIMONY, S. DOC. NO. 64-415, at 17–18 (1916).

In the thirty years since Morton Horwitz wrote in 1985 about the development of corporate theory after the Supreme Court's 1886 decision in *Santa Clara County v. Southern Pacific Railroad*, historians of the corporation have asked how, exactly, corporations gained the rights of individuals.[10] In the past year alone, two major works of scholarship on the history of the corporation have focused on the rise of corporate personhood and "how American businesses won their civil rights."[11] This important research describes a real concern. Given an Anglo-American legal tradition that describes everything as either a "state" whose powers may be restricted or an "individual" whose rights are inviolable, corporate executives have fought for centuries to drag their institutions from one identity to the other.[12]

But what this dissertation suggests is that corporate personhood is not the end of history; its advancement was neither inevitable nor has it ever been complete.[13] An alternative conception of the corporation as a governmental, representative entity remains very much alive. Institutionally, corporations, cities, states, and the Federal Government continue to share a common ancestor and retain common linkages.[14] Legally, corporate law—particularly the law of corporate governance—continues to be understood as political

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[10] Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985).

[11] *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS (2018); CORPORATIONS AND AMERICAN DEMOCRACY (Naomi Lamoreaux & William Novak eds. 2017).

[12] OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 97–100 (Fredric William Maitland trans., Cambridge, U.K.: Cambridge University Press, 1900); *see also* FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 490–92, 502–511 (2d ed., 1898).

[13] *Cf.* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

[14] *See* David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418 (2017).

theory applied to the corporation.[15] Recent social movements by labor activists, environmentalists, consumer advocates, and other groups have demanded that corporations broaden their relevant constituencies to include disfranchised "stakeholders"—just as social movements by people of color, women, young people, and immigrants have demanded that states and cities broaden the voting population to include them.[16] And as cities and governments return to a seventeenth-century-style model of state economic activity in which "public-private partnerships" and publicly managed corporations govern territories or important projects, the line between the corporate person and the corporate state remains blurry and contested.[17]

In other words, the idea of corporate statehood is a through line connecting the Massachusetts Bay Company of the past with the Commonwealth of Massachusetts in the future; a conceptual metaphor that is intrinsic to the corporate form. Corporate America is a phrase that refers not just to America's businesses, but also to its governments.

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[15] *See, e.g.*, THE HANDBOOK OF BOARD GOVERNANCE (Richard Leblanc ed. 2016); ROBERT E. WRIGHT, CORPORATION NATION (2014).

[16] *See* R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 25 CAL. MGMT. REV. 88 (1983).

[17] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225 (2015); Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 821 F.3d 19 (D.C. Cir. 2016).

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