

THE MAYFLOWER COMPACT: CELEBRATING FOUR HUNDRED YEARS OF INFLUENCE ON U.S. DEMOCRACY

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The Mayflower Compact

In the Name of God, Amen.

We whose names are underwritten, the loyal subjects of our dread Sovereign Lord King James, by the Grace of God of Great Britain, France, and Ireland King, Defender of the Faith, etc.

Having undertaken, for the Glory of God and advancement of the Christian Faith and Honour of our King and Country, a Voyage to plant the First Colony in Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names at Cape Cod, the 11th of November, in the year of the reign of our Sovereign Lord King James, of England, France, and Ireland the eighteenth, and of Scotland the fifty-fourth. Anno Domini 1620.¹

*†Associate Dean for Academic and Student Affairs and Associate Professor, University of North Dakota School of Law. This article is dedicated to my mother, Janet Lee (Mohr) Ernst, a proud descendant of Mayflower passenger John Billington and a constant source of inspiration, strength, and love throughout my life. It is also dedicated to my father, the late Judge John Richard Ernst, who proclaimed on countless occasions that the greatest blessing of his life was his wife, my mother. I am very grateful for invaluable assistance from Burtness Scholar Research Assistants Lauren Kauffman and Kari Peterson, as well as UND School of Law Thormodsgard Law Library Head of Faculty Services Anne Mostad Jensen. I also thank Dean Michael McGinniss, Professor Emeritus Patti Alleva, Anne, and my mother for their thoughtful comments on drafts of this article, in addition to the NDLR editors and members for their excellent work on this piece.

1. WILLIAM BRADFORD, OF PLYMOUTH PLANTATION 1620-1647 83-84 (Random House ed. 1981) (modern English spelling).

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I. INTRODUCTION²

The year 2020 marks the 400th anniversary of the Mayflower Compact, signed by the Pilgrims aboard the *Mayflower* anchored just offshore from the land that would become Plymouth Colony. This manuscript would become the historical precedent for future seminal documents in the formation of the American governmental system, including the Fundamental Orders of Connecticut, the U.S. Articles of Confederation, the Virginia Declaration of Rights, the Northwest Ordinance, and particularly the U.S. Constitution. As the nation commemorates the quadricentennial of the landing of the Pilgrims in 1620, this paper explores the influence the Mayflower Compact has had on the evolution of democracy in the United States over the past four centuries, tracing both the document's precursors and its legacy.³ As many leaders in our country historically and today have endeavored to increase civic virtue and to foster broader participation in the democratic process,⁴ this article calls for a greater emphasis in law schools and other educational institutions on the Mayflower Compact and other additional formative documents that have helped shape our constitutional establishment of government.

Part II of this article sets the stage of the historical context leading up to the Mayflower Compact by examining the democratic precursors to this document in and around Europe, as well as the situation in the Americas preceding the Pilgrims. In the next section, Part III focuses on the Pilgrims, the Mayflower Compact, and Plymouth Colony. This part of the paper follows the path of the Pilgrims from England to Holland in the early 1600s and then

2. Internal citations have been omitted throughout the quotations in this article unless otherwise indicated.

3. As suggested in the introduction, this article is not intended to offer a revolutionary new theory about the Mayflower Compact. Instead, it provides a contextual examination of the Mayflower Compact for audiences interested in an overview of its place in the development of American democracy. For an insightful exploration of the Mayflower Compact, see Mark L. Sargent, *The Conservative Covenant: The Rise of the Mayflower Compact in American Myth*, 61 THE NEW ENGLAND Q. 233, 233-51 (1988).

4. See, e.g., THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS 49 (Adrienne Koch & William Peden eds., 1946) (John Adams wrote "It is the form of government which gives decisive color to the manners of the people, more than any other thing. Under a well-regulated commonwealth, the people must be wise, virtuous, and cannot be otherwise As politics therefore is the science of human happiness, and human happiness is clearly best promoted by virtue, what thorough politician can hesitate who has a new government to build whether to prefer a commonwealth or a monarchy?").

on to the New World in 1620. After highlighting the events leading up to the formation of the Mayflower Compact, which the voyagers adopted to unify the members of the religious community along with the others travelling with them, this section then explores the text and meaning of this important agreement. Next, this section investigates the rise of Plymouth Colony and its ultimate absorption into the Massachusetts Bay Colony in 1691. Part IV of the article discusses the Mayflower Compact's enduring legacy, surveying the establishment of other colonies, the continued progress of democratic political thought in Europe, the Mayflower Compact's impact on the Revolutionaries, and its post-Revolution significance. The article concludes in Part V with a brief note about the Mayflower Compact's lessons for the present day.

II. HISTORICAL CONTEXT LEADING UP TO THE MAYFLOWER COMPACT

In forming an agreement that provides for the consent of the governed, lauds equality and justice, and establishes a government whose purpose is the general good of everyone in the community no matter their station in life, the Mayflower Compact's uniting of the travelers aboard the eponymous ship may appear to be somewhat of a revolutionary action when it was penned four centuries ago. However, these ideas were not novel. Indeed, political and theological concepts had begun to question absolute political and ecclesiastical authority, to promote the notion of participatory governance, and to assert that the purpose of government is to advance the good of the people for quite some time beforehand, as described below.

The concept of a society based upon a "social contract" or "covenant" among the members of the society emerged at least three to four thousand years ago.⁵ Such a society is based on the deliberate choice to shape one's social and political relationships through purposeful agreement about the best governance structure, usually resulting in one based on democracy, equality, and civil rights.⁶ This concept stands in stark contrast with either a society based upon enforced hierarchical relationships (such as an absolute monarchy or a colonizer's conquest and political dominance over conquered peoples),⁷ or a society based upon an ad hoc evolution of a societal framework

5. Daniel J. Elazar, *The Political Theory of Covenant Biblical Origins and Modern Developments*, 10 PUBLIUS: THE J. OF FEDERALISM 3, 5 (1980).

6. *Id.* at 13 ("Covenantal foundings emphasize the deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights Polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design.").

7. *Id.* at 12 (Conquest includes "a conqueror gaining control of a land or a people."). The concept of conquest is central to the United States story, such as the settlers in North America taking the land of the original inhabitants, and the U.S. government ultimately claiming significant political

(such as an oligarchy based upon tradition and its corresponding governance structure based on wealth).⁸ These competing ideas about and models of social structures and their corresponding systems of governance have played out in various regions of the world for the past several millennia.⁹ This segment of the article briefly explores some of those governance and societal structures focusing on Europe and the Americas, particularly highlighting the budding democratic antecedents to the Mayflower Compact leading up to the formation of this historic document.

A. DEMOCRATIC PRECURSORS TO THE MAYFLOW COMPACT IN AND AROUND EUROPE¹⁰

Since early recorded history several thousand years ago,¹¹ people have created sophisticated societies and governments throughout the globe, some including the kernels of modern democracy. The Mesopotamian region (now parts of Iraq, Iran, Syria, and other countries) developed the first written history approximately 5,000 years ago (c. 3200 BC).¹² The Mesopotamian governments of Babylon and Sumer were well-organized with early vestiges of

control over the people who had originally occupied the North American continent. See the Marshall Trilogy, in which Chief Justice John Marshall created the “discovery doctrine,” and the doctrine of “domestic dependent nations” to provide legal justification for these conquests. See ROD GRAGG, *THE PILGRIM CHRONICLES: AN EYEWITNESS HISTORY OF THE PILGRIMS AND THE FOUNDING OF PLYMOUTH COLONY* 217-18 (2014). See generally *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1932); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D.L. REV. 627 (2006).

8. See Elazar, *supra* note 5, at 12 (“Organic evolution involves the development of political life from its beginnings in families, tribes, and villages to large polities in such a way that institutions, constitutional relationships, and power alignments emerge in response to the interaction between past precedent and changing circumstances with a minimum of deliberate constitutional choice.”); see also *id.* at 12-13 (“[J]ust as conquest tends to produce hierarchically organized regimes ruled in an authoritarian manner, organic evolution tends to produce oligarchic regimes which at their best, have an aristocratic flavor, and at their worst are simply the rule of the many by the few.”).

9. *The Nature of Government: Types of Government*, USHISTORY.ORG, <https://www.ushistory.org/gov/1b.asp> (last visited Feb. 21, 2020).

10. Although this article focuses on the development of societies, governments, religious theory, and political theory in Europe and North America, this focus is not intended to diminish the parallel developments occurring at the same time in civilizations throughout other regions of the world.

11. About 300,000 years ago, *Homo sapiens* first appeared in Africa. *Homo Sapiens*, SMITHSONIAN NAT’L MUSEUM OF NAT. HIST., <http://humanorigins.si.edu/evidence/human-fossils/species/homo-sapiens> (last updated Jan. 10, 2020).

12. See History.com Editors, *Mesopotamia*, HISTORY.COM (Nov. 30, 2017), <https://www.history.com/topics/ancient-middle-east/Mesopotamia>; Richard N. Frye, Dietz O. Edzard, Wolfram Th. von Soden, *History of Mesopotamia*, BRITANNICA, <https://www.britannica.com/place/Mesopotamia-historical-region-Asia> (last visited Jan. 15, 2020).

democracy, including elected assemblies to advise the king.¹³ These civilizations also incorporated the rule of law, such as the Code of Hammurabi, known as the first written set of laws, issued by King Hammurabi, who ruled between 1792-1750 BC.¹⁴

Ancient Greece developed a sophisticated civilization between 2000-0 BC.¹⁵ The term “democracy” was coined in ancient Greece as *demokratia*, or “rule by the people” in 507 BC by Cleisthenes.¹⁶ This ruler in Athens instituted three separate governmental institutions: (1) a body to write the laws and determine foreign policy, (2) a council of representatives, and (3) courts with jurors selected by lottery before whom citizens argued their cases.¹⁷

In a similar democratic development, the Roman Republic was governed by elected senators between 509-45 BC and also established a constitution, written laws, and a balance of powers.¹⁸ The Romans defeated the Greeks between the third and second centuries BC.¹⁹ In 46 BC, Julius Caesar took control of the government and became a supreme dictator, ending the Roman Republic.²⁰ He was followed by Caesar Augustus in 27 BC, who became the first Roman Emperor.²¹ The Roman Empire dominated Europe between 0-500 AD, and transitioned from a polytheistic religion to Christianity, beginning with Emperor Constantine I’s Edict of Milan in 313 AD, proclaiming

13. Richard N. Frye, Dietz O. Edzard, Wolfram Th. von Soden, *History of Mesopotamia*, BRITANNICA, <https://www.britannica.com/place/Mesopotamia-historical-region-Asia> (last visited Jan. 15, 2020).

14. *Id.*

15. Until recently, it was thought that early humans arrived in Europe about 45,000-43,000 years ago, but it seems that the date range may actually be older. Josh Davis, *Modern Humans May Have Been in Europe 150,000 Years Earlier Than Thought*, NAT. HIST. MUSEUM (July 10, 2019), <https://www.nhm.ac.uk/discover/news/2019/july/modern-humans-may-have-been-in-europe-150-000-years-earlier-than.html>.

16. *Democracy (Ancient Greece)*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/democracy-ancient-greece/> (last updated Mar. 15, 2019); History.com Editors, *Ancient Greek Democracy*, HISTORY.COM (Aug. 23, 2018), <https://www.history.com/topics/ancient-greece/ancient-greece-democracy>.

17. *Democracy (Ancient Greece)*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/democracy-ancient-greece/> (last updated Mar. 15, 2019); History.com Editors, *Ancient Greek Democracy*, HISTORY.COM (Aug. 23, 2018), <https://www.history.com/topics/ancient-greece/ancient-greece-democracy>.

18. The Roman Republic was governed by elected senators between 509-45 BC and also established a constitution, written laws, and a balance of powers. Eric A. Posner, *The Constitution of the Roman Republic: A Political Economy Perspective 2* (John M. Olin Program in Law and Economics, Working Paper No. 540, 2010).

19. See The Editors of Encyclopedia Britannica, *Macedonian Wars*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Macedonian-Wars>.

20. See History.com Editors, *Julius Caesar*, HISTORY.COM (Nov. 4, 2019), <https://www.history.com/topics/ancient-history/julius-caesar>; Arnold Joseph Toynbee, *Julius Caesar*, BRITANNICA (Jan. 12, 2000), <https://www.britannica.com/biography/Julius-Caesar-Roman-ruler>.

21. See History.com Editors, *Augustus*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/ancient-history/emperor-augustus>.

religious toleration of Christians. Christianity became the official religion of the Roman Empire in 391 AD.²²

The progression of democracy seemingly halted for a period. Raids by Germanic tribes ultimately led to the fall of the Western Roman Empire in 476 AD and the establishment of thousands of feudal governments thereafter, which local lords ruled.²³ The Middle Ages, otherwise known as the medieval period or Dark Ages, lasted in Europe from the fall of the Roman Empire to the fourteenth century.²⁴ During this epoch, the primary ordering of society entailed the church hierarchy and feudalism, through which local nobility controlled peasants and serfs, who were bound to the land and forced to cultivate it on behalf of the upper-class landowners.²⁵ The feudal lords eventually banded together and pledged their loyalty to kings, such as in France and England in Western Europe. German kings dominated the rise of the Holy Roman Empire between 800-1806.²⁶ Throughout this timeframe the Byzantine Empire controlled Eastern Europe.²⁷

Despite the widespread adherence to the absolute or divine right of kings, slivers of democratic thought still emerged in Europe during the Middle Ages.²⁸ For example, between the eleventh and fourteenth centuries, monarchs began granting royal charters to municipal corporations, usually through a process of negotiation between the crown and municipal leaders.²⁹ In 1159, John of Salisbury wrote *Policraticus*, the first political science text

22. See The Editors of Encyclopedia Britannica, *Edict of Milan*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/Edict-of-Milan>.

23. See Evan Andrews, *8 Reasons Why Rome Fell*, HISTORY.COM (Jan. 14, 2014), <https://www.history.com/news/8-reasons-why-rome-fell>.

24. History.com Editors, *Middle Ages*, HISTORY.COM (Apr. 22, 2010) <https://www.history.com/topics/middle-ages/middle-ages>.

25. See Elizabeth A.R. Brown, *Feudalism*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/feudalism>.

26. Geoffrey Barraclough, *Holy Roman Empire*, BRITANNICA (July 20, 1998), <https://www.britannica.com/place/Holy-Roman-Empire>.

27. See John L. Teall, Donald MacGillivray Nicol, *Byzantine Empire*, BRITANNICA (July 20, 1998), <https://www.britannica.com/place/Byzantine-Empire>; see also History.com Editors, *Byzantine Empire*, HISTORY.COM (Aug. 24, 2010), <https://www.history.com/topics/ancient-middle-east/byzantine-empire>.

28. See *The Middle Ages*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/government/The-Middle-Ages>.

29. Elazar, *supra* note 5, at 8 (“the political dimensions of covenanting received new impetus in the eleventh through the fourteenth centuries . . . [including] the establishment of municipal corporations throughout . . . [Europe] which were legitimized by royal charter, usually negotiated between the municipality and the throne.”); see also John Lothrop Motley, *Polity of the Puritans*, 69 THE N. AM. REV. 470, 478-79 (1849) (quoting GEORGE BANCROFT, I. HISTORY OF THE UNITED STATES, 310 (1834), who expounded, “‘The middle age had been familiar with charters and constitutions; but they had been merely compacts for immunities, partial enfranchisements, patents of nobility, concessions of municipal privileges, or limitations of the sovereign power in favor of feudal institutions.’ Bancroft, I. 310.”).

of the era, which—although it reaffirmed the divine right of kings—also advocated for the right of the ruled to depose and even assassinate a tyrannical monarch.³⁰ Although this line of thought did not flourish during that era, as scholars subsequently declared the king to be above the law, the thought was at least introduced.³¹

As another example, in 1215, the Magna Carta (“great charter”) encompassed the notion that everyone must comply with the law, even the rulers,³² and expressed several progressive ideals such as the right to own property and the right to a fair trial.³³ Although the upper-class nobility had created the Magna Carta and obliged the king to assent to its provisions, this pact afforded individuals—including those not in the upper class—certain rights that had not previously been recognized.³⁴ The Magna Carta also supported “the fundamental principle of no taxation without consent.”³⁵

Starting in the fourteenth century, Europe experienced the Renaissance, an era of “rebirth” after the Dark Ages, during which Europeans revived classical culture, art, literature, and science, as well as political, economic, religious, and philosophical thought.³⁶ The invention of the printing press by Johannes Gutenberg in the 1450s extensively facilitated the spread of knowledge throughout the continent,³⁷ including Bibles written in the languages spoken by people throughout Europe, instead of solely in Latin, which was incomprehensible to most people except the wealthy and few others with access to an education.³⁸ Before the Gutenberg printing press enabled mass

30. See Bradley Aron Cooper, *Defending Liberty and Defeating Tyrants: The Reemergence of Federal Theology in the Rhetoric of the Bush Doctrine*, 85 U. DET. MERCY L. REV. 521, 526-27 (2008) (“The notoriety of *Policraticus* is due to its defense of the doctrine of tyrannicide, the idea that it is legitimate to slay a ruler who has become a tyrant.” As opposed to total submission to the monarchy, however just or tyrannical it may be, *Policraticus* “introduces the concept of collective responsibility that rests upon all of society . . . Combined with this sense of ‘community justice’ was the idea that a tyrant, by definition, is a king who rules contrary to the law. Accordingly, it is up to the community to enforce the law, even if it is the king who violates it.” Political theorists subsequently “concluded that the king was no longer under the law, but was now to be considered superior to it.”).

31. This concept may sound familiar: the people may rebel against a government that is no longer serving the people—see the related provision in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

32. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 59 (1998).

33. See History.com Editors, *Magna Carta*, HISTORY.COM (Dec. 17, 2009), <https://www.history.com/topics/british-history/magna-carta>.

34. *Id.*

35. LUTZ, *THE ORIGINS* *supra* note 32, at 59.

36. History.com Editors, *Renaissance*, HISTORY.COM (Apr. 4, 2018), <https://www.history.com/topics/renaissance/renaissance>.

37. *Id.*; Evan Andrews, *7 Things You May Not Know About the Gutenberg Bible*, HISTORY.COM (Feb. 23, 2015), <https://www.history.com/news/7-things-you-may-not-know-about-the-gutenberg-bible>.

38. ALYSSA ADAMS ET AL., *A HISTORY OF THE BOOK: DISRUPTING SOCIETY FROM TABLET TO TABLET*, 29-33 (2015).

production and dissemination of documents, common people had to rely on the spoken interpretation and authority of their religious leaders.³⁹

Beginning in the 1500s, the Protestant Reformation popularized the idea that, in order to remain true to one's personal religious convictions, an individual may need to contravene the established authority, whether ecclesiastical or political.⁴⁰ The Reformation also generated widespread belief in the power of written documents, as opposed to the prior belief in the absolute authority and infallibility of religious or government figureheads.⁴¹ In accordance with the Judeo-Christian tradition, the initial concept of covenant as a mutual agreement between the people and God (e.g., God's covenants with Abraham, Moses, Noah, and so on)⁴² eventually evolved into the concept of covenant as the proper social ordering of people amongst themselves—both within the organized church, as well as within the context of government.⁴³ In 1517, Martin Luther published his *Ninety-Five Theses*, calling for reform within the Roman Catholic Church.⁴⁴ The Roman Catholic Church condemned Martin Luther's teachings through the Edict of Worms

39. Evan Andrews, *7 Things You May Not Know About the Gutenberg Bible*, HISTORY.COM (Feb. 23, 2015), <https://www.history.com/news/7-things-you-may-not-know-about-the-gutenberg-bible>.

40. George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 BRANDEIS L.J. 17, 38 (2000) (quoting WINSTON CHURCHILL, HISTORY OF THE ENGLISH-SPEAKING PEOPLES II, 82-83 (1963) ("With the Reformation the notion that it might be a duty to disobey the established order on the grounds of private conviction became for the first time since the conversion to Christianity of the Roman Empire the belief of great numbers. But so closely were the Church and State involved that disobedience to the one was a challenge to the other. The idea that a man should pick and choose for himself what doctrines he should adhere to was almost as alien to the mind of the age as the idea that he should select what laws he should obey and what magistrates he should respect.")).

41. Fernando Rey Martinez, *The Religious Character of the American Constitution: Puritanism and Constitutionalism in the United States*, 12 KAN. J.L. & PUB. POL'Y 459, 460 (2003) ("The Protestant Reformation may be foremost among the numerous factors that caused individuals to grant supreme authority to a written document. Edward S. Corwin wrote: 'The Reformation superseded an infallible Pope with an infallible Bible; the American Revolution replaced the sway of a king with that of a document'—the Constitution. The Puritans' political contributions to the constitutionalism in the 16th and 17th centuries dramatically changed the concept of political authority used until then."); see also GLENN ALAN CHENEY, THANKSGIVING: THE PILGRIMS' FIRST YEAR IN AMERICA 9-10 (New London Librarium 2007) (explaining separatists neither believed in an omnipotent pope nor an authoritarian king).

42. See NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR 9 (2006) (describing the Puritans' concept of covenant).

43. See Cooper, *supra* note 30, at 5331 n. 54 (quoting Elazar, *supra* note 5, at 9 ("[F]ederal theology . . . (federal is derived from the Latin foedus, which means covenant) stimulated the renewed political application of the covenant idea which was given expression first by political theologians.")). Cooper, *supra* note 30, at 530 (explaining the term "covenant" has been defined as "'a morally-informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent and established by mutual oaths or promises.' It was this type of pact that emerged in late thirteenth-century Switzerland that precipitated the reuniting of the secular and religious aspects of covenant").

44. CHENEY, *supra* note 41, at 3-4; Editors of Encyclopedia Britannica, *Ninety-five Theses*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Ninety-five-Theses>.

in 1521.⁴⁵ Protestantism's reliance on scripture (*sola scriptura*) instead of saints or priests undermined many people's belief in papal supremacy and in the infallibility of the pope.⁴⁶

As Protestantism spread throughout Europe in the 1500s, the Reformed Protestant notions of covenant between God and the people served as a model for political relationships among people—and significantly, this covenant was based upon consent.⁴⁷ For example, in Scotland in the 1500s, local clans banded together through pacts to protect their lives and property, and later to defend their liberty—particularly with respect to their religious freedom to practice Protestantism as opposed to the Catholic monarchy.⁴⁸ Notably, these clans chose to band together—they consented to be part of a group—as opposed to being forced to do so.⁴⁹

Other important thinkers during this time period contributed to the development of theological and political thought, particularly the importance of relationships based on covenant, or mutual promises consisting of both mutual rights and mutual obligations. For example, in 1525, German Protestant reformer Johannes Oecolampadius discussed the relationship between biblical covenants and political covenants.⁵⁰ John Calvin, who was born in France and resided primarily in Geneva, published the influential *Institutes of the Christian Religion* in 1536 and further developed covenant theology, noting God's covenants with Adam, Noah, Moses, and Abraham, and with all of

45. See Sylvia Poggioli, *The Pope Commemorates The Reformation That Split Western Christianity*, NPR (Oct. 28, 2016, 4:29 AM), <https://www.npr.org/sections/parallels/2016/10/28/499587801/pope-francis-reaches-out-to-honor-the-man-who-splintered-christianity>; see also Editors of Encyclopedia Britannica, *Diet of Worms*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Diet-of-Worms-Germany-1521>.

46. See generally RONALD W. DUTY & MARIE A. FAILINGER, ON SECULAR GOVERNANCE: LUTHERAN PERSPECTIVES ON CONTEMPORARY LEGAL ISSUES (2016).

47. See Elazar, *supra* note 5, at 14. (“[A covenant] world view was recreated by the Reformed wing of Protestantism as the federal theology from which . . . the English and American Puritans developed political theories and principles of constitutional design.”); see also *id.* at 5 (“Out of these covenantal peoples emerged Judaism and Christianity with their biblical covenantal base, reformed Protestantism with its federal theology, federalism as a political principle and arrangement, the modern corporation, civil societies based upon interlocking voluntary associations, and almost every other element that reflects social organization based upon what has loosely been called ‘contract’ rather than ‘status.’ Moreover, these covenantal peoples seemed to have internalized a covenantal or federalistic approach to life[.]”); see also J. Wayne Baker, *Covenant and Community in the Thought of Heinrich Bullinger*, in *THE COVENANT CONNECTION: FROM FEDERAL THEOLOGY TO MODERN FEDERALISM* 15-29, at 20 (Daniel J. Elazar & John Kincaid eds., Lexington Books 2000) (“[T]he modern political philosophy of federalism is directly linked to the covenantal theology of the Reformation period.”), as quoted in Cooper, *supra* note 30, at 546, n. 140.

48. Cooper, *supra* note 30, at 540.

49. See *id.*

50. Elazar, *supra* note 5, at 20.

humanity through Jesus.⁵¹ As a part of the Protestant movement, people following Calvinist beliefs broke away from the Roman Catholic Church in Europe, and in England disavowed many of the tenets of the Church of England, arguing “that worship should be Bible-based, emphasizing simplicity instead of ceremony and biblical doctrine rather than Church tradition.”⁵² Calvinist ideas and Calvinist churches spread throughout Europe, including England, and then through settlers to the colonies in the New World.⁵³ Moreover, from Heinrich Bullinger’s experiences living in the Swiss confederation in the sixteenth century, which had originally formed when three independent states entered into a pact for mutual defense in 1291 and evolved into a loose confederation of states, this notable Swiss theologian in 1533 “developed a concept of the covenant that not only had theological meaning but also important social and political implications.”⁵⁴

In England, King Henry VIII converted from Catholicism to Protestantism in 1534 when the Catholic pope refused to annul his marriage, creating the Church of England and establishing himself as the head of the church as well as the state.⁵⁵ After his death and the death of his son King Edward VI, his daughter Queen Mary I violently attempted to restore Catholicism (earning her the nickname Bloody Mary), but upon her death five years later, her half-sister Queen Elizabeth I restored the Church of England.⁵⁶ During Elizabeth I’s reign from 1558-1603, the spread of printed Bibles led to a surge in religiosity, and access to scripture also led to a proliferation of differing religious beliefs, but the queen and Church of England mandated that everyone must follow the Book of Common Prayer and Church of England or face severe punishment.⁵⁷

51. See William J. Bouwsma, *John Calvin*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/John-Calvin>.

52. GRAGG, *supra* note 7, at 14-15.

53. Martinez, *supra* note 41, at 464 (noting the “expansion of Calvinism in the 16th century from . . . Switzerland, France, Holland, England and Scotland; and the expansion of Calvinism in the 17th century to the English colonies of America.”); see also *id.* at 465 (discussing John Calvin and Martin Luther).

54. Cooper, *supra* note 30, at 531 (explaining in 1533, Bullinger published a treatise in which “he established that God’s eternal covenant with man . . . was to be the divine model for all human affairs, be they religious or civil in nature. Bullinger’s work soon gained momentum, spreading quickly to other reformed communities of northwestern Europe, and then later to European colonies around the world.” “[I]t was this idea of covenant—as the guiding principle in both spiritual and political affairs—that was later responsible for reclaiming the anti-tyrannical stance that John of Salisbury had espoused four centuries earlier.”).

55. GRAGG, *supra* note 7, at 9.

56. *Id.* at 9-11.

57. *Id.* at 10-14, 25-29.

In 1574, Theodore Beza, a French Reformed Protestant theologian, advocated that people may legitimately rebel against tyranny of the state, particularly in religious matters, based on the concept that the authority of the ruler derives from a covenant between the ruler and the ruled, requiring both to submit to religious laws.⁵⁸ This reflects the Magna Carta's exhortation that everyone must obey the law, even the king.⁵⁹ In 1579, Philippe du Plessis-Mornay, also a French Protestant writer, is presumed to be the author of *Vindiciae Contra Tyrannos*, an essay promoting civil liberties and providing legal justification for popular resistance to tyranny of sovereigns, examining both covenants in theology and contracts under political theory.⁶⁰ In 1603, German jurist Johannes Althusius published *Politica*, in which he argued that the purpose of government is to enable social life to flourish; the authority of the state relies on the consent of the governed; and the ruler and ruled remain under mutual obligation to each other.⁶¹ Hugo Grotius was a Dutch jurist who studied at Leiden University and wrote an edict establishing religious toleration in Holland around 1613, as well as numerous works advancing religious freedoms and establishing principles of international law.⁶²

These developments in federal (i.e., covenantal) religious and political theory helped English Puritans and Separatists, undoubtedly including the people who would become known as the Pilgrims, develop their political and constitutional approaches to governance.⁶³ Throughout Europe, individuals,

58. See Elazar, *supra* note 5, at 20.

59. *Magna Carta*, NAT'L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/historical-documents/magna-carta> (last visited Feb. 1, 2020).

60. See Elazar, *supra* note 5, at 20 ("In his famous *Vindiciae Contra Tyrannos* (1579), Philippe du Plessis-Mornay articulated a similar notion of covenants between God and the people and, then, the people and their king, in the course of which he also expanded the scope of religious and civil liberty."); see also Cooper, *supra* note 30, at 534 (Mornay first "presents the idea of a king's duty and accountability to God. No longer is a king's reign to be understood as being 'absolute,' as a failure to fulfill covenantal obligations is now seen as leading to a removal of the authority to rule. Second, by depicting the relationship as covenantal, Mornay is able to return to the Old Testament, and build his entire argument on the main premise of Swiss covenantal theology: that covenant is to be the guiding principle in all human affairs."); see *id.* at 539 ("[T]he message contained in *Vindiciae, Contra Tyrannos* was to have an impact on the ideas of liberty and democracy around the world.") *id.* at 539 n. 96 (quoting Kathleen W. MacArthur, *The Vindiciae Contra Tyrannos: A Chapter in the Struggle for Religious Freedom in France* 9 Church Hist. 285 (1940)) (concluding the document had influence, "in the literature of freedom in seventeenth century England, and in early American thought.").

61. See Elazar, *supra* note 5, at 20 ("The idea of a civil covenant achieved its first full expression through Johannes Althusius (1603) whose work has been described as 'a watershed of modern political ideas.'").

62. See Martinez, *supra* note 41, at 463 (discussing the Natural Right doctrine in the 17th and 18th centuries, along with Grotius and Newton).

63. See Elazar, *supra* note 5, at 14. ("was recreated by the Reformed wing of Protestantism as the federal theology from which . . . the English and American Puritans developed political theories and principles of constitutional design."); *id.* at 5 ("Out of these covenantal peoples emerged Judaism and Christianity with their biblical covenantal base, reformed Protestantism with its federal

along with political units such as cities and provinces, began to assert their rights to autonomy and to associate freely, abandoning the strictly hierarchical frameworks that had been imposed upon them through medieval feudalism.⁶⁴ Beginning in the 1500s, English Puritans and Scots designed national covenants to order civil society, which were mirrored by the covenants settlers from Great Britain wrote to establish the colonial governments.⁶⁵

B. CONTEXT IN THE AMERICAS PRECEDING THE MAYFLOWER COMPACT

Indigenous people arrived in North America from Asia before 15,000 BC, and possibly up to 40,000 years ago.⁶⁶ Various indigenous civilizations flourished in the Americas, creating sophisticated social and political structures.⁶⁷ When Europeans initially made contact, about 50 million people lived in the Americas, including about 10 million people in the land that would eventually become the United States.⁶⁸

theology, federalism as a political principle and arrangement, the modern corporation, civil societies based upon interlocking voluntary associations, and almost every other element that reflects social organization based upon what has loosely been called ‘contract’ rather than ‘status.’ Moreover, these covenantal peoples seemed to have internalized a covenantal or federalistic approach to life[.]”).

64. Elazar, *supra* note 5, at 9 (“The reformed churches turned to the covenant concept with relish, finding in it the most appropriate expression of their theological ideas and expectations for church polity. The federal theology which they created (federal is derived from the Latin foedus, which means covenant) stimulated the renewed political application of the covenant idea which was given expression first by political theologians and then by [secular] political philosophers . . . [including] Hobbes, Locke, and Spinoza.”); *id.* at 19 (“Individuals revolted in the name of conscience and the freedom to associate or covenant on their own terms. Provinces, cities, and even villages asserted rights to autonomy, rejecting the hierarchical relationships of feudalism and medieval political society.”).

65. Elazar, *supra* note 5, at 4 (“during the sixteenth and seventeenth centuries, the Scots and the English Puritans not only conceived of civil society in covenantal terms, but actually wrote national covenants to which loyal members of the body politic subscribed. Similar covenants were used in the founding of many of the original colonies in British North America.”).

66. Simon Worrall, *When How Did the First Americans Arrive? It's Complicated*, NAT'L GEOGRAPHIC (June 9, 2018), <https://www.nationalgeographic.com/news/2018/06/when-and-how-did-the-first-americans-arrive—its-complicated-/#close> (explaining humans could have been here 40,000 years prior.).

67. See William T. Sanders et al., *Pre-Columbian Civilizations*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/pre-Columbian-civilizations/>.

68. History.com, *Native American Cultures*, HISTORY.COM (Dec. 4, 2009), <https://www.history.com/topics/native-american-history/native-american-cultures>; see also Alexander Koch, Chris Brierley, Mark M. Maslin, and Simon L. Lewis, *Earth System Impacts of the European Arrival and Great Dying in the Americas after 1492*, 207 QUARTERNARY SCI. REVIEWS 13, 16 (2019) (indicating that the exact numbers are not known, and estimates vary widely. For example, the number of inhabitants in North America in 1492 ranges between 900,000 and 18 million.).

The region where the Pilgrims settled had been inhabited for at least 10,000 to 12,000 years before their arrival.⁶⁹ These first Americans had developed thriving communities, using hunting, fishing, and farming methodologies similar to that of the Europeans at the time.⁷⁰ As opposed to absolute authority of monarchs in Europe ruling by divine right (no matter their level of competence), the many American communities were governed by a chief, along with a council of advisors, who could be replaced if not capably serving the tribe.⁷¹ This is an early example on the North American continent of the principles of the consent of the governed and that government should serve the good of the people, even before the Mayflower Compact.

Native American societies were advanced in other ways, as well. In comparison with European medical practices,⁷² the first Americans' medical science included some methods that were much more quick and effective than that of the Europeans.⁷³ One historian writes, "Despite the seeming simplicity of its technology, North American civilization was far larger and more organized than the Europeans ever knew,"⁷⁴ including trade that reached from the coasts to the Dakotas.⁷⁵ Notably, this historian has highlighted:

[T]he quality of life in [European] cities wasn't necessarily better than it was in [the Native American villages]. European cities were stinking places with garbage and sewage in the streets, where disease was widespread and often endemic, rats were rampant, public water was dangerous to drink, foods were often rotten, almost everyone drank an unhealthy amount of alcohol, and wars were fought with a technology-sharpened savagery beyond the imagination of the "savages" of North America.

[By contrast, the] first European explorers who met Indians in New England found them to be beautiful, healthy, and, until they learned European ways, friendly and generous.

While Europeans were consuming as much as they could and now needed a whole new continent to consume—its plants, minerals, and animals—the natives of North America had devised a sustainable

69. CHENEY, *supra* note 41, at 219.

70. *Id.* at 219-20.

71. *Id.* at 227-28.

72. *Id.* at 44 (including "the letting of blood, the drilling of skulls, the application of mercury and lead, and doses of anything from horse, hare and hen dung to crab juice beyond its prime.").

73. *Id.* at 222-23.

74. *Id.* at 223.

75. *Id.* at 224.

system that didn't demand the conquering of new lands and peoples.⁷⁶

Of course, Native American societies varied widely throughout the continent, as did the societies throughout Europe.⁷⁷ For example, not all Native American tribes were peaceful, and some maintained relatively hierarchical systems of governance.⁷⁸

Leif Erikson, a Norse explorer from Iceland, is the first known European to have reached the North American mainland around 1000 AD, in the region now known as Newfoundland province in Canada.⁷⁹ At that time, the Vikings established the first European settlements in the New World in Greenland and Newfoundland.⁸⁰ Some historians believe they may have first introduced new diseases to the indigenous populations, possibly beginning the epidemics that have reduced the indigenous population on the continent.⁸¹

As is well-known, in 1492, Christopher Columbus, a Spanish-supported Italian explorer, reached the Bahamas, Cuba, and Hispaniola with his crew aboard the *Niña*, the *Pinta*, and the *Santa Maria*.⁸² What may be less-well-known is that on his first voyage, Columbus seized the land from the indigenous people and established a fort in present-day Haiti, which the local inhabitants subsequently destroyed in an attempt to protect their land and way of life from these violent invaders.⁸³ Upon his return in 1493, Columbus established another settlement in the Dominican Republic and enslaved the indigenous people on the island, but starvation, disease, and unrest led to mutiny and the ultimate abandonment of that settlement.⁸⁴ In 1496,

76. CHENEY, *supra* note 41, at 220-22.

77. *Native American History*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/Native-American-history>.

78. *Native American History*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/Native-American-history>.

79. Emma Groenveld, *Leif Erikson*, ANCIENT HIST. ENCYCLOPEDIA (Sept. 20, 2018), https://www.ancient.eu/Leif_Erikson/.

80. Christopher Klein, *The Viking Explorer Who Beat Columbus to America*, HISTORY.COM (Oct. 8, 2013), <https://www.history.com/news/the-viking-explorer-who-beat-columbus-to-america>; Eric Weiner, *Coming to America: Who Was First?*, NPR (Oct. 8, 2007), <https://www.npr.org/templates/story/story.php?storyId=15040888>.

81. *Native American History*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/Native-American-history>.

82. *Columbus Reaches the New World*, HISTORY.COM, <https://www.history.com/this-day-in-history/columbus-reaches-the-new-world> (last visited Feb. 1, 2020).

83. Frances Maclean, *The Lost Fort of Columbus*, SMITHSONIAN MAG. (Jan. 2008), <https://www.smithsonianmag.com/history/the-lost-fort-of-columbus-8026921/>.

84. *Hispaniola*, YALE U., <https://gsp.yale.edu/case-studies/colonial-genocides-project/Hispaniola> (last visited Feb. 1, 2020); Charles C. Mann, *The Violent Story of Columbus' Forgotten Colony*, SALON (Aug. 18, 2011 5:01 AM), https://www.salon.com/2011/08/18/1493_charles_mann_excerpt/.

Bartholomew Columbus, brother of Christopher, established Santo Domingo, which became the first permanent European settlement in the Americas.⁸⁵ As many as 3 million people who originally inhabited the Caribbean islands were wiped out through their armed struggles against the European aggressors, starvation due to enslavement and maltreatment by the Europeans, and disease brought by the Europeans.⁸⁶ Through their trans-continental voyages, the Columbus brothers brought word of the New World back to Europe, sparking additional expeditions.

Through their voyages to the New World throughout the initial decades, Europeans began by exploring the continent and interacting with the people who originally inhabited the land, trading with them and bringing some of the continent's resources back to Europe.⁸⁷ For example, in 1513, Spanish voyager Juan Ponce de Leon is the first known European explorer to reach the Florida peninsula.⁸⁸ Explorers such as John Cabot, Giovanni de Verrazano, Jacques Cartier, Samuel Champlain, Bartholomew Gosnold, Martin Pring, and John Smith sailed up and down the Atlantic coast.⁸⁹ While some of these European missions were peaceful, many were not.⁹⁰ Captain George Weymouth and Captain Thomas Hunt kidnapped Native Americans, selling some of them into slavery in Europe.⁹¹

The Aztec civilization that reigned in the region that is now Mexico was ravaged by smallpox brought by the explorers.⁹² It was then brutally conquered in 1521 by the Spanish conquistadores and native allies led by Hernán Cortés.⁹³ The well-developed Inca Empire suffered a similar fate at the hands

85. Editors of Encyclopedia Britannica, *Bartholomew Columbus*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/Bartholomew-Columbus>.

86. Robert M Poole, *What Became of the Taíno?*, SMITHSONIAN MAG. (Oct. 2011), <https://www.smithsonianmag.com/travel/what-became-of-the-taino-73824867/>.

87. COTTON MATHER, *MAGNALIA CHRISTI AMERICANA OR THE ECCLESIASTICAL HISTORY OF NEW ENGLAND* 23-24 (Raymond J. Cunningham ed. (1970) (1702).

88. Matt Blitz, *The Oldest City in the United States*, SMITHSONIAN MAG. (Sept. 3, 2015), <https://www.smithsonianmag.com/travel/us-oldest-city-st-augustine-florida-180956434/>.

89. GRAGG, *supra* note 7, at 214-15.

90. *Native American History*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/Native-American-history>; see also *Native Americans and Colonization: the 16th and 17th Centuries*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/Native-Americans-and-colonization-the-16th-and-17th-centuries> ("From a Native American perspective, the initial intentions of Europeans were not always immediately clear. Some Indian communities were approached with respect and in turn greeted the odd-looking visitors as guests. For many indigenous nations, however, the first impressions of Europeans were characterized by violent acts including raiding, murder, rape, and kidnapping.").

91. GRAGG, *supra* note 7, at 215.

92. Richard Gunderman, *How Smallpox Devastated the Aztecs – and Helped Spain Conquer an American Civilization 500 Years Ago*, PBS (Feb. 23, 2019), <https://www.pbs.org/newshour/science/how-smallpox-devastated-the-aztecs-and-helped-spain-conquer-an-american-civilization-500-years-ago>.

93. *Id.*

of Spanish explorer Francisco Pizarro and his band of conquistadores in 1532 in the land that is now Peru.⁹⁴ One account described “the atrocities the Spaniards’ hateful hunt for gold had inflicted on the Indians of America.”⁹⁵

As Reformed Protestantism and its corresponding political concepts spread throughout Europe in the 1500s, people from Spain, France, and England began attempting to break away from those monarchies and colonize various parts of North America, but many of these initial efforts failed.⁹⁶ For example, colonists from Spain unsuccessfully endeavored to settle in the regions that would later become Georgia in 1526, Florida in 1528-1536 and 1559-1561, North Carolina in 1567-1568,⁹⁷ and Virginia in 1570-1571.⁹⁸ The French tried to settle in South Carolina in 1562-1563, Florida in 1564-1565,⁹⁹ and Maine in 1604-1605.¹⁰⁰ In 1585 and 1587-1590, English colonists unsuccessfully struggled to establish a settlement in North Carolina, now known as the “Lost Colony of Roanoke.”¹⁰¹ English settlers also attempted a failed colony in Maine in 1607-1608.¹⁰²

Many of the initial colonies failed in part due to starvation, disease, exposure to the elements, lack of sufficient resupplies from Europe, conflicts with the people who already inhabited the land, and slaughter by rival Europeans—reflecting the incessant violent conflicts between European nations across the Atlantic.¹⁰³

94. Liesl Clark, *The Lost Inca Empire*, PBS (Oct. 31, 2000), <https://www.pbs.org/wgbh/nova/article/lost-inca-empire/>.

95. PHILBRICK, *supra* note 42, at 6.

96. Nat’l Human. Ctr., *Reading Guide – Failed Colonies*, <http://nationalhumanities-center.org/pds/amerbegin/exploration/text6/text6read.htm> (last visited Feb. 21, 2020).

97. *The National Park Service and American Latino Heritage: The Spanish Claim to Florida, Georgia, and the Carolinas, 1513-1821*, NPS, https://www.nps.gov/nr/travel/american_latino_heritage/Spanish_Claim_to_Florida_Georgia_and_the_Carolinas.html (last visited Feb. 1, 2020).

98. Anthony Aveni, *Why Virginia Was Not Spanish*, HISTORY.ORG, <https://www.history.org/foundation/journal/spring13/spanish.cfm> (last visited Feb. 1, 2020).

99. Kenneth C. Davis, *America’s First True “Pilgrims”*, SMITHSONIAN MAG. (May 22, 2008), <https://www.smithsonianmag.com/history/americas-first-true-pilgrims-50229713/> (discussing Spanish slaughter of French soldiers).

100. *Saint Croix Island*, NAT. PARK SERV., <https://www.nps.gov/sacr/learn/historyculture/saint-croix-island-timeline.htm> (last visited Feb. 1, 2020); *Champlain and the Settlement of Acadia 1604-1607*, THE U. OF ME., <https://umaine.edu/canam/publications/st-croix/champlain-and-the-settlement-of-acadia-1604-1607/> (last visited Feb. 1, 2020).

101. CHENEY, *supra* note 41, at 26; *Roanoke Colony Deserted*, HISTORY.COM, <https://www.history.com/this-day-in-history/roanoke-colony-deserted> (last visited Feb. 1, 2020).

102. Evan Andrews, *The Lost Colony of Popham*, HISTORY.COM (May 12, 2017), <https://www.history.com/news/the-lost-colony-of-popham>.

103. Kenneth C. Davis, *America’s First True “Pilgrims”*, SMITHSONIAN MAG. (May 22, 2008), <https://www.smithsonianmag.com/history/americas-first-true-pilgrims-50229713/>; *see e.g.*, MATHER, *supra* note 87, at 23-24.

Despite the numerous failed attempts at settling the New World, Europeans from primarily Spain, France, and England kept trying to establish colonies, some of which became permanent settlements. As mentioned above, Bartholomew Columbus founded Santo Domingo in the Dominican Republic in 1496, which became the first permanent European settlement.¹⁰⁴ Europeans next established Veracruz, Mexico in 1519, which later relocated to its current site.¹⁰⁵ In 1521, colonists founded a settlement in San Juan, Puerto Rico,¹⁰⁶ and that same year other colonists established the first permanent settlement in South America on land that is now within Venezuela.¹⁰⁷ In 1565, Spanish colonists led by Pedro Menendez de Aviles and his fleet of galleons established the first permanent European settlement in the United States at St. Augustine in Florida.¹⁰⁸ As described in greater detail below, settlers from England established Jamestown in 1607 as the first permanent English colony in America.¹⁰⁹ The settlement of Santa Fe, in what is now New Mexico, was established in 1610.¹¹⁰

Some may find it surprising that the Pilgrims in Plymouth have secured such a prominent place in the American story, despite that fact that Jamestown was the first permanent English colony,¹¹¹ as mentioned above (and also despite the fact that St. Augustine was the very first permanent European settlement in the United States).¹¹² English colonists traveling aboard the *Susan Constant*, *Godspeed*, and *Discovery* established the Jamestown settlement in 1607.¹¹³ The settlers briefly abandoned the colony in 1610 after the

104. Editors of Encyclopedia Britannica, *Bartholomew Columbus*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/Bartholomew-Columbus>.

105. History.com Editors, *Veracruz*, HISTORY.COM (Dec. 8, 2009), <https://www.history.com/topics/mexico/Veracruz>.

106. History.com Editors, *Puerto Rico*, HISTORY.COM (Sept. 28, 2017), <https://www.history.com/topics/us-states/puerto-rico-history>.

107. Editors of Encyclopedia Britannica, *Cumaná*, BRITANNICA (July 20, 1998), <https://www.britannica.com/place/Cumana>.

108. Matt Blitz, *The Oldest City in the United States*, SMITHSONIAN MAG. (Sept. 3, 2015), <https://www.smithsonianmag.com/travel/us-oldest-city-st-augustine-florida-180956434/>.

109. Sarah J Stebbins, *A Short History of Jamestown*, NAT'L PARK SERV. (Apr. 2011), <https://www.nps.gov/jame/learn/historyculture/a-short-history-of-jamestown.htm>; History.com Editors, *Jamestown Colony*, HISTORY.COM (Mar. 8, 2010), <https://www.history.com/topics/colonial-america/Jamestown>.

110. Editors of Encyclopedia Britannica, *Santa Fe*, BRITANNICA (July 20, 1998), <https://www.britannica.com/place/Santa-Fe-New-Mexico>.

111. PHILBRICK, *supra* note 42, at 5.

112. Peter Feuerherd, *St. Augustine, the Real First European Settlement in America?*, JSTOR DAILY (Apr. 15, 2017), <https://daily.jstor.org/st-augustine-the-real-first-european-settlement-in-america/>; Matt Blitz, *The Oldest City in the United States*, SMITHSONIAN MAG. (Sept. 3, 2015), <https://www.smithsonianmag.com/travel/us-oldest-city-st-augustine-florida-180956434/>.

113. *What Happened to the Three Ships?*, NAT'L PARK SERV., <https://www.nps.gov/jame/learn/historyculture/what-happened-to-the-three-ships.htm> (last updated Feb. 26, 2015).

“starving time,”¹¹⁴ when some of the colonists even resorted to cannibalism to survive the food shortage due to an extended drought and conflict with the Powhatan Indian tribe.¹¹⁵ Re-supply ships arriving from England intercepted the fleeing colonists, who were persuaded to return to the Jamestown settlement. Under the Virginia Company Charters of 1606, 1609, and 1612, the colony was initially under control of the monarch, then under the control of the Virginia Company under a virtually absolute governor along with a council.¹¹⁶

Considering the advancements in democratic political and theological concepts that were sweeping through Europe throughout the 1500s and into the 1600s, unsurprisingly, the colonists in Jamestown, Virginia, eventually adopted some of those notions in developing the governance structure in their new colony. After the new supplies brought in 1610 helped stabilize the colony, the settlers adopted the “Articles, Laws, and Orders, Divine, Politic, and Martial for the Colony in Virginia—1610-1611”¹¹⁷ as a type of constitutional agreement. Then in 1619, the Jamestown colonists wrote and adopted the “Laws Enacted by the First General Assembly of Virginia—Aug. 2-4, 1619,”¹¹⁸ and “a representative House of Burgesses was created, elected by all male landowners [in the colony.]”¹¹⁹ The governor of the Virginia Company could veto its laws, yet these proclamations established a more egalitarian, independent, and participatory form of governance—establishing rights and duties of members of the community and proffering its fundamental values.¹²⁰

Yet in a stark turn away from equality, liberty, and human rights, the Jamestown settlers introduced slavery of people brought from Africa in

114. PHILBRICK, *supra* note 42, at 5.

115. GRAGG, *supra* note 7, at 100; *Jamestown Rediscovery: History*, HISTORIC JAMESTOWNE, <https://historicjamestowne.org/history/history-of-jamestown/the-starving-time/> (last visited Feb. 1, 2020).

116. Martinez, *supra* note 41, at 472.

117. Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 PUBLIUS: THE J. OF FEDERALISM 115, 129 (1980) [hereinafter Lutz, *From Covenant*].

118. *Id.* at 129.

119. Martinez, *supra* note 41, at 472.

120. Lutz, *From Covenant*, *supra* note 117, at 129.

1619,¹²¹ as memorialized in the events calling attention to the 400th anniversary of the introduction of slavery into the United States throughout 2019.¹²² Although the Jamestown events between 1607 and 1620 preceded the Mayflower Compact, Jamestown has largely been overshadowed by the historical significance within the United States that has transpired around the Pilgrim story.¹²³

As mentioned above, the early European explorers and settlers contributed numerous factors to the decimation of the indigenous population throughout the Americas in the 1500s, including disease, warfare, loss of homelands, enslavement, and societal disruption.¹²⁴ Tragically, by 1650, the entire indigenous population throughout the Americas was reduced to less than 6 million, in what is described as “possibly the greatest demographic disaster in the history of the world.”¹²⁵ Therefore, when the Pilgrims and the growing waves of European settlers began arriving in the 1600s, only a fraction of the original inhabitants remained.¹²⁶

121. *First Enslaved Africans Arrive in Jamestown, Setting the Stage for Slavery in North America*, HISTORY.COM, <https://www.history.com/this-day-in-history/first-african-slave-ship-arrives-jamestown-colony> (last visited Feb. 1, 2020); Olivia B. Waxman, *The First Africans in Virginia Landed in 1619. It Was a Turning Point for Slavery in American History—But Not the Beginning*, TIME (Aug. 20, 2019), <https://time.com/5653369/august-1619-jamestown-history/> (explaining Jamestown colony may not have been the first instance of slavery. “Juan Garrido became the first documented black person to arrive in what would become the U.S. when he accompanied Juan Ponce de León in search of the Fountain of Youth in 1513.”).

122. Gregory S. Schneider, *Virginia Marks the Dawn of American Slavery in 1619 with Solemn Speeches and Songs*, WASHINGTON POST (Aug. 24, 2019, 2:05 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-marks-the-dawn-of-american-slavery-in-1619-with-solemn-ceremonies-speeches-songs/2019/08/24/adbc84ae-c66f-11e9-9986-1fb3e4397be4_story.html.

123. See, e.g., LUTZ, *THE ORIGINS*, *supra* note 32, at 168 (“it is . . . reasonable to see the era of constitution writing from 1776 to 1787 as resting firmly upon developments in American that began in 1620,” referring throughout the book to the date of the Mayflower Compact).

124. Ker Than, *Massive Population Drop Found for Native Americans, DNA Shows*, NAT’L GEOGRAPHIC (Dec. 5, 2011), <https://news.nationalgeographic.com/news/2011/12/111205-native-americans-europeans-population-dna-genetics-science/>; see also MATHER, *supra* note 87, at 34 (describing the decimation of the Native American population in New England due to smallpox); GRAGG, *supra* note 7, at 216-17; *Native American History*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/Native-American-history>.

125. *The Native Population of the Americas in 1492*, U. OF WIS. PRESS, <https://uwpress.wisc.edu/books/0289.htm> (last updated Apr. 24, 2012) (description of the book).

126. For a disturbing justification, see MATHER, *supra* note 87, at 21 (“[T]he good hand of God now brought them to a country wonderfully prepared for their entertainment, by a sweeping mortality that had lately been among the natives.”).

III. THE PILGRIMS, THE MAYFLOWER COMPACT, AND PLYMOUTH COLONY

Although the highly celebrated Thanksgiving story is frequently retold throughout the United States, the actual history of the Pilgrims, the Mayflower Compact, and Plymouth Colony is somewhat less well-known.¹²⁷ This section first briefly recounts the journey of the Pilgrims from England to Holland between 1607 and 1619, who then travelled back to Plymouth, England and from there to the New World in 1620.¹²⁸ It then examines the events giving rise to the Mayflower Compact and analyzes the text of this document.¹²⁹ Finally, this section reviews the subsequent history of Plymouth Colony and its ultimate merger into the much larger and better-established Massachusetts Bay Colony in 1691.¹³⁰

A. THE JOURNEY OF THE PILGRIMS

As noted above, in the late 1500s and early 1600s, due to the evolution of progressive theological and political thought throughout Europe and England, people began questioning the absolute authority of the established church and wanted to develop their own methods of worship in line with their religious beliefs.¹³¹ The Puritans wanted to “purify” the practice of religion by eliminating anything that was not specifically mentioned in the Bible and “believed that the Church of England must be purged of its many excesses and abuses.”¹³² Some wanted to purify the Church of England, and therefore endeavored to remain a part of the established church but to change its character from within.¹³³ They would operate their congregations in accordance with their own beliefs, yet still maintain their ties to the established church.¹³⁴ Others—more specifically known as Separatists—wanted to separate entirely from the established church and create their own, entirely independent, congregations that had nothing to do with the Church of England.¹³⁵

127. PHILBRICK, *supra* note 42, at xi.

128. *See id.* at 3-34; *The Pilgrims in Holland*, PLIMOTH PLANTATION, <https://plimoth.org/pilgrims-holland> (last visited Feb. 1, 2020).

129. *See* PHILBRICK, *supra* note 42, at 35-47.

130. *See id.* at 48-358.

131. GRAGG, *supra* note 7, at 14-15; Richard Howland Maxwell, *Pilgrim and Puritan: A Delicate Distinction* 3 (Pilgrim Society Note, Ser. Two, 2003) (explaining the reason behind the title “Separatist” and noting Separatists wanted to separate from the Church of England. “Pilgrims in Plymouth were separatists; Puritans in Massachusetts Bay Colony were not.”).

132. PHILBRICK, *supra* note 42, at 4, 8-10; CHENEY, *supra* note 41, at 7-11; Maxwell, *supra* note 131, at 3.

133. Maxwell, *supra* note 131, at 3; CHENEY, *supra* note 41, at 7.

134. Maxwell, *supra* note 131, at 3; CHENEY, *supra* note 41, at 7.

135. PHILBRICK, *supra* note 42, at 4, 8-10; Maxwell, *supra* note 131, at 3; CHENEY, *supra* note 41, at 7-8.

Eventually, three main strands of puritanism emerged: those who followed the Presbyterian model of working through a national hierarchical church structure and mandating everyone in the country must follow their religion;¹³⁶ the Congregationalists, who believed each local church should be made up of members who covenant with each other to form a self-governing congregation, with no mandate that everyone in the community must belong;¹³⁷ and the Separatists, who wanted to withdraw entirely from the church instead of reform it from within and believed each church congregation should be self-governing.¹³⁸ Of course, since the Church of England was inextricably intertwined with the national government, as the monarch was also the head of the church, the Separatists' move to separate from the national church was "an act equivalent in the legal system of the time to high treason."¹³⁹

Although each of these strands held distinct approaches, many people today conflate them, frequently referring to all three of these groups indistinguishably as "Puritans."¹⁴⁰ Perhaps this conflagration has come about because all groups were similar in that they adopted more democratic religious beliefs and practices, which were founded upon mutual covenants between each member of their congregations.¹⁴¹ Therefore, the Puritans, as they are sometimes jointly labeled, were the forerunners of democracy, including republican (representative) forms of democracy.¹⁴²

Understandably, the established and hierarchical Church of England viewed all of these new congregations and beliefs as threats to its monopoly on religion, and therefore attempted to quash the upstart congregations.¹⁴³ In

136. Anastaplo, *supra* note 40, at 36-37.

137. Maxwell, *supra* note 131, at 3 (Congregationalists wanted the Church of England "to give each local congregation control over its own affairs.").

138. PHILBRICK, *supra* note 42, at 4, 8-10; Maxwell, *supra* note 131, at 3; GRAGG, *supra* note 7, at 36.

139. Anastaplo, *supra* note 40, at 37; GRAGG, *supra* note 7, at 25-29, 32-33.

140. Maxwell, *supra* note 131, at 3. In this article, although the text will normally refer to the Pilgrims using the more specific term "Separatists," the quotations in the text and footnotes may use the more generic term "Puritan" when referring to the Pilgrims.

141. Anastaplo, *supra* note 40, at 38 (They were "democratic in theory and organisation.").

142. Cooper, *supra* note 30, at 547 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 43 (1862) ("Puritanism, was not merely a religious doctrine, but it corresponded in many points with the most absolute democratic and republican theories."))..

143. Anastaplo, *supra* note 40, at 37 ("The great body of Puritans, whether they were working for a Presbyterian or a Congregational purification of England, were horrified by the Separatists. These endangered the cause by seeming to prove to the government that Puritanism was really what the government said it was—subversive, anarchical, disloyal So, the little band who eventually landed and suffered at Plymouth in 1620 are not quite representative. The large and well-organized body who settled Massachusetts Bay in 1630, though committed to the Congregational idea, stoutly maintained that they were not and never had been Separatists."); PHILBRICK, *supra* note 42, at 12-13; CHENEY, *supra* note 41, at 13-14.

England, since the monarch was the head of the church as well as the state, the church could claim that anyone espousing a belief contrary to the official religious precepts not only committed heresy against the church but also treason against the monarch, and therefore committed an illegal act.¹⁴⁴ Therefore, the established religious hierarchy was able to exert its authority in an attempt to quell any dissenting religious beliefs in England.¹⁴⁵ Both Queen Elizabeth I who ruled England from 1558 to 1603, as well as King James I who ruled between 1603 and his death in 1625, supported the crackdown by the Archbishop of Canterbury and other Anglican leaders against both Catholics and Puritans, especially Separatists.¹⁴⁶

A small band of people in Scrooby, near Nottinghamshire, England, had formed one of these new religious communities.¹⁴⁷ When harassment from the local clergy affiliated with the established state church became intolerable, members of this congregation determined to flee England in search of autonomy, freedom of religion, and freedom of association.¹⁴⁸ They established a new community first in Amsterdam, arriving between 1607 and 1608, then moved to Leiden in 1609.¹⁴⁹

The Dutch revolt against Spanish Catholic rule had, at least temporarily, provided a more tolerant environment for Protestants in the northern Dutch provinces of the Low Countries, in which the small English band could worship freely in accordance with its members' beliefs.¹⁵⁰ While in Leiden, with its university "as a center of European research and education" and "refugees who had fled from repression in other countries,"¹⁵¹ the Pilgrims had been exposed to a flurry of ideas concerning theology, the separation of church

144. PHILBRICK, *supra* note 42, at 4, 12-13; GRAGG, *supra* note 7, at 25-29.

145. PHILBRICK, *supra* note 42, at 4, 12-13; *see also* MATHER, *supra* note 87, at 19-20; CHENEY, *supra* note 41, at 13-14.

146. GRAGG, *supra* note 7, at 25-47, 64-68.

147. PHILBRICK, *supra* note 42, at 10; *The Pilgrims in Holland*, PLIMOTH PLANTATION, <https://plimoth.org/pilgrims-holland> (last visited Feb. 1, 2020); Thomas W. Perry, *New Plymouth and Old England: A Suggestion*, 18 THE WILLIAM AND MARY QUARTERLY 251, 252 (1961); CHENEY, *supra* note 41, at 15-16; GRAGG, *supra* note 7, at 53-54.

148. PHILBRICK, *supra* note 42, at 4, 12-16; Anastaplo, *supra* note 40, at 43 (They "cannot rest content with things of this world—and so they undertake pilgrimages."); MATHER, *supra* note 87, at 18-19; CHENEY, *supra* note 41, at 17-18.

149. MATHER, *supra* note 87, at 18-19; *see also* PHILBRICK, *supra* note 42, at 13-16; GRAGG, *supra* note 7, at 67-72, 76-82.

150. The Dutch Revolt of the primarily Reformed Protestant northern provinces of the Low Countries against Roman Catholic Spain took place between 1568 and 1648. After years of rebellion, the northern provinces enjoyed a period of relative independence and flourishing between 1609-1621. *See* CHENEY, *supra* note 41, at 15-18, 21-22; GRAGG, *supra* note 7, at 84. The Low Countries occupy the region now known as Belgium, the Netherlands, and Luxembourg (otherwise known as "Benelux"). *See* Editors of Encyclopedia Britannica, *Low Countries* (July 20, 1998), <https://www.britannica.com/place/Low-Countries>.

151. GRAGG, *supra* note 7, at 83.

and state, and other progressive ideas, such as evolving gender roles.¹⁵² As John Quincy Adams later described: “They had resided in a city, the seat of a university, where the polemical and political controversies of the time were pursued with uncommon fervor.”¹⁵³ Moreover, “[a]fter twelve years of banishment from the land of their first allegiance, during which they had been under an adoptive and temporary subjection to another sovereign, they must naturally have been led to reflect upon the relative rights and duties of allegiance and subjection.”¹⁵⁴

However, after several years of living, working, and worshiping in Leiden, the members of this tiny religious enclave realized they could face significant problems if they remained.¹⁵⁵ First, much like new immigrants to the United States today, as new immigrants in a foreign country who could not speak the local language, the members of the congregation could only find menial work, which included difficult labor and low wages, even though many of them had been relatively well-educated and well-established members of the community in England.¹⁵⁶ Second, they found that their children were integrating into the Dutch culture at a much faster pace than they had expected.¹⁵⁷ This was troublesome for the Pilgrims, as they wanted their children to remain truly English instead of assimilating into the Dutch culture.¹⁵⁸ Therefore, they wanted to remove and isolate their children within their own community, to keep them firmly rooted within their own religious beliefs and culture.¹⁵⁹ Third, they were concerned that the Catholic Spanish monarchy

152. PHILBRICK, *supra* note 42, at 40 (“[T]he Pilgrims recognized the dangers of mixing temporal and spiritual authority In Holland, they had enjoyed the benefits of a society in which the division between church and state had been, for the most part, rigorously maintained. They could not help but absorb some decidedly Dutch ways of looking at the world.”); GRAGG, *supra* note 7, at 85, 87-92.

153. John Quincy Adams, Oration Delivered at Plymouth at the Anniversary Commemoration of the First Landing of Our Ancestors at that Place 18 (Dec. 22, 1802) (printed by Russell and Cutler, 1802).

154. *Id.*

155. PHILBRICK, *supra* note 42, at 5; MATHER, *supra* note 87, at 19.

156. PHILBRICK, *supra* note 42, at 5, 17; MATHER, *supra* note 87, at 19; GRAGG, *supra* note 7, at 92-97. Notably, this situation reflects the circumstances of many immigrants to the United States, today.

157. PHILBRICK, *supra* note 42, at 5, 17; MATHER, *supra* note 87, at 19; CHENEY, *supra* note 41, at 22; GRAGG, *supra* note 7, at 87-97.

158. PHILBRICK, *supra* note 42, at 5, 17; MATHER, *supra* note 87, at 19; CHENEY, *supra* note 41, at 25-26; GRAGG, *supra* note 7, at 87-97.

159. PHILBRICK, *supra* note 42, at 17; MATHER, *supra* note 87, at 19; GRAGG, *supra* note 7, at 87-97.

might re-take the Low Country region, thus eliminating the religious tolerance they had been fortunate to experience.¹⁶⁰ If Catholic Spain retook Leiden, they feared their religious and political freedoms would disappear, and also feared for their lives.¹⁶¹

For these and other reasons, a part of the religious congregation decided to return to England and then to set out for the New World, where they could establish a settlement free from the obstacles that faced them in both Leiden and England.¹⁶² They had heard of the various attempts prior settlers from Europe had made to establish colonies in the New World, many of which were unsuccessful.¹⁶³ Yet their firm conviction in their faith made them certain they would triumph in doing so despite others' failures.¹⁶⁴ Therefore, they briefly returned to England to prepare for their voyage, upon obtaining backing from investors who would provide funding for the travel and provisions for the colony, in exchange for a certain expectation of goods sent back to England from the colony in the years hence.¹⁶⁵ They obtained a patent from the Virginia Company to establish a colony under its charter, as well as assent from the king that he would not harass them for their religious beliefs, as he wanted more English subjects to establish settlements in the New World for economic reasons.¹⁶⁶ Of course, they could not attempt to build a new settlement from scratch without bringing other people with needed skills, so they cobbled together a group of craftsmen, servants, and others to accompany them to the New World.¹⁶⁷ The religious members on the voyage referred to

160. PHILBRICK, *supra* note 42, at 6 (discussing the religious groups' concerns and the fact that shortly after the Pilgrims' departure, "what became known as the Thirty Years' War would rage across the Continent as Protestant and Catholic forces reduced much of Europe to a burning, corpse-strewn battleground."); CHENEY, *supra* note 41, at 22; GRAGG, *supra* note 7, at 98.

161. CHENEY, *supra* note 41, at 22, 25; GRAGG, *supra* note 7, at 98.

162. PHILBRICK, *supra* note 42, at 5-6, 17-18; MATHER, *supra* note 87, at 19-20; CHENEY, *supra* note 41, at 21-23.

163. PHILBRICK, *supra* note 42, at 5-7, 19-20; MATHER, *supra* note 87, at 19-20; CHENEY, *supra* note 41, at 35 (indicating that the Pilgrims had a book describing New England written by John Smith, who also spent time in Jamestown, so they knew of its beginnings); GRAGG, *supra* note 7, at 105, 145-150.

164. PHILBRICK, *supra* note 42, at 5-7; MATHER, *supra* note 87, at 19-20.

165. Anastaplo, *supra* note 40, at 51-52 (noting commercial enterprise of Plymouth Colony in its contracts with the Virginia Company and agreements to send goods back to England—like indentured servants—exchange of goods for passage to the New World.); PHILBRICK, *supra* note 42, at 5-7, 20-21.

166. CHENEY, *supra* note 41, at 18-19, 27-29; GRAGG, *supra* note 7, at 100-01 (discussing the Virginia Company's "royal charter to establish colonies in America"); *id.* at 104-05 (discussing the king's acquiescence of the settlement in America and the patent they received from the Virginia Company).

167. Lutz, *From Covenant*, *supra* note 117, at 116-17 ("Not all aboard the ship were Puritans, a fact which did not seem crucial when setting sail from England for chartered land in Virginia."); PHILBRICK, *supra* note 42, at 6-7, 20-29 (the religious members "were weavers, wool carders, tailors, shoemakers, and printers, with almost no relevant experience when it came to carving a settlement out of the American wilderness.").

themselves as the “Saints,”¹⁶⁸ whereas all the rest were known as the “Strangers.”¹⁶⁹ In fact, the people who voyaged on the Mayflower and settled Plymouth Colony were not commonly called “Pilgrims” until Daniel Webster used the term in a speech during the bicentennial celebration in 1820,¹⁷⁰ although Cotton Mather also used the term in his history of New England,¹⁷¹ and Governor William Bradford made one reference to their band as “pilgrims.”¹⁷²

B. THE MAYFLOWER COMPACT’S UNIFICATION OF THE SAINTS AND STRANGERS

The voyage onboard the Mayflower from England to the New World was extremely difficult, right from the beginning. The Saints and Strangers initially sailed on two ships, the Mayflower and the Speedwell, but the latter proved not to be seaworthy, at least according to its crew.¹⁷³ Following two false starts, whereupon both ships returned so the Speedwell could be repaired, upon the third failed attempt the Speedwell turned back alone, after eleven passengers had transferred to the Mayflower to continue the journey.¹⁷⁴ Of the 102 passengers,¹⁷⁵ (only about half of whom were Saints)¹⁷⁶ along with about 30 crew crowded aboard the Mayflower,¹⁷⁷ only one passenger died during the voyage along with one sailor, and one infant was born (Oceanus Hopkins).¹⁷⁸ However, the passage was devastating to the travelers,

168. PHILBRICK, *supra* note 42, at 9.

169. *Id.* at 22.

170. Anastaplo, *supra* note 40, at 34-35 (“These first settlers, initially referred to as the Old Comers and later as the Forefathers, did not become known as the Pilgrim Fathers until two centuries after their arrival. A responsive chord was struck with the discovery of a manuscript of Gov. William Bradford referring to the ‘saints’ who had left Holland as ‘pilgrims.’ At a commemorative bicentennial celebration in 1820, orator Daniel Webster used the phrase Pilgrim Fathers, and the term became common usage thereafter.”).

171. MATHER, *supra* note 87, at 23.

172. PHILBRICK, *supra* note 42, at 7; CHENEY, *supra* note 41, at 68; GRAGG, *supra* note 7, at 113-115.

173. MATHER, *supra* note 87, at 20; PHILBRICK, *supra* note 42, at 23-30; CHENEY, *supra* note 41, at 58-63.

174. MATHER, *supra* note 87, at 20; PHILBRICK, *supra* note 42, at 23-30; CHENEY, *supra* note 41, at 61-63; GRAGG, *supra* note 7, at 135-39.

175. PHILBRICK, *supra* note 42, at 3.

176. Numerical accounts vary. *See, e.g.*, PHILBRICK, *supra* note 42, at 29 (noting “[T]here were just 50 or so [congregation members] . . . only about half of the Mayflower’s 102 passengers.”); Editors Encyclopedia Britannica, *Pilgrim Gathers*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/Pilgrim-Fathers> (“Of the 102 colonists, 35 were members of the English Separatist Church (radical faction of Puritanism).”); CHENEY, *supra* note 41, at 69 (noting “[A]t least thirty-seven of them were. As many as sixty-four others were just looking for something that London didn’t offer. Bradford would refer to these people as ‘strangers.’”).

177. CHENEY, *supra* note 41, at 69 (“Twenty-five or thirty others—the number is unknown—were sailors.”).

178. PHILBRICK, *supra* note 42, at 4, 31; CHENEY, *supra* note 41, at 81, 86-87.

leaving many in ill health upon arrival in the New World.¹⁷⁹ Moreover, storms had blown the ship off-course, so they did not land at their original destination near the Hudson River, which at that time was part of the region known as Virginia under the patent of the Virginia Company, as they had permission to do under their charter from the king. Instead, on November 9, 1620, after traveling on the ocean for sixty-five days, they arrived significantly north, off the Cape Cod in what would later become Massachusetts.¹⁸⁰ Although they tried to sail south along the coast, they encountered such treacherous shoals and worsening weather that they decided to take shelter inside the cape and establish their settlement in a region to which they did not have a legal claim under the king's grant of authority.¹⁸¹

Aboard the Mayflower, the governor of the ship, Christopher Martin, held authority on behalf of the "Adventurers" who had funded the voyage.¹⁸² And although the Saints did not have a particular leader among them,¹⁸³ they were mutually bound together through their religious convictions.¹⁸⁴ However, as the voyagers came closer to leaving the ship and entering into the wilderness, some of the Strangers aboard the Mayflower—likely among them John Billington¹⁸⁵—began to speak in mutinous terms, claiming that no one would hold authority over them once they disembarked, because the king's charter held no legal weight since they landed in the wrong location.¹⁸⁶ Of

179. PHILBRICK, *supra* note 42, at 3.

180. Lutz, *From Covenant*, *supra* note 117, at 116-17 (They arrived "a great distance north of Virginia . . ."); MATHER, *supra* note 87, at 20-21; PHILBRICK, *supra* note 42, at 35; CHENEY, *supra* note 41, at 95-96; GRAGG, *supra* note 7, at 181-83.

181. Lutz, *From Covenant*, *supra* note 117, at 116-17 ("[T]he colonists found themselves in a situation where the charter was not effective."); MATHER, *supra* note 87, at 20-21; PHILBRICK, *supra* note 42, at 35-47; CHENEY, *supra* note 41, at 95-96; GRAGG, *supra* note 7, at 182-87.

182. PHILBRICK, *supra* note 42, at 25; GRAGG, *supra* note 7, at 130-31.

183. Perry, *supra* note 147, at 254-55 (discussing how they had no natural leader among them, and making matters even more difficult, among them were a majority of "strangers."); GRAGG, *supra* note 7, at 188-89.

184. PHILBRICK, *supra* note 42, at 40-42.

185. Albert Borowitz, *The Mayflower Murderer*, 29 LEGAL STUD. F. 597, 597 (2005) ("John Billington Sr. was . . . 'unquestionably one of those mixed up in the mutiny on the Mayflower,' which was resolved on November 11, 1620 by the adoption of the Mayflower Compact, under which the settlers bound themselves to submit to a civil body politic to be governed by just and equal laws. Billington was one of the signatories and thereby forswore the aim of the mutineers to break free of the Puritan leadership."); PHILBRICK, *supra* note 42, at 39 ("Some of the Strangers . . . made 'discontented and mutinous speeches,' insisting that 'when they came ashore they would use their own liberty, for none had power to command them.' It's likely that [these dissidents included] John Billington, who subsequently established a reputation as the colony's leading malcontent and rabble-rouser."); GRAGG, *supra* note 7, at 188-89.

186. Perry, *supra* note 147, at 255 (The Mayflower combination/compact came about because of mutinous tendencies of many of the strangers on board the ship, who threatened to go their own ways, because "none had power to command them," because the patent was for Virginia and they were going to land elsewhere.); Anastaplo, *supra* note 40, at 43-44 (Since the settlers had no legal authority, and several people aboard the Mayflower threatened to go off on their own and not remain with nor contribute to the colony nor submit to the authority of the colony, the leaders drew up the

course, the Saints and Strangers who wanted the colony to succeed knew that, without every person's skill and labor, the entire group was unlikely to survive the winter in what appeared to be a largely uninhabited region.¹⁸⁷ According to *Mourt's Relations*:

This day before we came to harbor, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement that we should combine together in one body, and to submit to such government and governors as we should by common consent agree to make and choose, and set our hands to this that follows word for word.¹⁸⁸

Thus came the impetus for the Mayflower Compact, which the more influential members drew up in order to quell the potential rebellion.¹⁸⁹ Therefore, through this agreement establishing governance for the settlers, the Pilgrims created a more egalitarian and more broadly inclusive political community to help support their spiritual endeavor to practice their religion as they saw fit.¹⁹⁰ Because they held no valid patent, and therefore were subject to no applicable law, they needed the Mayflower Compact to create the validity of their governance authority and to establish the rule of law reflecting the diversity within their community.¹⁹¹ This "Pilgrim Covenant" has been dubbed "the first constitution in America."¹⁹² This historian continues,

Mayflower Compact to subdue this mutiny.); MATHER, *supra* note 87, at 21; PHILBRICK, *supra* note 42, at 39; GRAGG, *supra* note 7, at 188-89.

187. PHILBRICK, *supra* note 42, at 40, 42.

188. MOURT'S RELATION: A JOURNAL OF THE PILGRIMS AT PLYMOUTH 17 (Dwight B. Heath ed., Applewood Books (1963) (1622) [hereinafter MOURT'S RELATION]; CHENEY, *supra* note 41, at 99-100.

189. Anastaplo, *supra* note 40, at 44 ("[T]he misuse by others of political power had jeopardized the Pilgrims' spiritual efforts; and besides, there was an immediate need for law and order—and so they entered into an arrangement which has its own requirements and 'dynamic.'"); PHILBRICK, *supra* note 42, at 40-41; CHENEY, *supra* note 41, at 99-100.

190. PHILBRICK, *supra* note 42, at 40-42; Anastaplo, *supra* note 40, at 40 (quoting WINSTON CHURCHILL, HISTORY OF THE ENGLISH-SPEAKING PEOPLES II, 130-32 (1963)) ("Before they landed there was trouble among the group about who was to enforce discipline. Those who had joined the ship at Plymouth were no picked band of saints, and had no intention of submitting to the Leyden set. There was no possibility of appealing to England. Yet, if they were not all to starve, some agreement must be reached. Forty-one of the more responsible members thereupon drew up a solemn compact which is one of the remarkable documents in history, a spontaneous covenant for political organization."). Note: The English spelling of Leiden is Leyden. Editors of Encyclopedia Britannica, *Leiden*, BRITANNICA (July 20, 1998), <https://www.britannica.com/place/Leiden>.

191. PHILBRICK, *supra* note 42, at 40-42; Lutz, *From Covenant*, *supra* note 117, at 116-17 ("Worse, the Puritans found themselves in the company of people not bound by the religious covenant which defined them as a people, and no longer restrained by a charter. The Puritan leaders wrote up this agreement to bind the non-Puritans to their community, and also to create the basis for political obligation until a new charter could be had."); BRECKINRIDGE LONG, GENESIS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 6-7 (The Macmillan Company 1926).

192. LONG, *supra* note 191, at 4.

“Their constitution was the foundation stone of democracy in America. At once it was a declaration of independence, except as to the Crown itself, and a constitution of democracy . . . it is from the seed as thus originally sown that the great protecting tree of our federal constitution has grown.”¹⁹³

Therefore, as they prepared to traverse into the New World beyond the confines of everything they had previously known, they entered into a mutual covenant to be bound to each other through a civil government, to establish equal and just laws, and to abide by those laws, for the general good of the whole.¹⁹⁴ In doing so, they followed along the path established by the Reformation and the progressive religious and political notions of people compacting or covenanting among themselves to establish a new system of governance for their fledgling society.¹⁹⁵ This agreement, signed by the 41 adult males¹⁹⁶ who were in sufficient health to do so,¹⁹⁷ demonstrated a quintessential step toward establishing a democratic form of government.¹⁹⁸ The men signed the document on behalf of all members of the community, who were all intended to be bound by its duties and to profit from its benefits.¹⁹⁹ The members of the community entered into this pact based upon principles that were understood to apply universally, such as the formation of a “just and equal” governmental system.²⁰⁰ Of course, women were not permitted to

193. *Id.* at 5.

194. Cooper, *supra* note 30, at 545-47 n. 140 (“The evidence is overwhelming that the covenant principle translated into the larger political realm as part of the development of modern popular government produced the idea of federalism.”); PHILBRICK, *supra* note 42, at 9 (describing the Puritans’ concept of covenant).

195. Cooper, *supra* note 30, at 547 (“In the Mayflower Compact, the settlers followed the British practice of religious banding, or covenanting together, in order to create their community.”); *Id.* at 548 n. 150 (quoting Martinez, *supra* note 41, at 467) (“The Puritans brought to North America their familiarity with pacts or religious alliances as instruments to build communities.”); GRAGG, *supra* note 7, at 190.

196. PHILBRICK, *supra* note 42, at 43; Edward Channing, *An Historical Retrospect*, 26 THE AM. HIST. REV. 191, 191-202 (1921) (The Mayflower Compact was signed only by men.).

197. PHILBRICK, *supra* note 42, at 43 (“Only nine adult males did not sign the compact—some had been hired as seamen for only a year, while others were probably too sick to put pen to paper.”); Anastaplo, *supra* note 40, at 48 (The signatures include all “responsible” male passengers except one Pilgrim who was dying.).

198. Elazar, *supra* note 5, at 13 (“Frontiersmen generally—that is to say, people who have gone out to settle new areas where there were new established patterns of governance in which to fit and who, therefore, have had to compact with one another to created governing institutions—are to be found among the most active covenanters.”); GRAGG, *supra* note 7, at 191 (“It was an extraordinary act of democratic self-government: a tiny band of colonists in wilderness America had drafted and enacted a governing document for their colony.”).

199. GRAGG, *supra* note 7, at 191.

200. Cooper, *supra* note 30, at 548 (quoting Vincent Ostrom, *Religion and the Constitution of the American Political System*, 39 EMORY L.J. 165, 171-172 (1990)) (“Hence, the concept of a covenantal relationship provides a key to an understanding of democracy in America People covenant with God and with one another to constitute civil bodies politic based upon principles that are presumed to have universal application.”).

sign the document,²⁰¹ nor was that thought likely even entertained, except perhaps silently by some of the more reflective and enlightened among them. But it was a step toward democracy nonetheless, and quite radical for its time, as it included adult males regardless of their station in life in a document establishing an agreement to civil and political governance of their community.

C. THE MAYFLOWER COMPACT: WHAT IT DID AND DID NOT DO

Although the original document has been lost, the earliest surviving text of the Mayflower Compact was transcribed in *Mourt's Relation: A Journal of the Pilgrims at Plymouth*,²⁰² a pamphlet providing an account of the settlers' first thirteen months in the colony, said to have been written by Edward Winslow and William Bradford among other settlers.²⁰³ Bradford, the long-standing governor of the colony, included the version quoted at the beginning of this article in his book, *Of Plymouth Plantation 1620-1647*.²⁰⁴ The components of the Mayflower Compact provide a glimpse into the elements of governance thought to be the most important in establishing the cohesion necessary to bind diverse members of the group into a community working together toward their survival through the first winter and ultimately the success of the colony.²⁰⁵ For the convenience of the reader, the text is reprinted below, and then the significant clauses will be examined:

In the Name of God, Amen.

We whose names are underwritten, the loyal subjects of our dread Sovereign Lord King James, by the Grace of God of Great Britain, France, and Ireland King, Defender of the Faith, etc.

Having undertaken, for the Glory of God and advancement of the Christian Faith and Honour of our King and Country, a Voyage to plant the First Colony in Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of

201. PHILBRICK, *supra* note 42, at 43; CHENEY, *supra* note 41, at 100.

202. "The original document has disappeared, so this may be regarded as the most authentic text of the Compact. It was first printed in *Mourt's Relation* (1622) and that text differs from this only by the dropping of an occasional *the*, *and* and *at*." BRADFORD, *supra* note 1, at 83 n. 2. In this version of Bradford's manuscript, "Contractions and abbreviations in the manuscript were extended, and capitalization, punctuation, and spelling are regularized." *Id.* at xxv; *see also* MOURT'S RELATION, *supra* note 188.

203. PHILBRICK, *supra* note 42, at 126; CHENEY, *supra* note 41, at 77-80; GRAGG, *supra* note 7, at 192.

204. BRADFORD, *supra* note 1, at 83; CHENEY, *supra* note 41, at 80.

205. Lutz, *From Covenant*, *supra* note 117, at 116-17 ("This is obviously an agreement to create a government, but it is also, we know from history, an agreement to create a people."); Anastaplo, *supra* note 40, at 50-51 ("they had to stick together if they were to survive," and lists numerous other inducements for the Strangers to sign the Mayflower Compact.).

another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names at Cape Cod, the 11th of November, in the year of the reign of our Sovereign Lord King James, of England, France, and Ireland the eighteenth, and of Scotland the fifty-fourth. Anno Domini 1620.

[Signatures of 41 adult males]²⁰⁶

The preamble phrase indicating that the settlers agreed to the Mayflower Compact “*In the Name of God, Amen,*” and the testament that they signed it “*solemnly and mutually in the presence of God,*” reflect the fact at the time that church and state were not separate in Great Britain (which remains the case today).²⁰⁷ Therefore, documents of political significance would also invoke the deity, and documents of religious significance would also invoke the monarchy. These phrases also bring a religious solemnity to the document and grant a weighty sense of authority to the colonial leaders who would claim to wield power under it, since the community agreed to the document in the name of God as well as in their own names.²⁰⁸

The next sentence proclaims that those signing the document remain “*loyal subjects*” of King James, and the following sentence emphasizes that the settlers were establishing the new colony in part “*for the . . . Honour of*

206. Anastaplo, *supra* note 40, at 48-49 (Bradford did not name the signers in his book; the names had been pieced together subsequently.); see also Sarah Pruitt, *How the Mayflower Compact Laid a Foundation for American Democracy*, HISTORY.COM (Aug. 5, 2019), <https://www.history.com/news/mayflower-compact-colonial-america-plymouth> (among the 41 men who signed the Mayflower Compact were two indentured servants.).

207. BRADFORD, *supra* note 1, at 83-84; see also *The Queen, the Church and Other Faiths*, THE ROYAL FAM., <https://www.royal.uk/queens-relationship-churches-england-and-scotland-and-other-faiths> (last visited Feb. 2, 2020) (“These titles date back to the reign of King Henry VIII, who was initially granted the title ‘Defender of the Faith’ in 1521 by Pope Leo X. When Henry VIII renounced the spiritual authority of the Papacy in 1534 he was proclaimed ‘supreme head on earth’ of the Church of England. This was repealed by Queen Mary I but reinstated during the reign of Queen Elizabeth I, who was proclaimed ‘Supreme Governor’ of the Church of England. The [current] Queen’s relationship with the Church of England was symbolised [sic] at the Coronation in 1953 when Her Majesty was anointed by the Archbishop of Canterbury and took an oath to ‘maintain and preserve inviolably the settlement of the Church of England, and the doctrine worship, discipline, and government thereof, as by law established in England’.”).

208. Anastaplo, *supra* note 40, at 41-42 (“The promises they have made with one another, and in the presence of God, are thereby reinforced” by the references to God in the Mayflower Compact.).

our King and Country.”²⁰⁹ Here they proclaim deference to the sovereignty of their king—not a declaration of independence from Great Britain.²¹⁰ The Mayflower Compact did not mention any differences with King James or with the Church of England.²¹¹ The Saints were not entirely dismissive of England; they remained loyal to England through Holland and in New World,²¹² “still proudly, even defiantly, English.”²¹³ Indeed, the colonists were not attempting to effect a complete break from England, but still strongly thought of themselves as English subjects with all the rights and privileges emanating from that status.²¹⁴ The preeminence and imperial standing of Great Britain as a predominant world power throughout the recent Elizabethan era, sometimes referred to as England’s golden age (1558-1603, during the reign of Queen Elizabeth I), evoked great pride in English subjects, which likely also influenced the pride the travelers aboard the Mayflower also had in their country of origin.²¹⁵ Although the Saints detested the established church as operating in opposition to God’s wishes, and as the instrument of their persecution, they did not openly speak against the government or monarch.²¹⁶

The Saints had primarily suffered from persecution by their Anglican neighbors.²¹⁷ They would also need to rely on resupply ships from England to survive and thrive.²¹⁸ Their very lives depended upon maintaining their ties with Great Britain by virtue of the supply ships that were expected to continue to travel back and forth between the colony and England, bringing

209. BRADFORD, *supra* note 1, at 83-84; *see also* Perry, *supra* note 147, at 252 (“Though radical in religion, they remained loyal and conservative in their outlook This attitude of the Pilgrims toward the English state, as distinguished from the English Church, is not sufficiently appreciated.”).

210. Perry, *supra* note 147, at 255 (explaining the Mayflower Compact is neither a Declaration of Independence (as they declared loyalty to the King), nor a Constitution (which establish the structures of government); *see also* Anastaplo, *supra* note 40, at 42-43 (stating the Pilgrims “reaffirm that they are ‘loyall subjects.’ Just as they have good cause to worry about James, so James has good cause to worry about them: the need to reassure one’s sovereign of one’s loyalty may be particularly acute if one not only holds to a different faith but also first goes East and then West to save that faith from political interference.”).

211. Anastaplo, *supra* note 40, at 49-50.

212. Perry, *supra* note 147, at 252.

213. PHILBRICK, *supra* note 42, at 5.

214. Perry, *supra* note 147, at 252.

215. *Id.* (“[T]hey were post-Elizabethan Englishmen, and it would have been entirely unlike men of that proud age to forget their newly achieved national eminence and prestige. Perhaps the best specific evidence for this is the inclusion of ‘the honour of our King and country’ among the reasons for their voyage as given in the Mayflower Compact.”).

216. *Id.*

217. *Id.* at 257.

218. GRAGG, *supra* note 7, at 276 (The visit from the *Fortune* in 1621 was “the first of many ships to follow. They would bring new colonists to Plymouth and ferry goods back and forth to England.”).

necessary goods to the settlers and returning with the cargo from the New World that would repay the debt of their initial voyage.²¹⁹ Moreover, invoking the authority of King James would help subdue the rebellious Strangers who threatened to leave the colony and imperil its survival.²²⁰ Finally, it would provide the semblance of authority to the government of Plymouth Colony, whose very existence was perpetually in doubt due to its settlement in an area not within its original patent, the dubious validity of the patent they were able to obtain from the Plymouth Company's New England Council in 1630, and the fact that they were never able to obtain an official royal charter from the royal crown.²²¹

The word "*dread*" in conjunction with "*Sovereign Lord King James*" was simply a term of honor at the time; it did not signify that they feared the king in the way the term is used today.²²² Likewise, the designation "*Defender of the Faith*" was a title given to reigning monarchs beginning in 1521 with King Henry VIII, as described previously. Therefore, the authors of the Mayflower Compact did not intend to signify that they agreed with nor adhered to the Church of England by using this phrase—indeed, the main purpose of their flight from Great Britain was to separate from the Church of England.²²³ They simply intended to maintain all the headings to which King James was entitled, to endow their invoking of his name with the full weight of his authority, and thus reflect that authority back onto the leaders of the new colony. Additionally, since the Strangers were not members of the Separatist congregation, bringing the clout of the Church of England into the document made sense in order to persuade the Strangers to accept and abide by the document under the authority of their own religion.²²⁴

219. Paul Lermack, *The Constitution is the Social Contract So It Must Be a Contract... Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1414 (2007) (although in the Mayflower Compact they say they remain loyal to the king, this was a practical necessity because they needed continued supplies shipped from England. However, their actions leaving England and establishing their own government demonstrate that they no longer wish to remain subjects of the king's authority and control).

220. Perry, *supra* note 147, at 255 ("What the Compact was, rather, was a temporary political expedient, intended by the Pilgrim leaders to silence the mutinous 'strangers' who had so embarrassingly called attention to their lack of patent authority. The use of the royal style in the Compact was a significant part of this design: the references to King James were meant, not to deceive people in England (as is sometimes argued), but rather to heighten the solemnity of the document and the occasion, and, more specifically, to gull the mutineers into believing that somehow the King's majesty and power stood behind the Pilgrim leaders who had just exacted this weighty pledge of obedience from them.").

221. LONG, *supra* note 191, at 6-7.

222. *Dread*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dread> (last visited Feb. 21, 2020) ("archaic: to regard with awe").

223. Anastaplo, *supra* note 40, at 42-43 ("Certainly, the faith that James is now 'defender of' . . . is hardly that to which the Pilgrims subscribe.").

224. Anastaplo, *supra* note 40, at 49-51.

Indeed, the authors of the Mayflower Compact acknowledged that the primary reason for their decision to settle in the New World was “*for the Glory of God and advancement of the Christian Faith.*” Note that here they used the more general term “Christian Faith,” and nowhere in the document did they specifically mention the Church of England or Separatism. Their use of the broader term was undoubtedly intentional, as it would encompass both the Strangers who adhered to the Church of England as well as the Separatists.²²⁵ Also, the Strangers likely would not have signed the Mayflower Compact with language enforcing the Saints’ version of religion. And perhaps they all wanted King James and others in England to continue to support them, and any reference to separatism may have jeopardized that relationship, so best leave any specific mention of religion or religious liberty unsaid.²²⁶ Interestingly, the word “advancement” could cleverly have signified the Separatists’ intention to change the practice of Christianity in a direction they deemed to be superior (i.e., to “advance” the way in which Christianity was being practiced, away from the mode of the Church of England and toward a purer method of adhering to Christian tenets, according to their beliefs). As might be expected, since everyone on board the Mayflower had grown up surrounded by the Christian faith through the pervasiveness of the Church of England, the Mayflower Compact’s stated purpose of advancing Christianity implicitly excluded other religions, as well as other belief systems such as humanism, deism, and atheism. Although the Pilgrims have subsequently been lauded as champions of religious freedom, the Mayflower Compact makes no mention of religious liberty.²²⁷ Religious liberty and freedom of worship would have meant that people of other faiths might claim that freedom as well. This the Pilgrims likely did not want to grant.

Understandably, the authors skirted around the fact that they were settling in a region that was not within the patent that had been granted by the king, acknowledging they were “*to plant the First Colony in Northern Parts of Virginia.*”²²⁸ Again, at that time, the region known as Virginia extended all the way up into the bay where Hudson River releases into the Atlantic

225. *Id.* at 63 (“In their references to the Deity, it seems, the Pilgrims were obliged, in order to bind the Strangers thereby, to ‘generalize’ Him. They could not rely simply on their interpretation, but on a wider, yet still Christian, view.”).

226. *Id.* at 49-50 (“It would have done the authors of the Mayflower Compact no good to have mentioned the differences they had with James I and with the Government of England with respect both to the Christian Faith and to the understanding of God relied upon in the instrument.”).

227. *Id.* at 53 (“The Pilgrims were silent as well in the Compact about that religious liberty of which so much is made (as a Mayflower contribution) by their successors.”).

228. Lutz, *From Covenant*, *supra* note 117, at 116-17 (“However, arriving a great distance north of Virginia, the colonists found themselves in a situation where the charter was not effective.”); CHENEY, *supra* note 41, at 95-96.

Ocean, now New York City and its surroundings—where they had permission to settle under the authority of the Virginia Company, as well as beyond up into Maine, the northern regions of which were to be controlled by the Plymouth Company.²²⁹ Instead of landing near the Hudson River under their patent from the Virginia Company as planned, storms had blown their ship farther north during the journey.²³⁰ They clearly understood they were signing the document “*at Cape Cod*,” so perhaps they intended to tie their original patent into their newfound circumstances in an attempt to bring legitimacy to their claim over the land on which they ultimately settled near Cape Cod.²³¹ Another theory postulates that the Pilgrims may have intentionally decided not to travel to Virginia and instead to settle outside of the region delineated in their official charter, so they would be outside of the control of the Virginia Company charter and truly be independent of all outside forces, barring the king.²³²

The crux of the Mayflower Compact was to establish a common agreement among all the people in the colony, “*mutually*” and “*in the presence of one another*,” to “*Covenant and Combine ourselves together into a Civil Body Politic*.” This is the beginning of a democratic form of governance established by the people and for the people under the principle of majority rule.²³³ It is a foundational document—not a set of specific rules, but a charter creating the polity (the public relationships among the members of that community) and the government to institute and maintain order in that society. They agreed to “*Covenant*” with each other—to enter into a formal and fundamentally sacred reciprocal promise with every other member of the community.²³⁴ This form of agreement reflected the earnest solemnity of the covenant theological system and the covenant political system with which most

229. CHENEY, *supra* note 41, at 95-97; BRECKINRIDGE LONG, GENESIS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 2-3 (1926).

230. CHENEY, *supra* note 41, at 95-96.

231. BRADFORD, *supra* note 1, at 84; *see also* LONG, *supra* note 191, at 2-3.

232. Martinez, *supra* note 41, at 472 (“The Puritan Pilgrims from the Mayflower decided in November of 1620 to establish themselves outside of the Virginia Company and build the Plymouth Colony. As they did not have a Charter to give them any juridical-political cover, they signed the Mayflower Compact, a genuine example of a social contract. These Pilgrims then created a legislative Assembly (General Court) and chose a Governor and a Council. When they became totally independent from their English promoters, the political organization of the colony approximated a democracy.”); *see also* CHENEY, *supra* note 41, at 95-99; PHILBRICK, *supra* note 42, at 35-36; LONG, *supra* note 191, at 3.

233. Channing, *supra* note 196, at 191 (They “agreed for the immediate future to obey any orders that should be adopted by the majority of those who signed this compact.”).

234. Martinez, *supra* note 41, at 460 n. 7 (“According to Pound, one of the Puritans’ fundamental propositions was that man is an active free being with the power to choose what he has to do, and with responsibilities coming down from such a power. Individual conscience was paramount in this belief, and no authority could constrain it. Applied to ecclesiastical politics, this leads to a regime of ‘association but not subordination.’ . . . Such an ecclesiastical organization was based on

of them were probably accustomed. The Separatists utilized covenants in their religious beliefs and practices, as mentioned previously. And likely many of the Strangers were familiar with covenants through the evolving intellectual debates spreading through Europe during that timeframe, due to the Reformation and related evolution in thought about religion, government, and society.²³⁵ Not only did they make a formal promise to each other through the “*Covenant*,” but they also pledged themselves to “*Combine*” with each other—to work together as one unit for the common good of all members of the diverse community, both Saints and Strangers.²³⁶ In fact, the Mayflower Compact was not so designated until 1793—it was originally called the Plymouth Combination, reflecting the coming together of all individual members into one cohesive, collective, egalitarian unit.²³⁷

The Mayflower Compact does not contain all the elements of a written constitution, such as fleshing out the form in which the new government will take shape.²³⁸ However, it forms the basis for such a government through their agreement “*to enact, constitute and frame such just and equal Laws,*

a type of contract. If men were free to act according to their conscience, and to contract among themselves to form congregations, it was a necessary conclusion that the state (as a political congregation) would be also based on a kind of contract. The early history of New England offers numerous applications to the idea that the covenant or compact (whose first antecedent was the covenant between God and Abraham and his descendants) constitutes the authentic foundation of all communities, both religious and political.”).

235. Elazar, *supra* note 5, at 4 (“during the sixteenth and seventeenth centuries, the Scots and the English Puritans not only conceived of civil society in covenantal terms, but actually wrote national covenants to which loyal members of the body politic subscribed. Similar covenants were used in the founding of many of the original colonies in British North America.”).

236. BRADFORD, *supra* note 1, at 84; *see also* Daniel F. Piar, *Keepers of the New Covenant: The Puritan Legacy in American Constitutional Law*, 49 J. CATH. LEGAL STUD. 143, 176-77 (2010) (“Like the church covenant, the hallmarks of the civil covenant were consent of the members to be bound and their mutual obligation thereafter. These elements are illustrated by perhaps the most famous example of a Puritan civil covenant, the Mayflower Compact The notion of consent to be bound appears in the colonists’ pledge to ‘combine ourselves,’ instead of being forced to combine by others. The mutual obligation that flows from this consent is seen in the promise of ‘all due submission and obedience’ to the ‘generall good’ of the new colony. These principles are repeated elsewhere in the Puritan literature.”).

237. Lutz, *From Covenant*, *supra* note 117, at 106 (“The term [compact] is not used in any of the titles for colonial documents. The Mayflower Compact was actually not so named until 1793, and was known by the citizens of Plymouth as the ‘Plymouth combination,’ or the ‘agreement between the settlers at New Plymouth.’”); *id.* at 107 (The terms “covenant, compact, contract . . . organic act, . . . charter, constitution, patent, agreement, frame, combination, ordinance, and fundamentals” had slightly different and nuanced meanings, but they had also been used inconsistently and interchangeably, both in colonial times and subsequently.); John Witte, Jr., *How To Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, n. 25 (1990) (discussing “The Agreement Between the Settlers of New Plymouth” (1620) (after 1793 called The Mayflower Compact)).

238. Perry, *supra* note 147, at 255 (The Mayflower Compact is neither a Declaration of Independence (as they declared loyalty to the King) nor a Constitution (which establish the structures of government)).

Ordinances, Acts, Constitutions and Offices, from time to time.”²³⁹ Thus, the Mayflower Compact was in effect a pre-constitutional agreement, as it expressly envisions that the members of the civil society will jointly create “*Constitutions and Offices.*”²⁴⁰ In other words, their community will together decide upon and implement the form of government that will govern their society through the “*Laws, Ordinances, [and] Acts*” legislated by that government.²⁴¹

The phrase “*from time to time*” modifies not only the “*Laws, Ordinances, [and] Acts*”—meaning the people can change them as justified by changing circumstances over time—but also modifies the “*Constitutions and Offices*” ordering the government—meaning the people can change the very structure of government as similarly justified by changing circumstances over time.²⁴² This engrained flexibility is prescient of what some scholars have called the living Constitution, noting that the framers of our nation intentionally crafted the U.S. Constitution in a skeletal and adaptable manner, so it would naturally modernize to reflect the advancements of the United States as its society continues to embrace broader conceptions of civil rights, as exemplified by successes in achieving greater equality for women, people of color, members practicing diverse religious faiths, and so on.²⁴³ Of course, Great Britain did not have (nor does it yet have) a written constitution, so the drafters of the

239. BRADFORD, *supra* note 1, at 84; *see also* Lutz, *From Covenant*, *supra* note 117, at 120 (“There is a very sensible reason underlying the two different linguistic patterns. If a legislature is writing the document, then the people and government are already in existence and there is little sense in compacting or covenanting if it has already been done. Rather, one is interested in framing and constituting laws and ordinances. We can distinguish, then, compacts from non-compacts on the basis of the operative words they use. This pattern of word usage remains consistent between 1620 and 1776.”).

240. BRADFORD, *supra* note 1, at 84; *see also* Lutz, *From Covenant*, *supra* note 117, at 216-17 (“A careful examination of the Plymouth Combination (Mayflower Compact, 1620) illustrates the early presence of . . . constitutional elements.”).

241. BRADFORD, *supra* note 1, at 84; *see also* Elazar, *supra* note 5, at 22 (“A classic covenant, it explicitly created a community and the basis for its subsequent constitutional development.”).

242. BRADFORD, *supra* note 1, at 84; *see also* Anastaplo, *supra* note 40, at 48 (“amendments are provided for; changes may be made ‘from time to time’”).

243. For example, *see generally*, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009). *See also* JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789* 172 (2015) (“In the long run—and this was probably Madison’s most creative insight—the multiple ambiguities embedded in the Constitution made it an inherently ‘living’ document. For it was designed not to offer clear answers to the sovereignty question (or, for that matter, to the scope of executive or judicial authority) but instead to provide a political arena in which arguments about those contested issues could continue in a deliberative fashion. The Constitution was intended less to resolve arguments than to make argument itself the solution. For judicial devotees of ‘originalism’ or ‘original intent,’ this should be a disarming insight, since it made the Constitution the foundation for an ever-shifting political dialogue that, like history itself, was an argument without end. Madison’s ‘original intention’ was to make all ‘original intentions’ indefinitely negotiable in the future.”).

Mayflower Compact would not necessarily have conceived of a singular written document ordering the governmental structure—hence their reference to “*Constitutions*” as a plural term.²⁴⁴ However, the Pilgrims did believe in the preeminence of the Bible as the written document providing the structure for their Christian faith and practices, so calling for adherence to a written document to provide structure for their civil ordering and practices would have been a natural concept for them to adopt.

Significantly, all of the “*Laws, Ordinances, Acts, Constitutions and Offices*” must be “*just and equal*” in order to be valid under the Mayflower Compact. They were also intended “*for our better ordering and preservation*” of each of the signers, who represented all of the diverse members of the community. In addition, only those edicts that “*shall be thought most meet and convenient for the general good of the Colony*” were to be adopted. Each of these phrases point to a relatively democratically minded group of people who agreed that the government must promote justice and adhere to principles of equality.²⁴⁵ They adopted a republican (i.e., representative) approach, in the sense that the adult men who signed the document did so not only on behalf of themselves, and on behalf the women, children, non-freemen, and sick aboard the Mayflower, but also on behalf of all members of Plymouth Colony who joined the settlement after the Mayflower Compact had been originally signed.²⁴⁶

Indeed, the leaders of the community continued to refer to their authority under the Mayflower Compact for years to come, even after the original signers were far outnumbered by the “newcomers” to the settlement, as well as the progeny born to the original settlers in the New World.²⁴⁷ It is unclear whether the signers conscientiously thought of themselves as representatives of the interests of those who did not sign the document—but it was clear that they thought of themselves as representatives of the others with respect to their obligations under the compact and their duties to support the document and ensuing government for the good of the colony as a whole.²⁴⁸

244. Robert Blackburn, *Britain's Unwritten Constitution* (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution>.

245. Anastaplo, *supra* note 40, at 48 (“every qualified person seems to be entitled (if not obligated) to participate to some extent in the decisions made by the community”).

246. *Id.* at 58 (“once the community began to govern itself, subsequent settlers were not required to sign the Charter,” referring to the Mayflower Compact).

247. *Id.* (“once the community began to govern itself, subsequent settlers were not required to sign the Charter,” referring to the Mayflower Compact); *id.* at 55 (“the Compact seems to have been of considerable use in the early decades of Plymouth Colony, but it was superseded when that colony was absorbed in 1692 by the much larger Massachusetts Bay Colony.”).

248. *Id.* at 47 (“the fifth part of the Compact . . . deals with the immediate consequences of the establishment of a civil body politic: the community is empowered to legislate; and each signer, nay each inhabitant, is obliged to obey.”).

Despite these steps toward equality, in addition to gender inequality manifest in the Plymouth Colony, other materializations of inequalities similarly remained, as did the strictures of their religious tenets and the English laws they brought with them.²⁴⁹ However, the Compact makes no mention of any dissention within the ranks of the settlers or signers.²⁵⁰ Perhaps the reference to “just and equal” laws and to the “general good” of the whole were concessions to induce the people who were not among the religious congregation to sign the document.²⁵¹ These phrases could also have been intended as a check on their superior authorities back in England, as a reminder to the crown that the inhabitants of the new colony should be treated justly and equally, and even further, may have been a refutation of the hereditary stations imposed by society in the old country.²⁵²

Finally, the signers agreed to “*promise all due submission and obedience*” to the “*Laws, Ordinances, Acts, Constitutions and Offices*”—again, as long as they were “*just and equal*” and “*for the general good of the Colony.*” Notably, this provision in the Mayflower Compact entrenched the principle of the consent of the governed. Moreover, the agreement by the governed to obey the government was contingent upon the justice, equality, and soundness of the government as a whole, the government officials, and the laws and other acts of the government.²⁵³ If the government ever eschewed justice, equality, or adherence to the good of the whole, the people could presumably

249. *Id.* at 48 (“there is here a democracy with plenary powers—but a democracy in which class distinctions and privileges are understood, and plenary powers which are very much restricted by both Church law and the laws of England (as well as by considerations of ‘the generall good’ and of what is ‘due’ in the way of submission).”).

250. *Id.* at 50.

251. BRADFORD, *supra* note 1, at 84; *see also* Anastaplo, *supra* note 40, at 50 (“the reluctance of some to sign may be seen in various of the concessions made (. . . ‘for the generall good of the Colonie;’ ‘all due submission and obedience’; . . . ‘shuch just and equall laws etc.’).”).

252. Anastaplo, *supra* note 40, at 60 (“Indeed, one can now see the Plymouth community in the Mayflower Compact, in effect, as much invoking a claim against Great Britain as placing limitations upon themselves as governors. Thus the guarantee (in effect) of ‘just and equall lawes’ challenges hereditary class privileges, even while it recognizes distinctions based on (or taking account of) property and character and education. In any event, standards are asserted which can later be brought to bear against Great Britain as well as against American governments themselves.”).

253. *Id.* at 47 (“the immediate consequences of the establishment of a civil body politic: the community is empowered to legislate; and each signer, nay each inhabitant, is obliged to obey . . . Neither the power nor the obligation is unqualified, however: the legislation must be thought to be (must reasonably be?) ‘most meete and convenient for the general good of the Colonie’; the inhabitants promise ‘all due submission and obedience’—and no doubt questions can arise whether one is obliged to obey an enactment which is clearly not ‘for the general good of the Colonie’; certainly, room seems to be left for the dictates of the Christian conscience. Perhaps these qualifications were necessary to secure the unanimous acquiescence of all heads of households and otherwise responsible adult males among the passengers on this ship.”).

then revoke their consent and refuse to obey an unjust and unequal government—one that was not acting for the general good.²⁵⁴ This is reflective not only of the federal political ideas that had been percolating for several centuries, but also foreshadows the provision in the Declaration of Independence that at times “in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another.”²⁵⁵ Again, perhaps this language was included to appease the Strangers and reassure them that the government would be benevolent to them as well as to the Saints.²⁵⁶ Nonetheless, this language contains the germination of human rights.²⁵⁷

If the purpose of government is to protect rights, such as justice and equality, and all people within that community are endowed with those inalienable rights that the government must protect, then the Mayflower Compact was a significant step in recognizing and protecting those nascent human rights. Human rights have often been taken away by unjust rulers through conquest, marginalization, brutalization, tyranny, and so on, and therefore those governments are illegitimate because they are not protecting rights, but instead are violating rights. In contrast, the Mayflower Compact supports this concept of rights, among those including justice and equality, which the government must protect in order to remain a legitimate government.²⁵⁸

Despite its short length, and the fact that its colony no longer exists as a distinct political entity (unlike Massachusetts, Virginia, and the other initial colonies that later became states), the Mayflower Compact has risen to become a preeminent, pre-constitutional political document of the colonial era in the United States.²⁵⁹ In fact, the very problems that troubled the Mayflower voyagers—the fact that they landed in an area outside of their official patent, and the fact that a few unruly passengers threatened the survival of the colony due to their lack of authority under a valid patent—were the root of the Mayflower Compact that blossomed into the political establishment of a written and binding constitution-like agreement, democratic participation, just and equal laws, and the consent of the governed.²⁶⁰ The Mayflower Compact was

254. *See id.* at 42 (Under the Mayflower Compact, “words help to restrain the deeds of others and to arm those to whom promises have been made.”).

255. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

256. Anastaplo, *supra* note 40, at 50 (“the reluctance of some to sign may be seen in various of the concessions made (. . . ‘for the generall good of the Colonie;’ ‘all due submission and obedience’; . . . ‘shuch just and equall laws etc.’).”).

257. Lermack, *supra* note 219, at 1414.

258. *Id.*

259. PHILBRICK, *supra* note 42, at 40 (calling the Mayflower Compact “the document many consider to mark the beginning of what would one day be called the United States”).

260. Quincy Adams, *supra* note 153, at 18 (“The settlers of all the former European colonies had contented themselves with the powers conferred upon them by their respective charters . . . The

perhaps initially only intended to put the authority of a government in place until British crown sent them their hoped-for royal charter providing official sanction to their colony (which never materialized).²⁶¹ Alternatively, as suggested above, some have speculated that perhaps their landing at Plymouth Rock (or at least not in Virginia) may have been intentional to allow them to have as much independence from all outside authority as possible.²⁶²

The Saints followed a tradition of separation—they separated their religious beliefs from the Church of England, they separated themselves physically from England by moving to the Netherlands, and then largely separated themselves from all of society by fleeing to the New World, and indeed they were even labeled “Separatists.”²⁶³ They strongly valued their own liberty.²⁶⁴ Yet, ironically, their need for everyone to stay in the original colony in order to survive caused the Pilgrims to refuse to allow any of the Strangers to separate from the colony.²⁶⁵ In order to convince the others to stay, the Pilgrims had to concede within the Mayflower Compact to principles of justice, equality, consent of the governed, submission and obedience to the law only when such submission and obedience was “due,” and relatively democratic and broad-based participation in government.²⁶⁶ This developed the basis for the government to explain and justify itself to keep people within the polity, which promotes good governance.²⁶⁷

We continue to laud the Mayflower Compact and the Pilgrims to this day for laying the foundation of these American democratic values. Although its introduction into the colonies was based on the happenstance of a few insubordinate rabble rousers aboard the Mayflower, it subsequently contributed to American mythology as a conceptual precursor to the Declaration of Independence and a federal theory of government based on popularly founded state constitutions, along with the U.S. Constitution,²⁶⁸ that are now known worldwide as beacons of human rights, equality, social justice, and

founders of Plymouth had been impelled by the peculiarities of their situation to examine the subject with deeper and more comprehensive research.”).

261. LONG, *supra* note 191, at 3-4, 6 (“This charter was not confirmed by the Crown, nor did the colony, as such, ever receive a royal grant. So the settlement of Plymouth did not have a truly legal existence as a corporate body until its union with the Colony of Massachusetts Bay some years later.”).

262. Anastaplo, *supra* note 40, at 51.

263. *Id.* at 57-58.

264. Motley, *supra* note 29, at 490 (“With all their foibles, . . . the Pilgrims were lovers of liberty as well as sticklers for authority.”).

265. PHILBRICK, *supra* note 42, at 40-42; *see also* Anastaplo, *supra* note 40, at 57-58.

266. PHILBRICK, *supra* note 42, at 40-42; *see also* Anastaplo, *supra* note 40, at 57-58.

267. Anastaplo, *supra* note 40, at 57-58.

268. PHILBRICK, *supra* note 42, at 42 (the Mayflower Compact “ranks with the Declaration of Independence and the United States Constitution as a seminal American text.”).

civil liberties.²⁶⁹ To preserve this rich heritage, we must continue to ensure that people throughout our country are aware of our history, including the contributions made by the Mayflower Compact.

D. THE ASCENT AND ABSORPTION OF PLYMOUTH COLONY

1. *The Early Years*

Once they had agreed upon and signed the Mayflower Compact, the men aboard the ship elected John Carver as the first governor of the colony for a year as their initial action under the Compact and their first act of democracy.²⁷⁰ A prominent member of the religious community, John Carver had been a successful businessman in England who helped make the financial and logistical arrangements for the Mayflower voyage.²⁷¹ After settling the authority of governance for the community, a few men went ashore in several locations over the next several weeks to try to find a suitable site for their colony where they would have access to fresh water and appropriate terrain to build a settlement.²⁷² These explorers found a stash of corn and other supplies carefully stored by the Native Americans, which the settlers raided to replenish their own dwindling food stock, and they also looted several gravesites and houses of the local inhabitants.²⁷³ They initially had only rare encounters with the Native Americans who lived in that area, as by that time the region was sparsely populated, most likely due to disease the previous explorers had brought to the indigenous inhabitants, significantly diminishing their population.²⁷⁴ The ship provided squalid accommodations to those who remained on-board, leading to several deaths due to illness, and possibly suicide, and desperate circumstances:²⁷⁵

269. *Id.* at 40-42.

270. *Id.* at 42-43; *see also* Anastaplo, *supra* note 40, at 47 (After adoption of the Mayflower Compact, then quoted Bradford describing the confirmation of John Carver as Governour and the development of “lawes and orders”); MATHER, *supra* note 87, at 21.

271. PHILBRICK, *supra* note 42, at 19, 42-43; Editors of Encyclopedia Britannica, *John Carver*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/John-Carver>.

272. PHILBRICK, *supra* note 42, at 56-77; MATHER, *supra* note 87, at 21-22; CHENEY, *supra* note 41, at 104-36.

273. PHILBRICK, *supra* note 42, at 61-69; CHENEY, *supra* note 41, at 115-23, 130.

274. PHILBRICK, *supra* note 42, at 47 (“nowhere had they found any people”); *id.* at 48 (“From 1616-1619, what may have been bubonic plague introduced by European fishermen in modern Maine spread south along the Atlantic seaboard to the Eastern shore of Narragansett Bay, killing in some cases as many as 90 percent of the region’s inhabitants.”); *id.* at 48-77 (describing various encounters between the immigrants and the Native Americans); *id.* at 79-80 (“nowhere could they find evidence of any recent Native settlements” at Plymouth Harbor); *see also* MATHER, *supra* note 87, at 20-22; CHENEY, *supra* note 41, at 104-36.

275. CHENEY, *supra* note 41, at 104-36.

We think of the Pilgrims as resilient adventurers upheld by unwavering religious faith, but they were also human beings in the midst of what was, and continues to be, one of the most difficult emotional challenges a person can face: immigration and exile.²⁷⁶

Upon finding an acceptable location now called Plymouth Harbor,²⁷⁷ the ragged band set about building a few rudimentary structures, although most slept aboard the ship throughout the first part of winter, before they could move into the rough buildings.²⁷⁸ Most of them were so sick from the voyage that they could not work, as the extended time aboard the Mayflower in close quarters lead to significant illness, scurvy among other ailments.²⁷⁹ The few healthier people not only had to construct the buildings, but also had to tend to the ill, find and prepare the food, and shoulder all of the other necessary chores enabling them to survive the snow and cold throughout the season.²⁸⁰ Death claimed over half of their population in their first few months on the continent.²⁸¹ Although the Mayflower was supposed to sail back to England after the passengers disembarked, the crew was also so sick that they remained languishing in the new settlement, until the crew members who were still alive regained enough strength to sail back to England the following spring.²⁸² Governor John Carver died that spring, whereupon the settlers elected William Bradford to become the next governor²⁸³—a position he held for three decades.²⁸⁴ The fifty people who survived the first winter welcomed the early coming of spring.²⁸⁵

The story of the Pilgrims' interactions with Samoset, Squanto, Chief Massasoit, and other Native Americans in their region resonates around the

276. PHILBRICK, *supra* note 42, at 76-77.

277. MATHER, *supra* note 87, at 23.

278. PHILBRICK, *supra* note 42, at 78-92; MATHER, *supra* note 87, at 22-23; CHENEY, *supra* note 41, at 146-72; GRAGG, *supra* note 7, at 203, 235.

279. PHILBRICK, *supra* note 42, at 3, 78-92; *see also* GEORGE W. PRINCE, JOHN BILLINGTON, THE PLYMOUTH MARTYR 6 (1902), <https://archive.org/stream/johnbillingtonpl00prin#mode/2up>; BRADFORD, *supra* note 1, at 85; CHENEY, *supra* note 41, at 146-72; *Migration to Plymouth Colony 1620-1633*, PLYMOUTH ANCESTORS, https://www.plimoth.org/sites/default/files/media/pdf/historical_migration.pdf (last visited Feb. 2, 2020) (much of the illness was most likely due to scurvy); CHENEY, *supra* note 41, at 107; GRAGG, *supra* note 7, at 245-49.

280. *See* PHILBRICK, *supra* note 42, at 3, 78-92; MATHER, *supra* note 87, at 23; PRINCE, *supra* note 279, at 6; CHENEY, *supra* note 41, at 146-72.

281. PHILBRICK, *supra* note 42, at 46, 84; PRINCE, *supra* note 279, at 6; CHENEY, *supra* note 41, at 146-72; GRAGG, *supra* note 7, at 245-49.

282. PHILBRICK, *supra* note 42, at 86, 91, 100; CHENEY, *supra* note 41, at 168-70, 196-98.

283. PHILBRICK, *supra* note 42, at 102-103; MATHER, *supra* note 87, at 24-25.

284. Editors of Encyclopedia Britannica, *William Bradford*, BRITANNICA (Jan. 28, 1999), <https://www.britannica.com/biography/William-Bradford-Plymouth-colony-governor>.

285. PHILBRICK, *supra* note 42, at 91; Patricia Scott Deetz & James Deetz, *Population of Plymouth Town, Colony & County*, HISTARCH (Dec. 14, 2007), <http://www.histarch.illinois.edu/plymouth/townpop.html> (detailing the population of the colony).

Thanksgiving holiday throughout much of the United States today.²⁸⁶ Samoset, a Native American who had learned some English from European explorers, befriended the settlers in the spring of 1621, proclaiming “Welcome, Englishmen!” as he boldly strode into their village.²⁸⁷ He introduced them to Chief Massasoit, leader of the nearby Wampanoag tribe to the west of Plymouth Colony, and Squanto, who spoke more fluent English.²⁸⁸ When he was younger, Squanto and the other members of the Pawtuxet tribe had lived in the region on which Plymouth Colony now stood.²⁸⁹ Earlier European explorers had kidnapped Squanto and sold him into slavery in Spain.²⁹⁰ He escaped to England, where he learned the language, and he eventually returned to North America to find that his tribe had disappeared, likely due to disease.²⁹¹ Squanto became an invaluable member of the Plymouth Colony.²⁹² He taught the colonists how to plant corn and vegetables so their gardens would flourish, and showed them other methods to help them survive and thrive in the New World.²⁹³ Squanto also acted as an emissary between the

286. PHILBRICK, *supra* note 42, at xi, 117-20. As noted below, the Thanksgiving holiday and related story of the Pilgrims and Native Americans are complicated, as evidenced by an examination of their history. For example, some Native Americans view Thanksgiving as a day of mourning in remembrance of the genocide of their peoples. Additionally, the Pilgrim story and Thanksgiving traditions were used by Protestants in the early 1900s to try to exclude Catholic immigrants. See e.g., Sean Sherman, *The Thanksgiving Tale We Tell Is a Harmful Lie. As a Native American, I've Found a Better Way to Celebrate the Holiday*, TIME (Nov. 19, 2018), <https://time.com/5457183/thanksgiving-native-american-holiday/>; Dennis Zotigh, *Do American Indians Celebrate Thanksgiving?*, SMITHSONIAN MAG. (Nov. 26, 2019), <https://www.smithsonianmag.com/blogs/national-museum-american-indian/2019/11/27/do-american-indians-celebrate-thanksgiving/>; *American Indian Perspectives on Thanksgiving*, NAT'L MUSEUM OF THE AM. INDIAN, https://americanindian.si.edu/sites/1/files/pdf/education/thanksgiving_poster.pdf (last visited Feb. 21, 2020); Julie Turkewitz, *Thanksgiving for Native Americans Four Voices on a Complicated Holiday*, N.Y. TIMES (Nov. 23, 2017), <https://www.nytimes.com/2017/11/23/us/thanksgiving-for-native-americans-four-voices-on-a-complicated-holiday.html>.

287. PHILBRICK, *supra* note 42, at 92-94; MATHER, *supra* note 87, at 23-24; CHENEY, *supra* note 41, at 176-81; GRAGG, *supra* note 7, at 251.

288. PHILBRICK, *supra* note 42, at 52-55, 96-97; MATHER, *supra* note 87, at 23-24; CHENEY, *supra* note 41, at 184-95; GRAGG, *supra* note 7, at 251-58.

289. PHILBRICK, *supra* note 42, at 52-55, 97; MATHER, *supra* note 87, at 23-24; CHENEY, *supra* note 41, at 184-89; GRAGG, *supra* note 7, at 251-58.

290. PHILBRICK, *supra* note 42, at 52-55, 97; Editors of Encyclopedia Britannica, *Squanto*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/Squanto>; see also MATHER, *supra* note 87, at 23-24; CHENEY, *supra* note 41, at 184-89; GRAGG, *supra* note 7, at 252-53.

291. PHILBRICK, *supra* note 42, at 52-55, 97; Editors of Encyclopedia Britannica, *Squanto*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/Squanto>; see also MATHER, *supra* note 87, at 23-24; GRAGG, *supra* note 7, at 252-53.

292. PHILBRICK, *supra* note 42, at 100 (“Squanto, it was agreed, would remain with the English.”); MATHER, *supra* note 87, at 23-24; CHENEY, *supra* note 41, at 195, 199-203; GRAGG, *supra* note 7, at 252-53.

293. PHILBRICK, *supra* note 42, at 101-02; MATHER, *supra* note 87, at 23-24; CHENEY, *supra* note 41, at 249-50; GRAGG, *supra* note 7, at 252-53.

settlers and the nearby Wampanoag tribe, led by Chief Massasoit, who entered into a peace treaty with the colonists and engaged in a relatively longstanding, mutually beneficial trade relationship.²⁹⁴

Interestingly, although the Thanksgiving story has taken on great national significance throughout the United States,²⁹⁵ William Bradford mentioned it just briefly in one of only two first-hand accounts of the event:

They began now to gather in the small harvest they had, and to fit up their houses and dwellings against winter, being all well recovered in health and strength and had all things in good plenty. For as some were thus employed in affairs abroad, others were exercised in fishing, about cod and bass and other fish, of which they took good store, of which every family had their portion. All the summer there was no want; and now began to come in store of fowl, as winter approached, of which this place did abound when they came first (but afterward decreased by degrees). And besides waterfowl there was great store of wild turkeys, of which they took many, besides venison, etc. Besides, they had about a peck of meal a week to a person, or now since harvest, Indian corn to that proportion. Which made many afterwards write so largely of their plenty here to their friends in England, which were not feigned but true reports.²⁹⁶

The other first-hand recounting of the initial Thanksgiving is contained in *Mourt's Relations*, attributed to Edward Winslow:

[O]ur harvest being gotten in, our governor sent four men on fowling, that so we might after a special manner rejoice together, after we had gathered the fruits of our labors; they four in one day killed as much fowl, as with a little help beside, served the Company almost a week, at which time amongst other Recreations, we exercised our Arms, many of the Indians coming amongst us, and amongst the rest their greatest king Massasoit, with some ninety men, whom for three days we entertained and feasted, and they went out and killed five Deer, which they brought to the Plantation and bestowed on our Governor, and upon the Captain and others. And

294. PHILBRICK, *supra* note 42, at xiv, 96-100. Editors of Encyclopedia Britannica, *Massasoit*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/Massasoit>; MATHER, *supra* note 87, at 23-24.

295. PHILBRICK, *supra* note 42, at 117-20. For another description of the first Thanksgiving, see GRAGG, *supra* note 7, at 264-70.

296. BRADFORD, *supra* note 1, at 83; *see also Primary Sources for "The First Thanksgiving" at Plymouth*, PILGRIM HALL MUSEUM, https://pilgrim-hall.org/pdf/TG_What_Happened_in_1621.pdf (last visited Feb. 2, 2020) (modern English spelling).

although it be not always so plentiful, as it was at this time with us, yet by the goodness of God, we are so far from want, that we often wish you partakers of our plenty.²⁹⁷

In 1623, Governor Bradford declared a second celebration and day of thanksgiving after a drought abated that had nearly devastated their crops.²⁹⁸ Other settlements in the New England colonies also adopted periodic thanksgiving festivities.²⁹⁹

While the Europeans dedicated a day periodically to give thanks, the original Americans had developed a practice of giving thanks within their everyday lives.³⁰⁰ One historian describes: “The European settlers did not teach the Pokonoket about thanks-giving. In fact, the giving of thanks among Indians was as constant and ongoing as the manipulation and harvesting of nature. The taking of life, be it that of a clam or a chestnut tree, was a moment for a prayer of thanks. To fail to use any part of that life was something like a sin. They used all, wasted little, lived well, and didn’t need a holiday to give thanks.”³⁰¹

As Plymouth Colony became better established, more people continued arriving from England.³⁰² The “newcomers,” as the original members of the settlement called them, were absorbed into the colony.³⁰³ Although they were not required to add their signatures to the Mayflower Compact,³⁰⁴ they were expected to abide by the strictures established by the Compact as fleshed out through the governance structure the settlers had adopted for themselves, not infrequently leading to dissention the leaders need to quell.³⁰⁵ The Mayflower

297. *Primary Sources for “The First Thanksgiving” at Plymouth*, PILGRIM HALL MUSEUM, https://pilgrimhall.org/pdf/TG_What_Happened_in_1621.pdf (last visited Feb. 2, 2020) (modern English spelling); see also CHENEY, *supra* note 41, at 258-68 (for a full description of what the first Thanksgiving may have been like).

298. MATHER, *supra* note 87, at 25-26; History.com Editors, *Thanksgiving 2020*, HISTORY.COM (Oct. 27, 2009), https://www.history.com/topics/thanksgiving/history-of-thanksgiving#section_2.

299. History.com Editors, *Thanksgiving 2020*, HISTORY.COM (Oct. 27, 2009), https://www.history.com/topics/thanksgiving/history-of-thanksgiving#section_2.

300. CHENEY, *supra* note 41, at 228.

301. *Id.*

302. PHILBRICK, *supra* note 42, at 123 (arrival of the Fortune with 37 new settlers); Perry, *supra* note 147, at 260 (“It is a common error to exaggerate the isolation of New Plymouth” as they had interactions with ships and fishing vessels, letters crossed back and forth across the Atlantic to and from England, new settlers arrived, prior settlers left, etc.).

303. PHILBRICK, *supra* note 42, at 123-29.

304. Anastaplo, *supra* note 40, at 58 (“It should be noticed that once the community began to govern itself, subsequent settlers were not required to sign the Charter.”) Similarly, once the U.S. Constitution was ratified, all future inhabitants are expected to abide by it without giving it their explicit consent.

305. Perry, *supra* note 147, at 256 (“The magistrates of early Plymouth were faced, then, with the problem of ruling over a divided and often uneasy community. They had to contend not only

Compact continued to guide the leaders and members of the colony throughout its existence, and particularly in its initial decades.³⁰⁶ However, the precise language of the Mayflower Compact likely diminished in importance, unlike the parsing of the text of the U.S. Constitution and state constitutions that remains a staple of legal and jurisprudential thought, argument, and writing to this day.³⁰⁷

And as noted above, it is important to remember that the colonizers who settled in Plymouth, along with all of the European colonizers throughout the Americas, were taking land that originally belonged to the indigenous civilizations who had lived on these continents for centuries before the Europeans came and appropriated the land from them.³⁰⁸ Although a painful and uncomfortable facet of history, residents of the United States must be willing to recognize and accept this aspect of our country, which still resonates in a very real manner throughout the current lived experiences of millions of Americans—both Native Americans and their immigrant neighbors.³⁰⁹

As a gesture of goodwill, in 1621 Chief Massasoit gave to the Pilgrims the Patuxet lands on which they had built their small settlement as a gift from his tribe.³¹⁰ Then over the next several decades, as more European settlers arrived, they took over more and more of the land throughout the region, as described in Nathaniel Philbrick's book, *Mayflower*:

The Pilgrims believed that since no Indians were presently living on the land, it was legally theirs . . . By the 1630s, however, the Pilgrims had begun to take a different view . . . Roger Williams . . . moved from Boston to Plymouth in 1633 . . . Williams insisted that the Indians were the legal owners of their lands. If the English were to take title, Williams argued, they must first purchase the land from its previous owners . . . [H]e appears to have had a lasting influence

with the usual difficulties of maintaining public order, but also with the particular problem of enforcing a fairly rigorous moral code upon a body politic that included a large group which did not subscribe to that code. This . . . created serious divisions which were usually kept quiet but which sometimes . . . erupted into open faction.”); PHILBRICK, *supra* note 42, at 123-29.

306. Anastaplo, *supra* note 40, at 55 (“the Compact seems to have been of considerable use in the early decades of Plymouth Colony”).

307. *Id.* at 56 (“Once the Plymouth community began to govern itself on land, the Compact itself probably did not have to be consulted. In this respect it is quite different from, say, the Constitution of the United States, which provides a constant guide for action.”).

308. See, e.g., PHILBRICK, *supra* note 42, at 169-72; GRAGG, *supra* note 7, at 217-18.

309. Currently approximately 4.5 million Native Americans and Alaska Natives live in the United States, comprising about 1.5 percent of the population, with the remaining 98.5 percent of the population consisting of more recent immigrants and descendants of immigrants. History.com Editors, *Native American Cultures*, HISTORY.COM (Dec. 4, 2009), <https://www.history.com/topics/native-american-history/native-american-cultures>. Native American communities are still grappling with the effects of the European infiltration of their continent.

310. PHILBRICK, *supra* note 42, at 169-70.

on the colony. Soon after his departure, the Pilgrims began recording their purchases of Indian land. [However, by] monopolizing the purchase of Indian lands, Plymouth officials kept the prices they paid artificially low. Instead of selling to the highest bidder, Massasoit was forced to sell his land to the colonial government—and thus was unable to establish what we would call today a fair market price . . .³¹¹

Although the Pilgrims may have treated the Native Americans' ownership of the land somewhat more respectfully than "many European colonists, who had no regard for Indian lands," they still manifested "'the obvious expectation that in the end most of the territory would become the property of the English,'" despite the fact that the region was still inhabited by thousands of indigenous people.³¹²

With respect to religion, the leadership of the colony initially demonstrated a certain amount of tolerance for the religious beliefs and practices of people who were not with the Separatist congregation, perhaps giving some credence to the modern-day narratives that the Pilgrims were champions of religious freedom, religious liberty, and religious tolerance.³¹³ Perhaps their negative experience with the divine right of kings leading to absolute authority played a part in these early kernels of the separation of church and state.³¹⁴ According to their theology, God established three separate covenantal relationships among humans: one for social relationships, one for political or governance relationships, and one for religious relationships.³¹⁵ The fact that the colonists conceived of political or governance relationships as separate from religious relationships formed a precursor to the separation of church and state that later developed more concretely in the U.S. Constitution. Moreover, the Mayflower Compact has been proffered as a prime example of a social covenant,³¹⁶ much like the social contract theory John Locke subsequently developed as the basis for political relationships, as described further

311. *Id.* at 170-71.

312. GRAGG, *supra* note 7, at 218.

313. Anastaplo, *supra* note 40, at 59-60 ("And however intolerant the Puritans may have been at times, they were exercising the right to worship God as they chose—and this no doubt influenced, as security permitted them to relax, a development of some respect for a like right in others.").

314. PHILBRICK, *supra* note 42, at 40.

315. Witte, *supra* note 237, at 44-45 ("Unlike many Protestants, the Puritans also believed that God had created various covenants for the organization and ordering of human society, including 1) a social or communal covenant, 2) a political or governmental covenant, and 3) an ecclesiastical or church covenant. The social covenant created the society or commonwealth as a whole; the political and ecclesiastical covenants created the two chief seats of authority within that society, the church and the state."). In this article, Witte does not distinguish between the Separatists in Plymouth and the Puritans in other parts of New England. *Id.* at 46 (discussing the Mayflower Compact as an example of a social covenant formed by "Puritan colonists").

316. *Id.* at 47 (citing to the Mayflower Compact as an example of the social covenant).

below. The Mayflower Compact, similarly, demonstrated the Pilgrims' recognition of the need to make a distinction between religion and politics: "Just as a spiritual covenant had marked the beginning of their congregation in Leiden, a civil covenant would provide the basis for a secular government in America."³¹⁷

As one example of early foreshadowing of separation of church and state in Plymouth Colony, the Separatists believed that "what Scripture does not specifically claim as a religious function remains a civil one,"³¹⁸ which included marriage.³¹⁹ As another example, although the Separatists believed that people should work, even on religious holidays, they allowed some of the newcomers who protested doing so on religious grounds to refrain from working in the fields on Christmas day.³²⁰ However, when the leaders found the newcomers to be enjoying games and other frivolity, the colonial leaders insisted that the newcomers observe the religious day solemnly, such as by reading the Bible, instead of engaging in unseemly revelry.³²¹ Over time, the leaders of the colony became increasingly suspicious of and heavy-handed with people who held different religious beliefs or stepped outside the bounds of what the leaders considered proper conduct.³²²

Speaking of improprieties, please allow a slight diversion. The author's family is descended from the Billingtons, who have earned quite a negative reputation as "one of the profanest families among them,"³²³ according to Governor William Bradford, although this characterization has been questioned.³²⁴ As noted above, John Billington, Sr., was likely one of the Strangers who spread rebellious grumblings to others onboard the Mayflower

317. PHILBRICK, *supra* note 42, at 41.

318. Maxwell, *supra* note 131, at 5 ("At Plymouth, church and state were even more markedly separated. Like all Puritans, both groups held that the Bible—as opposed to church leaders or their pronouncements—is the final authority. In Plymouth, they interpreted that to include the idea that what Scripture does not specifically claim as a religious function remains a civil one. The best-known result of this thinking was the belief that marriage was a civil rite, not a religious one.").

319. *Id.*; PHILBRICK, *supra* note 42, at 40, 104 ("marriage in Holland was a civil ceremony, and so it would be—much to the dismay of English authorities—in Plymouth Colony.").

320. PHILBRICK, *supra* note 42, at 128; Anastaplo, *supra* note 40, at 54-55 (noting Bradford's account of allowing the newcomers not to work on Christmas day, but also not allowing them to revel in the streets.).

321. PHILBRICK, *supra* note 42, at 128; Anastaplo, *supra* note 40, at 54-55.

322. PHILBRICK, *supra* note 42, at 162-65, 177.

323. *Id.* at 26.

324. *Family Society Friday Q&A: Seeking Justice for John Billington*, GEN. SOC'Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/blog/item/413-family-society-friday-q-a-seeking-justice-for-john-billington> (last visited Feb. 3, 2020); *see also* George W. Prince, *John Billington, The Plymouth Martyr* (1902), ARCHIVE.ORG, <https://archive.org/stream/johnbillingtonp100prin#mode/2up> (last visited Feb. 8, 2020) (excerpted in *Society of Mayflower Descendants in Michigan*, Mayflower Newsletter, Winter 2019, at 6-7; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 5 https://www.pilgrim-hall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020)).

in an attempt to question the legitimacy of the Saints as leaders of all the passengers, and who threatened to leave the settlers once they disembarked.³²⁵ Therefore, the descendants of the Billingtons could rightly claim that the Mayflower Compact may well not have existed but for their ancestors.³²⁶

The Billington family continued to have their antics documented in the early accounts of Plymouth Colony, particularly Bradford's *Of Plymouth Plantation*, which he published years later. For example, before most of the Mayflower passengers were allowed to go on shore, one of the Billington brothers, Francis, was reportedly playing with firearms on the ship when he accidentally fired off a gun, which could have caused the entire ship to explode if he had hit the stocks of gunpowder.³²⁷ Fortunately his mishap did not cause anyone harm, but it did cause a stir.³²⁸

As another example of mischievous behavior, once the settlers were on-shore beginning to build their settlement, John Jr., the older of the Billington brothers, wandered off into the woods and was taken in by the Native Americans who lived to the east—the Nausets on Cape Cod.³²⁹ Once his whereabouts were discovered, the leaders of the colony had to negotiate with the tribe whose goods they had previously raided for his safe return.³³⁰ Using diplomacy, offering gifts, and promising reimbursement for the goods the Pilgrims had stolen, this incident resulted in actually strengthening the settlers' relationship with the Nauset tribe.³³¹ During another escapade, Francis climbed a tall tree and discovered a large body of water a distance inland

325. Borowitz, *supra* note 185, at 597 ("John Billington Sr. was . . . 'unquestionably one of those mixed up in the mutiny on the Mayflower,' which was resolved on November 11, 1620 by the adoption of the Mayflower Compact, under which the settlers bound themselves to submit to a civil body politic to be governed by just and equal laws. Billington was one of the signatories and thereby forswore the aim of the mutineers to break free of the Puritan leadership.""); *see also* PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 5 https://www.pilgrim-hall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020).

326. Borowitz, *supra* note 185, at 597.

327. PHILBRICK, *supra* note 42, at 110; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 1 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020); PRINCE, *supra* note 279, at 6; CHENEY, *supra* note 41, at 127.

328. PHILBRICK, *supra* note 42, at 110; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 1 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020); PRINCE, *supra* note 279, at 6; CHENEY, *supra* note 41, at 127.

329. PHILBRICK, *supra* note 42, at 110-13; CHENEY, *supra* note 41, at 229-30; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 2 https://www.pilgrim-hall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020).

330. PHILBRICK, *supra* note 42, at 110-113; CHENEY, *supra* note 41, at 229-31; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 2 https://www.pilgrim-hall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020).

331. PHILBRICK, *supra* note 42, at 110-13; CHENEY, *supra* note 41, at 229-31.

from the settlement,³³² which to this day is named the Billington Sea.³³³ In addition to the Billington Sea, an area near Plymouth Harbor known as the Billington Rocks, which is offshore the location that was once the Billington property, can still be found on some maps and manuscripts.³³⁴

And perhaps starting the whole Billington/Bradford rivalry, shortly after landing in the New World, the elder John Billington witnessed an incident likely damaging Bradford's self-pride.³³⁵ As described below, Billington probably expressed great hilarity when William Bradford became entangled in a hunting snare.³³⁶ One source recounts:

The following incident is thought to have been its beginning. While a party from the Mayflower at Cape Cod was exploring the coast Nov. 1620 they came to a snare set by the Indians; young Bradford being careless, sprang the trap, and was jerked up by his heels into the air. Here he hung suspended, amidst the convulsive laughter of his companions, as they witnessed the comical contortions, gyrations, and gymnastic exercises of that aerial display! Is it strange that even those staid and sober Pilgrims should choke with laughter at the grotesque exhibit; or that the old hunter Billington, after releasing him, should have rolled over and over on the ground, almost bursting with efforts to suppress his mirth? It was then and there that the spark of anger and hatred was kindled—and this flame, continued for ten long years—yes, until [Bradford's] manuscript [*Of Plymouth Plantation*, in which he maligned the Billington family] was finished and perhaps until [Bradford's] death.³³⁷

332. PHILBRICK, *supra* note 42, at 110; CHENEY, *supra* note 41, at 152-53; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 2 https://www.pilgrim-hall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020).

333. PHILBRICK, *supra* note 42, at 110; WILLIAM THOMAS DAVIS, ANCIENT LANDMARKS OF PLYMOUTH 150 (1883); CHENEY, *supra* note 41, at 152-53.

334. DAVIS, *supra* note 333, at 150.

335. PRINCE, *supra* note 279, at 6.

336. *Id.*

337. *Id.* at 7; *see also* CHENEY, *supra* note 41, at 118-19 ("They came on a sapling bent over a strewing of acorns. Stephen Hopkins said it looked like a deer trap. William Bradford, bringing up the rear, didn't hear that theory in time. As he traipsed by, the tree snapped up and a noose snared his leg, no doubt to the joy of the men who could use a good laugh."); *see also* MOURT'S RELATION, *supra* note 188, at 23 ("As we wandered we came to a tree, where a young sprit was bowed down over a bow, and some acorns strewed underneath. Stephen Hopkins said it had been to catch some deer. So as we were looking at it, William Bradford being in the rear, when he came looked also upon it, and as he went about, it gave a sudden jerk up, and he was immediately caught by the leg.").

Not all of the accounts of the Billington family were negative.³³⁸ John Billington was apparently a highly talented marksman and provided a significant amount of game and fish to sustain the settlers during their initial difficult period in the New World.³³⁹ As the Billington family was “left completely untouched by disease” during the first winter,³⁴⁰ John and his wife Eleanor worked assiduously throughout the first winter caring for the sick, and are attributed with the survival of the colony.³⁴¹

Yet Billington was reportedly among several settlers who continued to question the legitimacy of the colony’s leadership³⁴² (even though he had previously signed the Mayflower Compact disavowing his prior subversiveness),³⁴³ and taking other oppositional stances,³⁴⁴ no doubt rankling Bradford and others among the colonial administration.³⁴⁵ Evidently the right to freedom of speech and to voice opposition to the government were not yet well-established values in America at that time. And as another bone of contention, once the parcels of farmland were distributed by lot, John Billington and his family happened to receive a lot near the brook and ocean bay, close to that

338. *Family Society Friday Q&A: Seeking Justice for John Billington*, GEN. SOC’Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/blog/item/413-family-society-friday-q-a-seeking-justice-for-john-billington> (last visited Feb. 3, 2020); PRINCE, *supra* note 279, at 6-7.

339. *Family Society Friday Q&A: Seeking Justice for John Billington*, GEN. SOC’Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/blog/item/413-family-society-friday-q-a-seeking-justice-for-john-billington> (last visited Feb. 3, 2020); PRINCE, *supra* note 279, at 6-7.

340. PHILBRICK, *supra* note 42, at 90; CHENEY, *supra* note 41, at 247.

341. *Family Society Friday Q&A: Seeking Justice for John Billington*, GEN. SOC’Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/blog/item/413-family-society-friday-q-a-seeking-justice-for-john-billington> (last visited Feb. 3, 2020); PRINCE, *supra* note 279, at 7.

342. PHILBRICK, *supra* note 42, at 103; Perry, *supra* note 147, at 256 (“the Compact was not completely successful in cowing the strangers”—almost immediately following the discussion of the Compact, Bradford again noted “discontents and murmurings” as well as “mutinous speeches and carriages,” which the Pilgrim leaders were able to quell, though not completely eliminate.); *see also* PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 4 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020); CHENEY, *supra* note 41, at 194-95.

343. Borowitz, *supra* note 185, at 597 (“John Billington Sr. was . . . ‘unquestionably one of those mixed up in the mutiny on the Mayflower,’ which was resolved on November 11, 1620 by the adoption of the Mayflower Compact, under which the settlers bound themselves to submit to a civil body politic to be governed by just and equal laws. Billington was one of the signatories and thereby forswore the aim of the mutineers to break free of the Puritan leadership.”).

344. PHILBRICK, *supra* note 42, at 110 (“In late March, [John Billington, Sr.] had berated Miles Standish and narrowly escaped public punishment”).

345. PHILBRICK, *supra* note 42, at 89; *Family Society Friday Q&A: Seeking Justice for John Billington*, GEN. SOC’Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/blog/item/413-family-society-friday-q-a-seeking-justice-for-john-billington> (last visited Feb. 3, 2020).

of Governor William Bradford.³⁴⁶ Apparently, a somewhat disgruntled Bradford may subsequently have coveted the Billington property.³⁴⁷

Ultimately, John Billington gained notoriety as the first person to be hanged in the colony in 1630 for killing John Newcomen.³⁴⁸ Stories differ,³⁴⁹ but the one handed down in our family and other accounts is that the man Billington shot had been repeatedly stealing from him.³⁵⁰ Billington attested that he had fired a warning shot, but the gun misfired, resulting in a wound eventually leading to the thief's demise.³⁵¹ Regardless, Governor "William Bradford, acting as prosecutor, judge, and imposer of the death sentence," seized the opportunity to make an example out of Billington, who had long been a thorn in his side, and sentenced him to be executed, despite the pleas of other community members to have mercy on Billington.³⁵² The propriety

346. PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 3, 8-9 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020) (depicting the acquisition by William Bradford of a parcel of property owned by John Billington's widow Eleanor eight years after John Billington was executed); *see also* New England Historic Genealogical Soc'y, *John Billington*, 2020 AMERICAN ANCESTORS, <https://mayflower.americanancestors.org/john-billington-biography#Elinor>; *see also* DAVIS, *supra* note 333, at 220 (describing the transfer of property from Eleanor Billington to Governor Thomas Prince in 1638, after John Billington had been hanged).

347. PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 8-9 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020) (depicting the acquisition by William Bradford of a parcel of property owned by John Billington's widow Eleanor eight years after John Billington was executed); *see also* New England Historic Genealogical Soc'y, *John Billington*, 2020 AMERICAN ANCESTORS, <https://mayflower.americanancestors.org/john-billington-biography#Elinor> (last visited Feb. 8, 2020); DAVIS, *supra* note 333, at 220 (describing the transfer of property from Eleanor Billington to Governor Thomas Prince in 1638, after John Billington had been hanged).

348. PHILBRICK, *supra* note 42, at 175; Perry, *supra* note 147, at 257 ("the Pilgrim leaders showed by their actions that they themselves felt their authority to be insufficient. We see this in their repeated efforts, even while other patents were in force, to obtain a more explicit grant of governmental powers and also in their very circumspect handling of the murder trial of John Billington."); *see also* DAVIS, *supra* note 333, at Part II, 28; PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 5 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020); PRINCE, *supra* note 279, at 7.

349. PHILBRICK, *supra* note 42, at 175.

350. In the author's oral family history, the villain Newcomen had been trying to steal livestock or steal from his hunting traps. Another account indicates he was trying to steal a pig from the Billington family farm. Rebecca Beatrice Brooks, *John Billington: Mayflower Pilgrim Executed for Murder*, HIST. OF MASS. BLOG (Jan. 8, 2013), <https://historyofmassachusetts.org/john-billington-mayflower-pilgrim-executed-for-murder/>; PRINCE, *supra* note 279, at 7.

351. Rebecca Beatrice Brooks, *John Billington: Mayflower Pilgrim Executed for Murder*, HIST. OF MASS. BLOG (Jan. 8, 2013), <https://historyofmassachusetts.org/john-billington-mayflower-pilgrim-executed-for-murder/>; PRINCE, *supra* note 279, at 7.

352. Perry, *supra* note 147, at 257 ("the Pilgrim leaders showed by their actions that they themselves felt their authority to be insufficient. We see this in their repeated efforts, even while other patents were in force, to obtain a more explicit grant of governmental powers and also in their very circumspect handling of the murder trial of John Billington."); *see also* PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 5 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020).

of Bradford's handling of this incident has been questioned.³⁵³ Several years later the colonial leaders consigned Eleanor Billington to a term in the stocks for allegedly slandering one of them.³⁵⁴ In sum, although the Billington family has been much maligned down through the years, they could conversely be seen as champions of freedom of speech, individual liberty, and the voice of opposition to government, as well as the impetus for the Mayflower Compact.³⁵⁵

Aside from their dealings with the Billington family, the leaders of Plymouth Colony also experimented with some unsuccessful ways in which to organize the colony in their attempts to figure out how best to enable it to flourish.³⁵⁶ For example, at one point, they mandated that everyone work together in communal fields and mutually share in the harvest.³⁵⁷ However, they quickly discovered that such a collective and cooperative work environment with shared returns from their labors gave way to a free-rider problem.³⁵⁸ Since community members knew they would receive provisions no matter how much or little they worked, the incentive was to perform the least amount of work possible.³⁵⁹ The results were devastating, leading to an extremely poor harvest that year. The leaders promptly divided the lands among the families by drawing lots, and each family had to fend for itself regarding its labor and its bounty.³⁶⁰

353. Perry, *supra* note 147, at 257 ("the Pilgrim leaders showed by their actions that they themselves felt their authority to be insufficient. We see this in their repeated efforts, even while other patents were in force, to obtain a more explicit grant of governmental powers and also in their very circumspect handling of the murder trial of John Billington."); *Family Society Friday Q&A: Seeking Justice for John Billington*, GEN. SOC'Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/blog/item/413-family-society-friday-q-a-seeking-justice-for-john-billington> (last visited Feb. 3, 2020).

354. New England Historic Genealogical Soc'y, *John Billington*, 2020 AMERICAN ANCESTORS, <https://mayflower.americanancestors.org/john-billington-biography#Elinor> (last visited Feb. 8, 2020).

355. Borowitz, *supra* note 185, at 599 (Billington as champion of free speech, individual independence, voice of opposition to government.); Perry, *supra* note 147, at 257 n. 18 (for more sources on Billington); see also Joseph Kelly, *The Thanksgiving Story You've Probably Never Heard*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/opinion/thanksgiving-pilgrims-puritans-democracy-.html>.

356. Perry, *supra* note 147, at 256 ("other sources of discontent—most notably, in the early years, the unpopular system of property and labor—created serious divisions which were usually kept quiet but which sometimes . . . erupted into open faction.").

357. Quincy Adams, *supra* note 153, at 20-21 (noting that the Pilgrims had attempted community property, but their experiment did not work, so they reverted to private property).

358. *Id.*

359. *Id.*

360. *Id.*; see also Martinez, *supra* note 41, at 472 n. 87 ("The colonists at the Plymouth Colony divided the land among them in 1627"); PILGRIM HALL MUSEUM, JOHN ELEANOR BILLINGTON 17TH CENTURY DOCUMENTS 3 https://www.pilgrimhall.org/pdf/John_Eleanor_Billington_17th_Century_Documents.pdf (last visited Feb. 8, 2020).

Despite continued questions about the legitimacy of the colony due to its lack of an official charter,³⁶¹ as well as and the constant flux in which the settlement existed, including the loss of numerous original settlers who died or returned to Great Britain,³⁶² the leadership of Plymouth Colony developed a relatively sophisticated governance structure.³⁶³ They relied on their previous experiences with local governance in England, as well as their ability to invoke the authority of the crown through the Mayflower Compact, and the population's reliance on their continued loyalty to England and pride in their English heritage.³⁶⁴ Moreover, true to their covenant tradition, they created the closest approximation of democracy and equality in the colonies, as they believed those elected to office were obliged to uphold the covenant with every person in the society established by the Mayflower Compact, in like manner.³⁶⁵ Thus, the Mayflower Compact has been dubbed a "proto-constitution" and recognized as a precursor to the U.S. Constitution.³⁶⁶

Toward the end of its first decade, the colony's social and governance structures were growing increasingly complex.³⁶⁷ By 1627, the land was pri-

361. Perry, *supra* note 147, at 257 ("As a result, there persisted at Plymouth, in chronic rather than acute form, the complementary problems—disaffection and want of authority—that had led to the crisis on board the Mayflower. Apparently one part of the leaders' response to this difficulty was to adopt, as a more or less conscious policy, an expedient similar to the one they had used in drafting the Compact, namely, the pretense, enforced by the use of English procedures and English formulae, that the government of the plantation derived its powers from the Crown. Their hope was that administrative and judicial proceedings carried on in the King's name would command fear and respect, and would serve as a psychological barrier that might help keep malcontents from realizing just how shaky was the constitutional ground upon which the magistrates stood.").

362. *Id.* at 260 (some original and prominent Pilgrims left and returned to England).

363. Martinez, *supra* note 41, at 472 n. 87 ("The colonists at the Plymouth Colony divided the land among them in 1627, making up a General Court. All freemen had the right to vote and be elected by the public posts. The General Court gave these rights to the 'newcomer' colonists as they arrived. The Assembly elected the Governor and his Council, giving him no power of veto over its laws.").

364. Perry, *supra* note 147, at 254 ("The Englishness of the settlers . . . [would] help solve Plymouth's most serious internal political problem."); *id.* at 252 (noting that the Pilgrims were not entirely dismissive of England, they remained very loyal to England through Holland and New World, as through their ties with England, they had imperial standing); *id.* at 265 ("The Pilgrims . . . were Englishmen, and thought of themselves as such."); *id.* at 259-60 ("the Pilgrim leaders, feeling a need to bolster their authority, were attempting by suggestion to associate their regime with the power and prestige of the English government.").

365. Maxwell, *supra* note 131, at 4 ("Plymouth's Mayflower Compact was viewed by the members of that colony as a covenant. Those who were elected to office were bound by the terms of the covenant just as were all members of the community, they were in that sense equals. Philosophically, therefore, Plymouth's government came close to being a true democracy; its elected officers derived their powers by the consent of the governed within the terms of their shared covenant.").

366. LUTZ, THE ORIGINS *supra* note 32, at 6-7.

367. GRAGG, *supra* note 7, at 283-85 (describing the governance of Plymouth Colony).

vatized and divided among the families. The freemen were allowed to participate in the governance of the colony.³⁶⁸ They were allowed to run for office and to elect, through a fairly democratic process, their governor, a council of men to advise the governor and help him carry out his directives, and representatives to a legislative body called the “general court.”³⁶⁹ Newcomers who were freemen were allocated land and also had the right to vote and run for office.³⁷⁰ Moreover, the governor was not allowed to veto pronouncements of the general court.³⁷¹ By 1630, the colony had grown to over 300 residents.³⁷² The first records of the General Court are from the 1632-1633 session,³⁷³ by which time the population had expanded to around 400 people.³⁷⁴ The freemen gathered in the general assemblies to decide upon executive, legislative, and judicial matters; hence the separation of powers was still not fully developed during that time.³⁷⁵ Moreover, some accounts reflect a lack of separation of church and state within the colony.³⁷⁶ However, certain rights were recognized, such as the right to a trial by jury, at least for some offences.³⁷⁷

Throughout the existence of Plymouth Colony, the leaders were constantly aware that their claim to the land and to their authority to govern the settlement was tenuous, since they were outside of their original charter.³⁷⁸

368. Martinez, *supra* note 41, at 472 n. 87 (“The colonists at the Plymouth Colony divided the land among them in 1627, making up a General Court. All freemen had the right to vote and be elected by the public posts.”).

369. *Id.* at 472 (“These Pilgrims then created a legislative Assembly (General Court) and chose a Governor and a Council. When they became totally independent from their English promoters, the political organization of the colony approximated a democracy.”).

370. *Id.* at 472 n. 87 (“The General Court gave these rights to the ‘newcomer’ colonists as they arrived.”).

371. *Id.* (“The Assembly elected the Governor and his Council, giving him no power of veto over its laws.”).

372. Motley, *supra* note 29, at 480; PHILBRICK, *supra* note 42, at 161.

373. Perry, *supra* note 147, at 258 (“The General Court session of January 1632/33—the first of which we have a formal record”).

374. *Migration to Plymouth Colony 1620-1633*, PLYMOUTH ANCESTORS, https://www.plimoth.org/sites/default/files/media/pdf/historical_migration.pdf (last visited Feb. 2, 2020).

375. Motley, *supra* note 29, at 481-82 (“the people were convened in primary assemblies” “to decide on executive, not less than on judicial, questions,” as well as legislative issues).

376. *Id.* at 482 (“they considered themselves a church congregation, and governed themselves accordingly.”).

377. Anastaplo, *supra* note 40, at 50 (Regarding right, “the first order of record we have from Plymouth provides for trial by jury for some offenses.”); LUTZ, *THE ORIGINS*, *supra* note 32, at 41.

378. Perry, *supra* note 147, at 256-57 (“What is more, the magistrates’ difficulties were compounded by the fact that they lacked settled constitutional authority for their actions.” So they spent years trying to obtain an official charter from England, which never materialized “What they needed . . . was a royal grant that would ‘inable you to make and execute lawes in shuch large and ample maner as the Massachusetts plantation hath it . . .’”); *id.* at 257 (“But the patent . . . finally obtained for them fell far short . . . ; indeed, never in its entire history was the colony able to obtain a royal

Although they continually attempted to obtain an official charter from the crown for their current location, they were not fully successful in doing so, and therefore their status remained tenuous until they were officially absorbed into Massachusetts Bay Colony in 1691.³⁷⁹ Therefore, throughout Plymouth Colony's duration, the colonial leaders attempted to remedy this situation by loudly proclaiming their fealty to the crown and claiming that their authority derived from the crown.³⁸⁰

After they had developed a more refined government, the settlers adopted the first set of written laws for the colony, known now as the Pilgrim Code of Law.³⁸¹ Of course, this was not the first written legislation in the New World, as Jamestown had previously developed its House of Burgesses and legislative pronouncements even before the Mayflower had landed, as noted above. However, the Pilgrim Code of Law is seen as one of the foundational documents for the United States, both establishing constitutional-type governmental structures, as well as elaborating the rights of the governed.³⁸²

2. *The Pilgrim Code of Law*

In October of 1636, King Charles decreed that prominent members from the town of Plymouth and nearby towns should meet to review the Mayflower Compact and subsequent laws that had been developed thereunder.³⁸³ The king charged them with evaluating all of the existing "laws, orders, and constitutions of the plantations within this government . . . so those that are still fitting might be established, those that time has made unnecessary might be

charter vesting the leaders on the spot with explicit and legally indisputable power to govern and administer justice."); PHILBRICK, *supra* note 42, at 201.

379. Perry, *supra* note 147, at 260 (The Pilgrims had many dealings with England, perhaps most importantly their attempts to gain a royal charter, although it never materialized); *id.* at 261 ("Their solution was to refer to themselves as a 'colony,' as if their status were clear; to be always on their best behavior; and to petition in a discreet manner for a charter confirming their liberties."); PHILBRICK, *supra* note 42, at 201. Although they never received a royal charter granting them legal authority, they did receive a patent from the new Council for New England permitting them to remain in their current location. CHENEY, *supra* note 41, at 271.

380. Perry, *supra* note 147, at 258-60 (the Pilgrims' government did everything in the name of the king—not separate and independent, but as loyal subjects and part of the royal government).

381. *Pilgrim Code of Law* 1 November 15, 1636, TEACHING AMERICAN HIST., <https://teachingamericanhistory.org/library/document/pilgrim-code-of-law> (last visited Feb. 8, 2020) [hereinafter *Pilgrim Code of Law*].

382. Martinez, *supra* note 41, at 469 ("the Pilgrim Code aimed to give coherent form to the colonists' political practices and rules. The Code starts by referring to the Mayflower Compact and the Charter given by the King, which established the juridical foundations of what followed. That is, the colonists felt obligated to derive their authority from both the English law and their own law, which came from within themselves through the Compact."); LUTZ, THE ORIGINS *supra* note 32, at 7 (calling the Pilgrim Code of Law "essentially constitutional").

383. *Pilgrim Code of Law*, *supra* note 381; Perry, *supra* note 147, at 259 (first set of recorded laws, 1636).

rejected, and others that were wanting might be prepared that . . . they might be established.”³⁸⁴ Thus, on November 15, 1636, members of Plymouth Colony adopted their first Code of Law.³⁸⁵ Some have viewed this enactment as the first constitution in the Americas.³⁸⁶ The Code began by referencing the Mayflower Compact and the royal 1629 Charter of Massachusetts Bay,³⁸⁷ to which the Pilgrims had to refer, since they never received an official royal charter for Plymouth Colony, as described above.

In this seminal document, the settlers began laying the explicit rules for the governance of the region encompassing Plymouth Colony, combining the governance of the towns and plantations into one overarching entity: “we find a solemn and binding combination . . . for the ordering of a body politic . . . by virtue whereof we ordain, institute, and appoint the first Tuesday in March every year for the election of such officers as shall be thought meet for the guiding and government of this corporation.”³⁸⁸ During that yearly meeting, which was also known as a “General Court,” those assembled would select a governor along with seven assistants “to rule and govern the said plantations within the said limits for one whole year and no more,”³⁸⁹ whereupon another election would determine whether they would retain their offices or be replaced by others.

The colonists considered the General Court equivalent to Parliament in Great Britain.³⁹⁰ The periodic elections were intended to provide a check on governmental power, and presaged the two-year terms in the U.S. House of Representatives, six-year terms in the U.S. Senate, and four-year presidential

384. Pilgrim Code of Law, *supra* note 381.

385. *Id.*

386. Lutz, *From Covenant*, *supra* note 117, at 115 n. 23 (Although colonists in other areas of New England had begun to write formal documents, such as the Salem Agreement of 1634, forming the people into a society, historians deem the Pilgrim Code of Law in 1636 “to be the first true American constitution,” since it delineated “the specifications for a form of government.”); Martinez, *supra* note 41, at 468 (quoting John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 44 (1990)) (“What distinguished the Puritans in New England, from other Calvinist communities in Europe and other English colonies in America, was their ability to derive from their theological doctrines direct and dramatic ideas and constitutional institutions. This was, in fact, the feature that made Puritans in New England become a fertile seed for American constitutionalism.”); *id.* at 467 (“The idea of a written constitution is an American contribution.”); *id.* at 468 (quoting Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 22 (1990)) (“to explain the surprising similarity of the state[s] constitutions and the colonial documents”).

387. LUTZ, *THE ORIGINS*, *supra* note 32, at 27, 40.

388. Pilgrim Code of Law, *supra* note 381. The date was subsequently changed to the first Tuesday in June. *Id.*; LUTZ, *THE ORIGINS*, *supra* note 32, at 40-41.

389. Pilgrim Code of Law, *supra* note 381; *see also* LUTZ, *THE ORIGINS*, *supra* note 32, at 40-41.

390. LUTZ, *THE ORIGINS*, *supra* note 32, at 39.

terms in the U.S. Constitution and similar terms in state constitutions.³⁹¹ All “freemen,” as designated “according to the former custom,” would participate in the annual meeting to elect the governor and assistants, a treasurer, a clerk of the court, a coroner, local constables and inferior officers.³⁹² Hence, the general court, along with the division of power among other governmental officials, instead of vesting all political authority into one person, augured the separation of powers so valued by the framers of our later federal and state constitutions.³⁹³

The Pilgrim Code of Law vested in the governor the quintessentially executive power to carry out “the execution of such laws and ordinances as are or shall be made and established.”³⁹⁴ This is equivalent to the power of the executive branch maintained by the current state governors and U.S. president. The governor of the colonial territory also had the power “to arrest and commit to ward any offenders,”³⁹⁵ equivalent to the policing and prosecutorial power currently vested in the executive branch. The assistants to the governor were charged with helping the governor both in executing the laws and in carrying out the policing, prosecuting, and imprisoning offenders.³⁹⁶ In addition, the constables were tasked with bringing “suspicious persons” and people who disturbed the peace before the governor or his assistants for a hearing.³⁹⁷

However, to ward against autocratic tendencies of those in power, the colonists included basic rights to safeguard against too much power being granted to the government, which is reflected in the current federal and state

391. Witte, *supra* note 237, at 59 (“the Puritans insisted that both political and ecclesiastical officials occupy their offices only for limited tenures Political officials generally served one to two year terms, and then ran for reelection.”) Between this influence and George III, it is no wonder the United States limited terms of members of Congress and of the President. *Id.* at 61 (“Sixth, the Puritans advocated the ‘democraticall election’ of both political and ecclesiastical officials . . . the people use elections to protect themselves against autocratic, arbitrary, and avaricious rulers.” Some officials did not want this.).

392. Pilgrim Code of Law, *supra* note 381; LUTZ, THE ORIGINS, *supra* note 32, at 41.

393. Witte, *supra* note 237, at 59 (“the Puritans advocated the development of self-limiting “republican” forms of government for both the church and the state. Rather than consolidate all forms of authority in one person or one office, they insisted on separate forms or branches of authority, each checking the sinful excesses of the other.”); *id.* at 60 (“Colonial government was divided, at least roughly, between the executive (administrative), legislative and judicial offices. Each office had a distinct responsibility in the commonwealth, and each wielded a measure of authority over the others.”).

394. Pilgrim Code of Law, *supra* note 381.

395. *Id.*

396. *Id.*

397. *Id.*

constitutions.³⁹⁸ Moreover, developing a written code of statutes would constrain the actions of governmental officials, who must then follow the written laws, ensconcing a measure of fairness and due process.³⁹⁹ For example, the rights of defendants were already beginning to emerge, in the qualifying language which “provided that with all convenient speed he shall bring the cause to hearing either of the assistants or general court according to the nature of the offense,”⁴⁰⁰ echoing the requirements of a speedy trial guaranteed to present-day defendants by the U.S. Constitution.⁴⁰¹ The fact that the accused party could be brought before the “assistants” may be considered a precursor of lower courts hearing minor matters, and the “general court” a precursor of the higher courts hearing more serious matters.

However, the “general court” was not a traditional court of law over which a judge presided, but was instead the assembly of all freemen within the colony that met once per year to elect the officials and to take care of other serious matters.⁴⁰² In addition to “general courts” (which were required to meet in Plymouth) the colony also relied on “courts of assistants” (which also met in Plymouth) and “inferior courts” (which could meet in other parts of the colony).⁴⁰³ The Code provided for a “grand inquest,” which could only “be brought to the bench . . . [when] done upon oath.”⁴⁰⁴ Moreover, “all trials, whether capital or between man and man, [must] be tried by juries according to the precedents of the law of England.”⁴⁰⁵ Regarding minor disputes, “the governor and two assistants, at the least, shall . . . determine in such trivial cases, viz., under forty shillings between man and man, as shall come before them: as also in offense of small nature.”⁴⁰⁶

In the Pilgrim Code of Law, the colonists asserted all of the rights of their counterparts back in England, with the principle of the consent of the governed as a primary right:⁴⁰⁷

398. Witte, *supra* note 237, at 58-59 (“This temptation toward self-indulgence and self-gain was particularly strong and dangerous among political and ecclesiastical officials They therefore advocated and adopted a variety of constitutional safeguards against autocracy for the state as well as the church. Many of these constitutional safeguards were the prototypes of those written into state and federal constitutions in the following century.”).

399. *Id.* at 60 (“the Puritans advocated the development of legal codes and clear statutes so that ‘magistrates might not proceed according to their discretions.’”).

400. Pilgrim Code of Law, *supra* note 381 (emphasis added).

401. U.S. CONST. amend. VI.

402. Pilgrim Code of Law, *supra* note 381 (“the annual election of officers before expressed be at a general court” at which the governor directed “the freemen to make their appearance,” the failure of which would result in a three shilling fine.).

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*; LUTZ, THE ORIGINS, *supra* note 32, at 41.

407. LUTZ, THE ORIGINS, *supra* note 32, at 27.

- “[A]s freeborn subjects of the state of England, we hither came endowed with all and singular the privileges belonging to such.”⁴⁰⁸
- “[W]e think good that it be established for an act that, according to the . . . due privileges of the subject aforesaid, no imposition, law, or ordinance be made or imposed upon us by ourselves or others at present or to come but such as shall be made or imposed upon us by consent, according to the free liberties of the state and kingdom of England and no otherwise.”⁴⁰⁹
- “[T]he laws and ordinances of the colony and for the government of the same be made only by the freemen of the corporation and no other.”⁴¹⁰
- “[Taxes] shall be laid upon the whole . . . without partiality so as the freemen be not spared for his freedom, but the levy be equal.”⁴¹¹

The Code required the governor to swear an oath “faithfully, equally, and indifferently . . . to administer justice in all cases coming before you as the governor.”⁴¹² The admonition to administer justice equally foreshadows the right to equality under the law in the U.S. Constitution. Of course, not everyone in colonies participated in governance and enjoyed the rights and privileges thereunder—women for example. This mandate also apparently provided the governor with the power to adjudicate cases as would the judge of a court in the present day, in contradistinction to the doctrine of separation of powers regarding the judicial branch embodied in our contemporary Constitution. Indeed, the assistants were also to take part in the judicial duties within the colony, “in giving his best advice both in public court and private council with the governor.” In fulfilling this duty, each assistant swore an oath to “faithfully, truly, and justly . . . be assistant to the governor for his present year for the execution of justice in all cases and towards all persons coming before you without partiality.”⁴¹³

The governor’s ability to “examine any suspicious persons for evil against the colony, and also to interpose or oppose such as he conceives may tend to the overthrow of the same,”⁴¹⁴ echoes the charges of treason in the U.S. Constitution. Of course, the separation of powers between the executive,

408. Pilgrim Code of Law, *supra* note 381.

409. *Id.*

410. *Id.*; LUTZ, THE ORIGINS, *supra* note 32, at 41.

411. Pilgrim Code of Law, *supra* note 381.

412. *Id.*; LUTZ, THE ORIGINS, *supra* note 32, at 41.

413. LUTZ, THE ORIGINS, *supra* note 32, at 41.

414. Pilgrim Code of Law, *supra* note 381.

legislative, and judicial branches that are now so familiar to Americans was not yet as well established, as is also apparent in this grant of seemingly broad power without mentioning the mediating involvement of the court. However, the skeletal outline of powers within the document may well have been implemented somewhat differently in practice.

Interestingly, not only were the officers of the colonial territories required to take an oath of loyalty and attest that they would exercise their duties in good faith, but so were all “freemen.”⁴¹⁵ The duties of this oath required freemen to “endeavor to advance the growth and good of the several plantations [within the government’s territory] by all due means and courses.”⁴¹⁶ Moreover, freemen were affirmatively required to oppose any actions of others that might “tend to the destruction or overthrow” of their respective plantations or of the colony as a whole and report such actions to the governor.⁴¹⁷

The Pilgrim Code of Law required that “the annual election of officers . . . be at a general court” at which the governor directed “the freemen to make their appearance,” the failure of which would result in a three shilling fine. Moreover, anyone elected to become governor or an assistant was required to accept that position or pay a hefty fine.⁴¹⁸ This was no small sacrifice, as the governor was required to live in Plymouth during the year in which he served as governor.⁴¹⁹ Thus, the Code imposed not only rights but also duties upon people within the colony. But since William Bradford served as governor for many years, this duty was presumably not as onerous as it might have been.

Of course, not all people were “freemen,” as not all were recognized as “freeborn subjects of the state of England.”⁴²⁰ All people, whether “freemen” or not, were required to take “an oath of allegiance to the King and fidelity to the government and the several colonies therein.”⁴²¹ Additionally, similar to the freemen, all other persons residing within the territory must oppose and report to the governor any “intents and purposes as tend [to the destruction or overthrow]” of the government. And as noted above, only freemen were allowed to participate in elections. In addition to males who were not considered freemen, women were not allowed to take part in the governance of the

415. *Id.*; LUTZ, THE ORIGINS, *supra* note 32, at 41.

416. Pilgrim Code of Law, *supra* note 381.

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*; LUTZ, THE ORIGINS, *supra* note 32, at 41.

colony, although they were expected to abide by its laws.⁴²² Moreover, women were forced to submit to male authority, though some rebelled.⁴²³ Although all of these restrictions may make the Pilgrim Code of Law seem archaic and discriminatory by today's standards, it nevertheless contained many progressive elements, considering the more stringent limitations on participation in government the colonists had experienced in England.⁴²⁴

Rather than simply a compilation of statutes, the Code was much more along the lines of a constitution, setting forth the structure of government, along with rights and responsibilities of individuals within the settlement, than was the Mayflower Compact.⁴²⁵ As such, it was one of the earliest written constitutions in the New World.⁴²⁶ The Code cemented the governmental institutions established by the settlers, as well as the political practices and laws they had adopted during the previous sixteen years, creating a coherent set of entities and edicts, and abandoning those no longer in use.⁴²⁷ In formulating written statutes, the Pilgrims removed uninhibited discretion of governmental officials and bound them to remain within the stricture of the laws

422. CHENEY, *supra* note 41, at 243. Note that women in the colonial period were starting to exert themselves in the public sphere. In fact, one of the American Bar Association's highest awards, the Margaret Brent Award, is named for Margaret Brent, the first woman lawyer in America. Brent arrived in the colony of Maryland in 1638 and was involved in 124 court cases in more than eight years, winning every case. In 1648, she formally demanded a vote and voice in the Maryland Assembly, which the governor denied. *ABA Bestows Brent Award on 5 Notable California Women Lawyers*, ABA (Aug. 11, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/aba-bestows-brent-award-on-5-notable-california-women-lawyers/>.

423. Roger Williams: *The Verin Case*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/verincase.htm> (last updated Feb. 26, 2015) ("In Puritan New England, as well as in Tudor and Stewart England, it was the accepted belief that intelligence and understanding was given to men, not women. Women were not allowed to speak in church, and were seen as intellectually and morally inferior (starting with Eve's failing in the Garden of Eden). At the same time, women were a valuable part of the 17th century household, particularly in early New England where they were expected to maintain and direct the household operation in the absence of the husband. However, when the husband was present, they were expected to defer judgment to him.").

424. Witte, *supra* note 237, at 62 ("The franchise limitations were the same for both church and state elections. Only males of the age of majority who were communicant members of the congregational church could vote. Though by modern standards such limitations seem unduly stringent, they were more liberal than those which the colonists had encountered in England.").

425. Lutz, *THE ORIGINS*, *supra* note 32, at 27 (With "the description of institutions, the Pilgrim Code of Law becomes the first modern constitution . . . A free, self-governing people used a deliberative process based upon their consent to create a government . . . centered upon a representative assembly beholden to a virtuous people as measured by God's law.").

426. *Id.* Of course, the North American Native American tribes had their own sophisticated governance systems, but they were in disseminated in the oral tradition rather than written format.

427. *Id.* (explaining the Pilgrim Code of Law established "all the political practices and institutions, as well as the laws generated since 1620, into coherent form, eliminating what was redundant or no longer needed.")

instead of exercising unfettered power, ensuring some measure of due process for the governed.⁴²⁸ Moreover, it bound together in one political entity several distinct towns, each with their own independent councils that together comprised Plymouth Colony, and as such became a model of a federal form of government, in which several entities covenanted to be bound together through mutual promises.⁴²⁹

The ideals brought from England and honed through the settlers' need to create from whole cloth their own independent forms of government helped them plant the seeds that would grow into the constitutional democracy in our country today.⁴³⁰ One historian noted that "the Pilgrim Code of Law becomes the first modern constitution . . . A free, self-governing people used a deliberative process based upon their consent to create a government. The government was centered upon a representative assembly beholden to a virtuous people . . . One hundred forty years later, Americans would use these same symbols as the basis not only for their first state constitutions but also for breaking with Great Britain."⁴³¹ The same historian noted that "Furthermore, the proceedings of adoption clearly indicated that the code was an extension of the Mayflower Compact, which was a covenant."⁴³²

3. *Plymouth Colony's Remaining Decades*

Along with the other colonies up and down the eastern seaboard, Plymouth Colony continued to grow as more immigrants arrived from England. And as mentioned previously, along with an increasingly developing and growing society, the government of the settlement correspondingly became more complex and sophisticated.

For over a half-century, the relationship between the settlers and some of the Native American tribes remained relatively amiable. However, at times

428. Witte, *supra* note 237, at 60 ("the Puritans advocated the development of legal codes and clear statutes so that 'magistrates might not proceed according to their discretions.'" Some officials did not want this.).

429. *Id.* ("the Puritans adopted a quasi-federalist structure of government for both the church and the state The state was divided into semi-autonomous town governments, each with their own internal structures of executive, legislative, and judicial authority, but conjoined into a broader colonial government." This was based on practical necessity initially, but later on federalist principles.).

430. *Id.* at 44 ("What distinguished New England Puritans both from other Calvinist communities in Europe and from other English Colonies in America was their ability to derive from their theological doctrines direct and dramatic constitutional ideas and institutions. It was this feature that rendered Puritan New England a fertile seedbed for American constitutionalism.").

431. LUTZ, *THE ORIGINS*, *supra* note 32, at 27.

432. *Id.* at 41.

“the Pilgrims proved unexpectedly violent and vindictive.”⁴³³ Moreover, as Europeans continued to immigrate to New England and confiscate more land, some purchasing it,⁴³⁴ and some taking it by fiat, the initial tolerance of the indigenous population toward Europeans waned.⁴³⁵ The growing insatiability of the colonists for the land that had traditionally been that of the indigenous people understandably caused the Native Americans to try to protect their homelands.⁴³⁶

The relationship between the two groups deteriorated precipitously, leading to the Pequot War of 1637, when the settlers conducted “a terrifyingly brutal assault” on Pequot children, women, and elderly men, introducing the region “to the horrors of European-style genocide.”⁴³⁷ The English settlers and their allies eventually nearly obliterated the Pequot tribe, killing hundreds of people, selling hundreds of others into slavery in the West Indies, and forcing others to live as captives among other tribes in the region who were on friendly terms with the settlements.⁴³⁸ Not surprisingly, some tribes found it might be advantageous to side with the Europeans— due in part to their longstanding rivalries with the tribes who were fighting against the settlers, and due in part to the growing strength of the colonies.⁴³⁹ Those tribes wanted to align with the side they predicted would eventually prevail.⁴⁴⁰

By 1640, nearly 25,000 immigrants had left Europe to start a new life in North America. About 1,000 people resided in the seven settlements comprising Plymouth Colony, approximately 1,500 people lived in the dozen settlements comprising the New Haven and Connecticut colonies, about 2,000 settled around the Boston area, and nearly 7,000 were dispersed to the west

433. PHILBRICK, *supra* note 42, at 155. For a description of one instance of the Pilgrims’ slaughtering neighboring Native Americans and the ensuing devastation to the local tribes, see *id.* at 151-57.

434. *Id.* at 170-72.

435. *The Native American Response*, BRITANNICA (Oct. 26, 1998), <https://www.britannica.com/place/United-States/The-Native-American-response>.

436. *Id.*

437. PHILBRICK, *supra* note 42, at 178-79; see also Dennis Zotigh, *Do American Indians Celebrate Thanksgiving?*, SMITHSONIAN MAG. (Nov. 26, 2019), <https://www.smithsonianmag.com/blogs/national-museum-american-indian/2019/11/27/do-american-indians-celebrate-thanksgiving/> (“On May 26, 1637, near the present-day Mystic River in Connecticut, while their warriors were away, an estimated 400 to 700 Pequot women, children, and old men were massacred and burned by combined forces of the Plymouth, Massachusetts Bay, and Saybrook (Connecticut) colonies and Narragansett and Mohegan allies. Colonial authorities found justification to kill most of the Pequot men and enslave the captured women and their children. Pequot slaves were sent to Bermuda and the West Indies.”).

438. *Id.* at 178-79, 253.

439. *Id.* at 178-80.

440. *Id.* at 178-80.

and along the northern coast of New England.⁴⁴¹ In 1643, the four New England colonies decided to band together in a loose confederation to help bolster their mutual protection against the Native Americans: Connecticut, Massachusetts Bay, New Haven, and Plymouth.⁴⁴² The Confederation of 1643 became the first instance where the colonies united together in a federal association—a precursor to the ultimate joining together of the United States.⁴⁴³ The population of Plymouth Colony in 1643 had grown to about 2,000 people.⁴⁴⁴ A few decades later, after a series of belligerent incidents between the Plymouth settlers and the original inhabitants of the region, another war broke out between the tribes and the settlers in New England between 1675-1678.⁴⁴⁵ This conflict is known as King Phillip's War or Metacom's War, in which the late Wampanoag Chief Massasoit's son, who went by both of those names, had united many of the region's Native-American inhabitants in one final attempt to reclaim their homeland against the insatiable Europeans.⁴⁴⁶ Ultimately the settlers defeated the indigenous communities, killing thousands of men, women, and children, capturing and enslaving great numbers of people and exporting them from the region,⁴⁴⁷ and forcing others to move farther west. Nearly eight percent of men from Plymouth Colony died in the war compared to the losses sustained by the Native American population of

441. LUTZ, *THE ORIGINS*, *supra* note 32, at 23.

442. Fred Shelley, *Ebenezer Hazard: America's First Historical Editor*, 12 WM. & MARY Q. 44, 57 ("The colonies of Plymouth, Massachusetts Bay, Connecticut, and New Haven entered into a Confederation in 1643, for their mutual help and safety."); MATHER, *supra* note 87, at 55; PHILBRICK, *supra* note 42, at 180-82.

443. Shelley, *supra* note 442, at 72-73 ("This federal compact, which was entered into by the colonies of New England with the view of resisting the Indians, was the first instance of union afforded by the Anglo-Americans. There were several other such compacts, up to the one of 1776, which led to the independence of the colonies."). See Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 43 (1862); see also PHILBRICK, *supra* note 42, at 180-82; LUTZ, *THE ORIGINS*, *supra* note 32, at 32 ("It was the first of many plans for uniting all the colonies.").

444. Patricia Scott Deetz & James Deetz, *Population of Plymouth Town, Colony & County*, HISTARCH (Dec. 14, 2007), <http://www.histarch.illinois.edu/plymouth/townpop.html>.

445. See PHILBRICK, *supra* note 42, at xiii, 213-344 (describing King Phillip's War in great detail); Roger Williams: *King Philip's War*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/philipswar.htm> (last updated Feb. 26, 2015).

446. PHILBRICK, *supra* note 42, at xiii, 213 (discussing "the English need for land" and 214-344 describing the war in detail); Rebecca Beatrice Brooks, *History of King Philip's War*, HIST. OF MASS. BLOG, (May 31, 2017), <https://historyofmassachusetts.org/what-was-king-philips-war/>.

447. PHILBRICK, *supra* note 42, at xii (describing Plymouth Colony's Governor Josiah Winslow's involvement in shipping 180 Native American slaves to the Caribbean after the uprising against the Europeans who had taken their land and wreaked havoc upon their society).

between 60 to 80 percent.⁴⁴⁸ Historian Nathan Philbrick describes: “one people’s quest for freedom had resulted in the conquest and enslavement of another.”⁴⁴⁹ After a time, few Native Americans remained in New England.⁴⁵⁰

Toward the last few decades of the 17th century, the settlement known as Plymouth Colony was dwarfed by its much larger neighbor, the Massachusetts Bay Colony. Many people had left Plymouth to branch to more fertile and productive places in the region.⁴⁵¹ Moreover, the European colonists in Plymouth and Massachusetts Bay had captured large numbers of Native Americans and shipped them away from New England as slaves in a policy of removal.⁴⁵² In 1691, the two colonies were merged by decree of a new royal charter from England, with the smaller being effectively absorbed into the larger with the arrival of a new governor appointed by the crown in 1692.⁴⁵³ At the time, Plymouth Colony contained about 7,000 people, the same number as living in Boston alone, with about 60,000 living throughout New England.⁴⁵⁴ The Mayflower Compact was no longer necessary as a governance document and its content disappeared for many years, until colonial leaders prior to the Revolution revived its existence toward the latter part of the 1700s and John Quincy Adams heralded its national significance in a patriotic speech at the beginning of the 1800s.⁴⁵⁵ However, even though people were not frequently referring to the Mayflower Compact by name in the 18th century, its establishment of democracy on American soil at the beginning of

448. *Id.* at 332.

449. *Id.* at xiii.

450. Roger Williams: *The Verin Case*, NAT’L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/verincase.htm> (last updated Feb. 26, 2015) (“By 1676 the rich Indian cultures of 1620 were reeling from war and disease, and Europeans would take virtually all of their lands.”).

451. PHILBRICK, *supra* note 42, at 185.

452. *Id.* at 252-53, 345 (“It has been estimated that at least a thousand Indians were sold into slavery during King Philip’s War, with over half the slaves coming from Plymouth Colony alone . . . Fifty-six years after the sailing of the Mayflower, the Pilgrims’ children had not only defeated the Pokanokets in a devastating war, they had taking conscious, methodical measures to purge the land of its people.”).

453. PHILBRICK, *supra* note 42, at 346.

454. GRAGG, *supra* note 7, at 290.

455. Anastaplo, *supra* note 40, at 55 (“the Compact seems to have been of considerable use in the early decades of Plymouth Colony, but it was superseded when that colony was absorbed in 1692 by the much larger Massachusetts Bay colony. Not only was the Compact superseded but, it seems, even the very text of it dropped out of sight thereafter for more than a century. Evidently, it did not come back into public view until John Quincy Adams discovered and publicized it in the early years of the Nineteenth Century.”). As described in greater detail below, this statement was somewhat exaggerated, as colonists referred to the Mayflower Compact in supporting their pre-Revolutionary activities in the 1700s, such as Thomas Jefferson’s inclusion of the Mayflower Compact in his compilation of important documents in 1775. See Shelley, *supra* note 442, at 49-50.

the colonies' experiences with self-governance continued to live on throughout the colonies during the rest of the colonial period leading up to the American Revolution, as described below.

IV. THE MAYFLOWER COMPACT'S ENDURING LEGACY

Shortly after its founding, people soon learned about the success of Plymouth Colony, inspiring them to undertake settlements in other parts of the New World.⁴⁵⁶ While one should not overstate the impact of the Mayflower Compact,⁴⁵⁷ this formative document, along with the political community it initially created, has certainly contributed to the historical evolution of governance and civic culture within the United States.⁴⁵⁸ For example, some nearby colonies established after Plymouth Colony similarly developed around a model of relative self-governance and relatively broad participation by the populace.⁴⁵⁹ Over subsequent decades, through exchanges of both people and letters between North America and Europe, political theorists throughout the European continent carefully watched the new political experiments occurring in the New World, which were following more egalitarian and democratic principles than governance under royal rule across the Atlantic.⁴⁶⁰ The iconic place of the Pilgrims and the Mayflower Compact be-

456. MATHER, *supra* note 87, at 28 (“the news of the good progress made in the new plantation of Plymouth, inspired the renowned Mr. White, minister of Dorchester, to prosecute the settlement of such another plantation here [Cape Ann] for the propagation of religion.”).

457. PHILBRICK, *supra* note 42, at 41 (“there is a temptation to make more out of the Mayflower Compact than there actually was.”).

458. GRAGG, *supra* note 7, at 190 (“The Mayflower Compact would prove to be a cornerstone for American culture, law, and government”).

459. *See, e.g.*, MATHER, *supra* note 87, at 29-30; *see also* PHILBRICK, *supra* note 42, at 175 (describing the close relationship between the governors of Plymouth Colony and Massachusetts Bay Colony “Bradford had already developed a rapport with Massachusetts Bay Governor John Winthrop”); LUTZ, *THE ORIGINS*, *supra* note 32, at 23 (“The New England settlements were in some contact with each other”).

460. *The American Enlightenment: Treasures from the Stanford University Libraries*, STANFORD LIBR., <https://exhibits.stanford.edu/american-enlightenment> (last visited Feb. 21, 2020) (“Like many European Enlightenment theorists, Locke had never been to the New World, but this small detail did not stop him from grounding some of his revolutionary ideas in the vast Enlightenment laboratory called America. The Enlightenment, that great age of intellectual inquiry and discovery that stretched from roughly 1680-1820, drew fundamentally from the European colonization of the Americas . . . ever-faster and more numerous ships regularly ferried books, objects, and letters across the Atlantic Ocean, so that Europeans and Americans communicated in increasingly dense intellectual networks over the course of the eighteenth century.”); *see also* Motley, *supra* note 29, at 472 (“the influence of America upon Europe and upon the world has been more extensive and more durable than it could have been under any other imaginable historical circumstances. Amid the volcanic convulsions of the last two years, by which the political surface of Europe has been so fearfully riven, this trans-Atlantic democracy has preserved so serene and prosperous an appearance, that the makers of constitutions, and the political philosophers of Europe, are examining the theory of the United States’ government and the history of the country with more attention than ever.”).

gan to emerge shortly before the American Revolution, and grew exponentially as civic and political leaders used their power to contribute to a new national identity.

A. ESTABLISHMENT OF OTHER COLONIES

As one might imagine, the Mayflower Compact was not the only document influenced by the covenantal leanings developed by the English colonists and others in the 1500s and 1600s. Many of the settlements throughout the New World had also been influenced by these progressive theological and political evolutions of thought during this timeframe, and their colonial documents likewise reflected these tendencies, as explored in this section.⁴⁶¹ William Bradford, the longstanding Governor of Plymouth Colony, gave his settlement credit for establishing a model for independent congregations throughout the New England region.⁴⁶² Additionally, the fact that the crown provided written documents in the form of royal charters granting the colonies certain rights and responsibilities must also have influenced the colonists to adopt written documents amongst themselves granting certain rights and responsibilities among the members of the settlements and establishing a governance structure to enforce those rights and responsibilities.⁴⁶³ This greater tendency in the colonies to favor written documents corresponded with their belief in restraints on government, as well as their respect for the Bible as the written religious laws governing their spiritual beliefs.⁴⁶⁴ As referenced above, this reliance on the written word by individual members of congregations was a relatively new phenomenon.

Great Britain adopted a hands-off policy toward the colonies, later known as “salutary neglect,” under which the crown allowed the colonies to

461. Elazar, *supra* note 5, at 4 (“during the sixteenth and seventeenth centuries, the Scots and the English Puritans not only conceived of civil society in covenantal terms, but actually wrote national covenants to which loyal members of the body politic subscribed. Similar covenants were used in the founding of many of the original colonies in British North America. Covenantal thinking was the common mode of political conceptualization during the American Revolution, where it was reflected in any number of constitutional documents.”); Martinez, *supra* note 41, at 466 (“The influence of Calvinism in North American constitutionalism is precisely visible in the main contributors [sic] of North America to the Universal constitutionalism: the Constitution as the supreme law and as a written rule, a limited and representative Government, and federalism and the civil rights.”).

462. PHILBRICK, *supra* note 42, at 173.

463. Martinez, *supra* note 41, at 474 (“charters guaranteed large amounts of local self-government, and the colonists got used to establishing their own local governments within the framework of a written document that was fundamental and superior to local authorities, and that simultaneously legitimated and limited their political activity.”); Lermack, *supra* note 219, at 1418 (“Colonial charters served as grants of authority for the erection of governments and the foundation for institutions and written law.”).

464. Martinez, *supra* note 41, at 465 (“English colonial experience in America shows a large amount of written legislation (contrary to customs and judicial decisions, the dominant sources in Great Britain).”).

develop economically and politically with relatively little restriction from the British government.⁴⁶⁵ This approach enabled the colonies to foster their own economic growth, entrepreneurship, and independent spirit.⁴⁶⁶ Practical reasons behind this policy included the great distance between the two continents, contributing to the difficulty and slowness of travel and communication, making governance from afar challenging.⁴⁶⁷

Thus, for the first part of colonial history, the monarch had initiated a relatively *laissez-faire* policy, allowing the settlers to create and implement their own structures for governance, as long as they generally complied with English law.⁴⁶⁸ This noninterventionist approach by Great Britain, coupled with the relationships that emerged among the colonies, led the colonies to rely on their own resources and upon each other as templates for the continued progression toward democratic structures of government, as highlighted by the examples below.

1. *Massachusetts*

After the Massachusetts Bay Company made a failed attempt in 1623 to establish an outpost in Cape Ann, on its second endeavor it started a successful settlement in 1628 in the area near Boston and Salem.⁴⁶⁹ The Massachusetts Bay Colony was initially founded by a profit-seeking corporation, like some of the other settlements in North America, such as the Virginia Company.⁴⁷⁰ Therefore, mercantile concepts of contract indubitably influenced the settlers' conceptualization of political theory and governance,⁴⁷¹ in addition to the theological covenant influences described above. Lawyer and religious leader John Winthrop led a surge of Puritan Calvinists to the colony starting in 1630 and served as governor for 12 of the colony's first 20

465. James Henretta, *Salutary Neglect*, ENCYCLOPEDIA VA. (May 27, 2011), https://www.encyclopediavirginia.org/salutary_neglect#start_entry.

466. Rebecca Beatrice Brooks, *18th Century Massachusetts*, HIST. OF MASS. BLOG (Aug. 12, 2016), <https://historyofmassachusetts.org/18th-century-massachusetts/>.

467. Martinez, *supra* note 41, at 471 (Factors contributing to independent governments in colonies included: "the directive counsel in London's nominal control over the colonies, the huge distance between the colonies and the monarchy, the dynamics of self-government, and England's preoccupation with its current civil war gave the colonists substantial latitude to resolve their own affairs.").

468. Witte, *supra* note 237, at 43 (citing Charter of Massachusetts Bay (1629) reprinted in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1846, 1857 (F. Thorpe ed. 1909) [hereinafter *Massachusetts Charter*], ("The colonists were largely free to develop their own political and legal structures, provided that they "be not contrarie or repugnant to the Lawes and Statues of . . . England.")).

469. See MATHER, *supra* note 87, at 27-36.

470. See *id.*

471. Martinez, *supra* note 41, at 471 ("American constitutionalism was also built upon the addition of the mercantile concept of contract to the political arena.").

years.⁴⁷² Infused by the Great Puritan Migration,⁴⁷³ the Massachusetts Bay Colony grew quickly and soon dwarfed the previously established Plymouth Colony, which was growing at a relatively slower pace.⁴⁷⁴ As noted above, by 1640, about 2,000 lived in the Boston area and only 1,000 in Plymouth Colony.⁴⁷⁵

As the Bible was of supreme importance in the Puritan religion, the ability to read and understand the Bible was also vital, and therefore education and literacy were of great concern.⁴⁷⁶ And since at least the late 1500s, political theorists in Europe had espoused the central importance of widespread education as a prerequisite for good governance.⁴⁷⁷ In 1636, the same year that the Pilgrim Code of Law was established, the Great and General Court of the Massachusetts Bay Colony voted to establish Harvard College, which is the oldest institution of higher education in the United States.⁴⁷⁸

Instead of direct democracy, in which all electors vote on government edicts and take part directly in governance, the settlers in the Massachusetts

472. See generally Maxwell, *supra* note 131 (In 1630, John Winship led the Puritans in establishing Massachusetts Bay Colony); MATHER, *supra* note 87, at 27-36.

473. Rebecca Beatrice Brooks, *17th Century Massachusetts*, HIST. OF MASS. BLOG (Aug. 12, 2016), <https://historyofmassachusetts.org/17th-century-massachusetts/> (“The Great Puritan Migration was a period between 1620 and 1642 when English Puritans migrated to the New World”).

474. PHILBRICK, *supra* note 42, at 173; MATHER, *supra* note 87, at 27-36.

475. LUTZ, *THE ORIGINS*, *supra* note 32, at 23.

476. Martinez, *supra* note 41, at 462 n. 19 (Under Calvinism, “If the source of the religions experience was mainly the Bible . . . education was an essential tool to the creation of the personal autonomy. In this sense, it is symptomatic that the founding of Harvard College in 1636, initially thought of as a shelter for Puritans in exile and Yale in 1701 had Congregationalist Calvinist influences. Princeton, established in 1747, had a Presbyterian Calvinist origin.”); GRAGG, *supra* note 7, at 19-20.

477. Cooper, *supra* note 30, between 534-39 (quoting *Vindiciae, Contra Tyrannos*, “A tyrant pursues eminent and just men with hatred, and holds them in suspicion . . . a king summons and invites good men from every quarter . . . and so that such men should not be lacking, he opens elementary schools of reading, establishes colleges, and cultivates seminaries of virtue everywhere.”).

478. *Harvard at a Glance: History*, HARVARD, <https://www.harvard.edu/about-harvard/harvard-glance/history> (last visited Feb. 8, 2020); Martinez, *supra* note 41, at 462 n. 18 (“[the Americans] were an ‘enlightened people’ who knew their rights and the limits of power and who, unlike any people before them, aimed to think before they felt.”); see also MATHER, *supra* note 87, at 92-100 (“The Salt of the Nations: The History of Harvard College”). The College of William and Mary was established in Virginia in 1693; St. John’s College was established in Maryland in 1696; Yale College was established in Connecticut in 1701; Princeton was founded in 1746; Columbia University in New York was started as King’s College in 1754; and Benjamin Franklin established the precursor to the University of Pennsylvania in 1751, which traces its roots back to 1740; the College of Rhode Island opened in Providence in 1755; Queen’s College, which later became Rutgers University, opened in New Jersey in 1766; and Dartmouth College was founded in New Hampshire in 1768. See *Alma Mater: The History of American Colleges & Universities*, COLUMBIA U., <https://ed-blogs.columbia.edu/histx3570-001-2014-1/timelines/early-american-colleges-1636-1860-a-timeline/> (last visited Feb. 21, 2020); *History of St. John’s College*, ST. JOHN’S C., <https://www.sjc.edu/about/history> (last visited Feb. 21, 2020); *History*, COLUMBIA U., <https://www.columbia.edu/content/history> (last visited Feb. 21, 2020); *Penn’s Heritage*, PENN., <https://home.www.upenn.edu/about/history> (last visited Feb. 21, 2020).

Bay Colony instituted a moderately democratic republic. They elected representatives to serve in government and act on behalf of the populace,⁴⁷⁹ just as the entire country would eventually do through state legislatures, the Articles of Confederation, and then the U.S. Constitution. At first, the Massachusetts settlers simply imposed the responsibilities of government upon the Board of Assistants during the first General Court in 1630, but subsequently the freemen participated in electing their government, starting with the third General Court in 1632.⁴⁸⁰ They remained firmly loyal to the monarch in England and thought of themselves as British subjects.⁴⁸¹

Like the Separatists in Plymouth Colony, the Puritans in Massachusetts Bay Colony believed in a covenant theology, which helped guide their religious and political actions.⁴⁸² However, in contrast with the beliefs and practices in Plymouth Colony, the Puritans in Massachusetts Bay Colony believed that once they had elected their governor, the governor ruled with divine right, and did not thereafter need the consent of the governed.⁴⁸³ Though asserting their own congregation's right to govern its internal matters, the Massachusetts Bay Puritans were Congregationalists, claiming to remain firmly within the Church of England, although in reality they worshiped as they pleased, without interference from church-appointed bishops.⁴⁸⁴ Therefore, they were appalled by the convictions of the Separatists who had established Plymouth Colony and had turned their backs on the Anglican Church.⁴⁸⁵

479. See MATHER, *supra* note 87, at 27-36.

480. Motley, *supra* note 29, at 483-84.

481. Maxwell, *supra* note 131, at 3 ("Both Massachusetts Bay and Plymouth perceived themselves as purely English colonies, subject to English law and loyal to the English monarch.").

482. Elazar, *supra* note 5, at 22-23 ("John Winthrop, the foremost Puritan founder, summarized this understanding in two brief sentences: 'We are entered into a Covenant with Him for this work. We have taken out a commission.'").

483. Maxwell, *supra* note 131, at 4 ("Plymouth's Mayflower Compact was viewed by the members of that colony as a covenant. Those who were elected to office were bound by the terms of the covenant just as were all members of the community, they were in that sense equals. Philosophically, therefore, Plymouth's government came close to being a true democracy; its elected officers derived their powers by the consent of the governed within the terms of their shared covenant."); *id.* at 405 (This contrasted with the prevailing philosophy in other colonies such as Massachusetts Bay. Once the governor and other officials were chosen by the people, they ruled with divine authority, derived from the divine right of kings.).

484. Martinez, *supra* note 41, at 466 ("Congregationalism . . . the government of the church should be completely decentralized with autonomous local congregations, and . . . a 'democracy' under juridical rules as the best form of ecclesiastical and civil government."); PHILBRICK, *supra* note 42, at 174.

485. Anastaplo, *supra* note 40, at 37 ("The great body of Puritans, whether they were working for a Presbyterian or a Congregational purification of England, were horrified by the Separatists. These endangered the cause by seeming to prove to the government that Puritanism was really what the government said it was—subversive, anarchical, disloyal . . . So, the little band who eventually landed and suffered at Plymouth in 1620 are not quite representative. The large and well-organized

Despite maintaining some trappings of a fledgling democracy, the new settlement was far from democratic.⁴⁸⁶ The Massachusetts Bay Colony was largely Puritan and was governed by a few Puritan leaders elected by free-men, who were required to be members of the local Puritan church.⁴⁸⁷ The leaders policing the population were strict, and punishments for violations of the laws laid down by those leaders were severe.⁴⁸⁸ Although people of other Christian faiths lived in the colony, such as Anglicans, Baptists, and Quakers, they suffered from various manifestations of intolerance at the hands of the colonial leaders and people in the religious majority.⁴⁸⁹ For example, in 1632 the General Court enacted an edict mandating that only members of the Puritan church were able to be citizens in the colony, in a move subsequently described: “Thus the aristocracy became a theocracy, and the colony was less democratic than ever.”⁴⁹⁰ Since only one-third of the population of Massachusetts Bay Colony were members of the Puritan church, two-thirds were excluded from citizenship and the ability to participate in governance of the colony.⁴⁹¹ Moreover, others, such as women, servants, bondsmen, artisans, were also unable to be involved in the government.⁴⁹² An account looking back from the mid-1800s described the situation as follows: “Religiously, socially, politically, the early government of Massachusetts was a severe, in many respects a tyrannical, system.”⁴⁹³

The Puritans in Massachusetts Bay Colony had come to the New World to distance themselves from the Church of England and King Charles in order

body who settled Massachusetts Bay in 1630, though committed to the Congregational idea, stoutly maintained that they were not and never had been Separatists.”).

486. Motley, *supra* note 29, at 487 (“In civil and political matters, too, the strictness of the government was not less apparent.” The General Court disfavored anyone who was not a member of the church.).

487. *Id.* at 482-84 (The colony was initially governed by a Board of Assistants elected by the “freemen,” Puritans who wanted to establish what they considered to be the “true church” (not religious freedom) Freemen included “men of aristocratic birth and education” from England, as well as “old planters,” who had immigrated to the region between 1623-1630. Freemen did not include servants, artisans, and women, among other subordinate groups).

488. *Id.* at 487-88 (“banishment, whipping, and cropping of ears; the tongue . . . was bored through with a red hot iron,” slavery—all punishments meted out by the Puritans in Massachusetts. “Nowhere in the world was a stricter police established than in Massachusetts.”).

489. *See, e.g.,* PHILBRICK, *supra* note 42, at 177 (discussing the treatment of the Quakers, including executions for their religious beliefs).

490. Motley, *supra* note 29, at 484 (“At the General Court in May [1632] that remarkable ordinance was passed, by which membership of a Calvinist church was established as an indispensable prerequisite of citizenship. Thus the aristocracy became a theocracy, and the colony was less democratic than ever.”).

491. *Id.* (stating two-thirds of the population of Massachusetts Bay Colony were not members of the Calvinist church); *see also* MATHER, *supra* note 87, at 31 (noting the creation of a “church state” earlier in Massachusetts Bay Colony).

492. Motley, *supra* note 29, at 483-84 (Women, servants, bondsmen, and artisans were all excluded from governance.).

493. *Id.* at 486.

to practice their Congregationalist Puritan beliefs in freedom,⁴⁹⁴ yet they denied that same religious freedom to others, including their propensity to exile people from the colony.⁴⁹⁵ Their intolerance led the colonial leaders to vehement theological disagreements with both Roger Williams and Anne Hutchinson, two independent-minded spiritual leaders, eventually leading to their banishment from the colony in the mid-1630s.⁴⁹⁶ Roger Williams and Anne Hutchison were later founders of Rhode Island, a colony based on principles of religious tolerance, as well as greater civil and political rights.⁴⁹⁷ Also due to disputes with the Puritan leaders in Boston, in 1636 Reverend Thomas Hooker led about 100 people out of Massachusetts Bay Colony to found Hartford, and later established the colony of Connecticut.⁴⁹⁸

The inclination of Puritans in the Massachusetts Bay Colony to separate themselves physically, and in many respects theologically, from the Church of England may have helped foster an environment of questioning those in power and separating from authority with which one disagrees. This inclination could consequently prompt the freethinking among the colonies to leave and establish their own settlements where they could practice their own beliefs.⁴⁹⁹

Undoubtedly influenced by the 1636 Pilgrim Code of Law,⁵⁰⁰ the leaders in Massachusetts Bay Colony adopted The Book of the General Laws and Liberties Concerning the Inhabitants of Massachusetts in 1648.⁵⁰¹ This set of

494. See MATHER, *supra* note 87, at 27-36.

495. PHILBRICK, *supra* note 42, at 170, 177.

496. Motley, *supra* note 29, at 486 (Note the “treatment to which Roger Williams, Anne Hutchinson, and subsequently the Quakers, were subjected. The fact is, that toleration, religious toleration, so far from being considered a virtue at that day, was rather accounted a crime.”). See more on Roger Williams and Anne Hutchinson in the discussion of Rhode Island, below. See also History.com Editors, *Anne Hutchinson*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/colonial-america/anne-hutchinson>; PHILBRICK, *supra* note 42, at 161, 170, 177.

497. PHILBRICK, *supra* note 42, at 161, 170, 177.

498. Nancy Finlay, *Thomas Hooker: Connecticut's Founding Father*, CONN. HIST. (Sept. 22, 2019), <https://connecticuthistory.org/thomas-hooker-connecticuts-founding-father/>.

499. Anastaplo, *supra* note 40, at 57 (“What made this problem particularly acute for the Puritans is that they were, as we have seen, themselves separatists, with a recent history of repeated separations. The principle upon which they had acted theretofore threatened to undermine their own stability—and, indeed, there were in the decades following the original settlements in Massachusetts separations into not only nearby towns but also into what we now know as Connecticut and Rhode Island. The availability of plentiful land to the West and South made such separations always attractive for the more restless spirits.”).

500. Members of Plymouth Colony and Massachusetts Bay Colony interacted with each other and consulted with each other on various occasions. See, e.g., MATHER, *supra* note 87, at 31 (“ours, now arrived at Salem, consulted with their brethren at Plymouth”).

501. Witte, *supra* note 237, at n. 76 (quoting The Book of the General Laws and Liberties Concerning the Inhabitants of Massachusetts 1 (1648) (M. Farrand ed. 1929) (page following A2) (“The authors of the Laws and Liberties [of Massachusetts] made clear, however, that codification should not lead to sterile conservatism, but that the law should be equitably applied. ‘[W]e have not published [this code] as a perfect body of laws sufficient to carry on the Government established

laws was based on a document called the “Body of Liberties” originally published in 1641.⁵⁰² The General Laws and Liberties set forth certain rights for certain segments of the population as well as duties, and the authors intended it to be a living document adaptable to new circumstances as they arose over time,⁵⁰³ which is an early precursor to the theories of the living Constitution in modern constitutional interpretation.⁵⁰⁴

Tragically, John Winthrop had written into the Body of Liberties the legalization of slavery in the colony, penning there “shall never be any bond slavery *unless* it be lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us.”⁵⁰⁵ Governor Winthrop also enslaved Native Americans, to which the Massachusetts General Court of Assistants gave legal approbation in 1639.⁵⁰⁶ When his son Samuel became an adult, he moved to Antigua and worked African slaves on a plantation, as the Caribbean was the heart of the triangular trade in slaves between Africa, the Caribbean and North America, including the New England colonies.⁵⁰⁷ Another son, John, Jr., who in later years became governor of Connecticut, also owned black slaves on numerous landholdings, as did other Winthrop family members and their progeny.⁵⁰⁸ Many people in the United States today do not realize the extent of slavery that existed throughout the northern colonies and states—including both indigenous and black slaves.⁵⁰⁹ At the time the U.S. Constitution was written, “[a]t least one-third of the slaveowners came from the northern states.”⁵¹⁰

for future times, nor could it be expected that we should promise such a thing . . . You have called us from amongst the rest of our Brethren and govern us power to make these lawes: we must now call upon you to see them executed: remembering that old & true proverb, The execution of the law is the life of the law.”); *see also* Martinez, *supra* note 41, at 480 (listing various right included in the Massachusetts Body of Liberties).

502. *Massachusetts Body of Liberties*, MASS.GOV, <https://www.mass.gov/service-details/massachusetts-body-of-liberties> (last visited Feb. 8, 2020); *see also* Martinez, *supra* note 41, at 480 (which lists various right included in the Massachusetts Body of Liberties).

503. Witte, *supra* note 237, at n. 76.

504. Anastaplo, *supra* note 40, at 18 (“The principles vital to the Constitution of the United States and to American constitutionalism invite, if they do not even require, continual reexamination by citizens. Such inquiry extends to the influential documents that precede the Constitution, such as Magna Carta, the Mayflower Compact, the Declaration of Independence, and the Articles of Confederation.”).

505. C.S. Mangold, *New England’s Scarlet “S” for Slavery*, THE BOSTON GLOBE (Jan. 18, 2010), http://archive.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/18/new_englands_scarlet_s_for_slavery/?page=full.

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*; *see also* PHILBRICK, *supra* note 42, at 253 (“Selling Indian captives served two functions: it provided income to help pay for the war, and it removed a dangerous and disruptive people from the colony—not to mention the fact that it made the rebels’ lands available for later settlement by the English.” “[M]any Englishmen in the Narragansett Bay region, would own African slaves”).

510. LUTZ, THE ORIGINS, *supra* note 32, at 137.

A series of squabbles with the crown in England led briefly to the revocation of the colony's charter in the later decades of the century. After King James' daughter Mary, along with her husband William of Orange, deposed the king in the Glorious Revolution in 1688,⁵¹¹ William and Mary issued a new charter in 1691 establishing the Province of Massachusetts Bay, which incorporated the former Plymouth Colony into the Massachusetts Bay Colony, along with a few other holdings.

Sir William Phips returned from England with the new charter to take charge of the expanded province in 1692.⁵¹² Phips had been born in New England of low socioeconomic stature, but through hard work and good fortune raised himself to become the first native-born New Englander to receive a knighthood.⁵¹³ Unfortunately, he arrived in the reestablished province just as the mass hysteria about witchcraft was cresting.⁵¹⁴ Around 125 people had already been incarcerated on such charges in Salem and Boston. In Phips' most notorious action, he launched the court that oversaw the Salem Witch Trials in May of 1692.⁵¹⁵ Largely focusing on other matters, Phips travelled north for several weeks during the height of the trials, and upon his return, twenty people had already been executed. Although initially deferential to the colonial church, after witnessing this religiously based persecution and slaughter, Phips disbanded the original court as well as a subsequent iteration and pardoned several of the accused.⁵¹⁶ Nearly all of those remaining in prison were released by May of 1693, bringing the horrors perpetrated by these infamous dogmatists to a close.⁵¹⁷

511. History.com Editors, *Glorious Revolution*, HISTORY.COM (Feb. 19, 2018), <https://www.history.com/topics/british-history/glorious-revolution>.

512. See MATHER, *supra* note 87, at iv; see also Brendan Dignan, *Governor, Sir William Phips*, SALEM WITCH TRIALS: DOCUMENTARY ARCHIVE AND TRANSCRIPTION PROJECT, <http://salem.lib.virginia.edu/people/phips.html> (last visited Feb. 21, 2020).

513. See MATHER, *supra* note 87, at 55-65; see also Brendan Dignan, *Governor, Sir William Phips*, SALEM WITCH TRIALS: DOCUMENTARY ARCHIVE AND TRANSCRIPTION PROJECT, <http://salem.lib.virginia.edu/people/phips.html> (last visited Feb. 21, 2020).

514. See MATHER, *supra* note 87, at 59-65; see also Brendan Dignan, *Governor, Sir William Phips*, SALEM WITCH TRIALS: DOCUMENTARY ARCHIVE AND TRANSCRIPTION PROJECT, <http://salem.lib.virginia.edu/people/phips.html> (last visited Feb. 21, 2020).

515. See MATHER, *supra* note 87, at 59-65; see also Brendan Dignan, *Governor, Sir William Phips*, SALEM WITCH TRIALS: DOCUMENTARY ARCHIVE AND TRANSCRIPTION PROJECT, <http://salem.lib.virginia.edu/people/phips.html> (last visited Feb. 21, 2020).

516. *The Trials*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Salem-witch-trials/The-trials#ref1229029>; see also Brendan Dignan, *Governor, Sir William Phips*, Salem Witch Trials: Documentary Archive and Transcription Project, <http://salem.lib.virginia.edu/people/phips.html> (last visited Feb. 21, 2020).

517. *The Trials*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Salem-witch-trials/The-trials#ref1229029>; see also Brendan Dignan, *Governor, Sir William Phips*, Salem Witch Trials: Documentary Archive and Transcription Project, <http://salem.lib.virginia.edu/people/phips.html> (last visited Feb. 21, 2020).

Since the early 1600s, the geographic proximity of the Plymouth and Massachusetts Bay Colonies allowed their members to interact with each other with relative frequency, enabling them to share experiences and insights.⁵¹⁸ As noted above, the Massachusetts Bay Colony eventually absorbed Plymouth Colony. Massachusetts colonial historians loyal to their Massachusetts Bay Colony heritage gave the Mayflower Compact and Plymouth Colony rather cursory treatment in the subsequent decades.⁵¹⁹ However, the Commonwealth of Massachusetts now proudly displays its Pilgrim heritage, showcasing this history through the Plimouth Plantation (using the original spelling), including a living-history 17th century village, a Wampanoag Homesite, and the Mayflower II ship docked in Plymouth Harbor.⁵²⁰ Plymouth, Boston, Provincetown, and the surrounding region have embraced this legacy with their preparations for the 400th anniversary events in September 2020.

2. *Connecticut*

In 1635, Thomas Hooker, a Puritan minister who engaged in theological and political disputes with the Puritan leaders in Boston, obtained permission from the General Court of the Massachusetts Bay Colony to establish a separate settlement in the Connecticut valley.⁵²¹ In 1636 he led a group of 100 people to start a new settlement in a region they named Hartford.⁵²² Chafing under the continued attempts by the Massachusetts Bay Colony to exert authority over the new settlement, Reverend Hooker gave a sermon in 1638 proclaiming the right of the people within the new settlement to choose their own leaders and establish their own government.⁵²³ That sermon later became the basis for the Fundamental Orders of Connecticut in 1639,⁵²⁴ through which the settlers asserted they had the status of an independent colony, distinct and separate from Massachusetts Bay Colony, and created a

518. See MATHER, *supra* note 87, at 27-36.

519. Sargent, *supra* note 3, at 237; MATHER, *supra* note 87, at 21.

520. *Plimoth Plantation*, MASS. VACATION, <https://www.massvacation.com/business/3180/> (last visited Feb. 8, 2020); PHILBRICK, *supra* note 42, at 356-57.

521. Martinez, *supra* note 41, at 473 ("In 1635 Puritan Reverend Thomas Hooker received a permit, from the General Court to colonize the valley of Connecticut."); MATHER, *supra* note 87, at 36-39 and 80-87.

522. Nancy Finlay, *Thomas Hooker: Connecticut's Founding Father*, CONN. HIST. (Sept. 22, 2019), <https://connecticuthistory.org/thomas-hooker-connecticuts-founding-father/>.

523. *Id.*

524. For a thorough examination of the Fundamental Orders of Connecticut, see LUTZ, *THE ORIGINS*, *supra* note 32, at 42-46.

civil government for the cities of Hartford, Wethersfield, and Windsor and the surrounding region.⁵²⁵

The Fundamental Orders of Connecticut were forward-thinking in that they did not include a religious test to be eligible to vote.⁵²⁶ Moreover, reflecting the Mayflower Compact's precedence establishing the consent of the governed, the Fundamental Orders of Connecticut affirmed that "the foundation of authority is in the free consent of the people."⁵²⁷ Sometimes known as the first constitution in the colonies, the Fundamental Orders of Connecticut guaranteed that free men had the right to elect their leaders in government.⁵²⁸ This framework adopted the basic governance structure that had already been in place in Plymouth Colony under the Mayflower Compact and the Pilgrim Code of Laws.⁵²⁹ Referring to the colonial documents for self-governance that the settlers had developed in New England, "In less than two decades, these isolated communities evolved a historically important idea—the written constitution, found in a single document and adopted by citizens through their direct consent."⁵³⁰

3. *Rhode Island*

As mentioned previously, around the time of Reverend Hooker's disputes with the Puritan authorities in Boston, Roger Williams and Anne Hutchinson were also engaging in dissent with the same religious and governmental officials of the Massachusetts Bay Colony.⁵³¹ Much to the colonial leaders' consternation, Roger Williams advocated for greater religious freedoms and asserted that the European colonists should not be able to seize

525. Nancy Finlay, *Thomas Hooker: Connecticut's Founding Father*, CONN. HIST. (Sept. 22, 2019), <https://connecticuthistory.org/thomas-hooker-connecticuts-founding-father/>; Bruce P. Stark, *The Fundamental Orders of Connecticut*, CONN. HIST. (Jan. 14, 2020), <https://connecticuthistory.org/the-fundamental-orders-of-connecticut/>; see also Martinez, *supra* note 41, at 473 ("Three cities were built there [in the valley of Connecticut]: Hartford, Windsor and Wethersfield. They later became confederated [for mutual protection against the Native Americans.] . . . The Fundamental Orders of Connecticut was signed in June of 1639.").

526. Bruce P. Stark, *The Fundamental Orders of Connecticut*, CONN. HIST. (Jan. 14, 2020), <https://connecticuthistory.org/the-fundamental-orders-of-connecticut/>.

527. *The First Colonial Constitution*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/the-first-colonial-constitution>.

528. History.com Editors, *Connecticut*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/us-states/Connecticut>.

529. LUTZ, *THE ORIGINS*, *supra* note 32, at 27 ("Other early constitutions such as the Fundamental Orders of Connecticut (1639) have similar formats" to the Pilgrim Code of Law).

530. *Id.*

531. PHILBRICK, *supra* note 42, at 161, 170, 177.

land for themselves without compensating the original inhabitants.⁵³² Previously, Roger Williams had moved to Plymouth Colony in 1631 to assist its pastor,⁵³³ but he came to believe that the church in Plymouth was not sufficiently Separatist. Moreover, he disapproved of Plymouth Colony's usurpation of the land from the Native Americans, arguing that the settlers should have negotiated a contract with the tribal governments to purchase the land in order to hold legitimate title.⁵³⁴ After, he left Plymouth and returned to Boston, he continued to provoke the colonial leaders, eventually resulting in his eviction.⁵³⁵

Upon his banishment from Massachusetts Bay Colony in 1635, Roger Williams fled and subsequently founded a new community on the Narragansett River named Providence, as he felt the community received divine approbation.⁵³⁶ Williams "declared the settlement open to all those seeking freedom of conscience and the removal of the church from civil matters, and many dissatisfied Puritans came,"⁵³⁷ among them Anne Hutchinson, who had been persecuted for her views on religion and for being an outspoken woman in an era rife with gender-based discrimination.⁵³⁸ The colony of Rhode Island also attracted some of the first Jews to the New World, as well as Quakers.⁵³⁹ For people who were being persecuted because of their religious beliefs in other colonies and in Europe, Rhode Island became a place of

532. *Id.* at 170; History.com Editors, *Rhode Island Founder Banished from Massachusetts*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/rhode-island-founder-banished-from-massachusetts>.

533. PHILBRICK, *supra* note 42, at 170.

534. *Id.*

535. *Id.* at 161, 170, 177.

536. History.com Editors, *Rhode Island Founder Banished from Massachusetts*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/rhode-island-founder-banished-from-massachusetts>; Martinez, *supra* note 41, at 473 ("In 1635, Roger Williams was banished from Massachusetts, for heterodoxy, and he left to found Providence, the nucleus of the Rhode Island Colony.").

537. History.com Editors, *Rhode Island Founder Banished from Massachusetts*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/rhode-island-founder-banished-from-massachusetts>; *Roger Williams: Later Years*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/after-years.htm> (last updated Feb. 26, 2015) ("As the colony grew, religious dissenters flocked to Rhode Island. The religious liberty given to the small colony in the Charter of 1663 guaranteed that no person would be punished because of their beliefs.").

538. History.com Editors, *Anne Hutchinson*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/colonial-america/anne-hutchinson>.

539. History.com Editors, *Rhode Island Founder Banished from Massachusetts*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/rhode-island-founder-banished-from-massachusetts>; *Roger Williams: Later Years*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/after-years.htm> (last updated Feb. 26, 2015) ("The oldest Synagogue and the oldest Quaker Meeting House in America are also in Rhode Island.").

refuge.⁵⁴⁰ In 1663, the colony had secured an official charter from King Charles II certifying that the colony would:

“hold forth a lively experiment, that a most flourishing civil state may stand and best be maintained, and that among our English subjects, with a full liberty in religious concerns; . . . That our royal will and pleasure is, that no person within the said colony, at any time hereafter, shall be anyway molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and does not actually disturb the civil peace of our said colony; but that all and every person and persons may, from time to time, and at all times hereafter, freely and fully have and enjoy his and their own judgments and consciences, in matters of religious concerns[.]”⁵⁴¹

The government of Rhode Island derived its power from the sovereignty of the governed instead of from the deity, creating a more complete separation of church and state and fostering greater religious and political freedoms than in any other colony.⁵⁴² Rhode Island, therefore, took the budding democratic ideals surfacing through the Mayflower Compact even further.

4. *Pennsylvania*

King Charles II granted a charter to William Penn in 1681 allowing him to establish the colony of Pennsylvania.⁵⁴³ An intellectual powerhouse within the Society of Friends, otherwise known as the Quakers, Penn developed the new colony as another refuge for Quakers and other people who had been persecuted for their religious beliefs.⁵⁴⁴ Before sailing to the New World to

540. *Roger Williams: Later Years*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/late-years.htm> (last updated Feb. 26, 2015).

541. *Roger Williams: Return to England*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/england.htm> (last updated Feb. 26, 2015).

542. *Roger Williams: Later Years*, NAT'L PARK SERV., <https://www.nps.gov/rowi/learn/historyculture/late-years.htm> (last updated Feb. 26, 2015).; Martinez, *supra* note 41, at 473 (“Williams obtain[ed] a Charter from England for the new colony, characterized by a strong spirit of religious freedom and a more ‘democratic’ government than the rest.”); LUTZ, *THE ORIGINS*, *supra* note 32, at 28, 49 (the Rhode Island charter “provided for religious freedom and permitted a religiously acceptable alternative to swearing allegiance . . . and discussed religious freedom at length The discussion in the 1663 charter about religious liberty used language similar to that in the early state constitutions.”).

543. Matthew A. Zimmerman, *First Purchasers of Pennsylvania*, *ENCYCLOPEDIA OF GR. BRIT* (2016), <https://philadelphiaencyclopedia.org/archive/first-purchasers-of-pennsylvania/>; *William Penn and American History*, PENNSBURY MANOR, <http://www.pennsburymanor.org/history/william-penn-and-american-history/> (last visited Feb. 8, 2020).

544. *Frame of Government*, *ENCYCLOPEDIA.COM*, <https://www.encyclopedia.com/law/encyclopedias-almanacs-transcripts-and-maps/frame-government> (last updated Jan. 21, 2020) (“In 1681 King Charles II of England granted William Penn a large tract of land on the west bank of the Del-

become the first governor of Pennsylvania, named for his father, Penn drafted the Pennsylvania Frame of Government, ensuring freedom of religion, guaranteeing all traditional rights enjoyed by English citizens, and creating a balance of powers in government to prevent rulers from becoming authoritarian.⁵⁴⁵

One can surmise that, since William Penn's founding of the colony of Pennsylvania occurred over a half-century after the Mayflower Compact and the establishment of Plymouth Colony, perhaps Penn may have been influenced by the values of self-governance, consent of the governed, and democratic participation the Pilgrims had inaugurated through their actions in the earlier part of the century. Indeed, the ideas and ideals launched by the Mayflower Compact and the initial settlers in the New World reverberated across Europe throughout the 17th century, as discussed in the next section.

B. CONTINUED DEVELOPMENT OF DEMOCRATIC POLITICAL THOUGHT IN EUROPE

Shaped by the political experiment occurring throughout the European colonies in the New World, parallel political concepts continued to evolve on the other side of the Atlantic throughout the 1600s and 1700s.⁵⁴⁶ The Mayflower Compact and other documents establishing governments throughout the colonies demonstrated a growing expectation that governments derive their authority from the consent of the governed, that governmental power should be limited, that governments should guarantee individual rights, and that governments should rule for the betterment of society.⁵⁴⁷ One scholar has commented, "Many of the constitutional and political ideas of the eighteenth century liberals and republicans were essentially secularized forms of

aware River, which Penn named Pennsylvania in honor of his father. Penn, a member and intellectual leader of the Quakers (Society of Friends), saw Pennsylvania as a refuge for Quakers and other persecuted peoples. Penn believed in religious toleration on both pragmatic and moral grounds. He thought that a harmonious society, unhampered by intolerance, would be a prosperous society as well.").

545. *Id.* ("In 1682, before he left England to become the first governor of Pennsylvania, Penn wrote the Frame of Government, which served as the colony's first constitution. The Frame of Government was an expression of Penn's religious and political ideas. He sought to create a framework that would frustrate political mischief and prevent a ruler from assuming absolute power to the detriment of the community. To prevent absolutism, Penn employed the concept of balancing forces, a concept that the Framers of the U.S. Constitution later would use liberally. Freedom of worship was to be absolute, and all the traditional English rights were to be protected.").

546. Sargent, *supra* note 3, at 239, 249.

547. Martinez, *supra* note 41, at 469 ("The transformation of a religious covenant into a political compact only required the secularization of the former by the substitution of popular sovereignty in place of God. The Puritan theory of the church empowered only by the believers' consent leads directly to the democratic theory of a government by the consent of the governed.").

Puritan antecedents and analogues.”⁵⁴⁸ Moreover, political thinkers in the 17th and 18th centuries continued to develop secular political concepts based on covenantal or federal political relationships (recall from above that the term “federal” is based on the Latin word “foedus,” meaning covenant).⁵⁴⁹ As noted above, these were the same covenantal concepts that spurred the Pilgrims aboard the Mayflower to enter into a covenantal relationship with each other through the Mayflower Compact.⁵⁵⁰

European political philosophers picked up on these ideas in their subsequent writings, including Samuel Rutherford (circa 1600-1661), Thomas Hobbes (1588-1679), John Locke (1632-1704), Baron de Montesquieu (1689-1755), and Jean Jacques Rousseau (1712-1778).⁵⁵¹ In 1784, Immanuel Kant penned a manuscript entitled *What Is Enlightenment?* to encourage people to think for themselves, coining the term for the Age of Enlightenment.⁵⁵² Also known as the Age of Reason, this epoch spanned roughly from 1665-1815.⁵⁵³ Thus, in the decades after the landing of the Mayflower at Plymouth Rock through the establishment of the United States, the tendency to embrace increasingly democratic ideals skyrocketed on both sides of the ocean.⁵⁵⁴

548. Witte, *supra* note 237, at 64; *see also id.* at 62-63 (providing a good summary of influence of Puritan institutions and concepts upon both “liberal” and “republican” thinkers).

549. Cooper, *supra* note 30, at n. 54 (quoting Elazar, *supra* note 5, at 9) (“[F]ederal theology . . . (federal is derived from the Latin foedus, which means covenant) stimulated the renewed political application of the covenant idea which was given expression first by political theologians and then by political philosophers such as Althusius. In the next century it was given a secular term by Hobbes, Locke, and Spinoza.”); *see also* Elazar, *supra* note 5, at 20 (“the covenant idea was secularized by Hobbes (1651), Locke (1690), Montesquieu (1748); and in somewhat altered form, Rousseau (1762), among others, as the civil or social compact or contract.”); Cooper, *supra* note 30, at 545-547 (quoting Elazar, *supra* note 5, at 245, 253 (“The evidence is overwhelming that the covenant principle translated into the larger political realm as part of the development of modern popular government produced the idea of federalism.”)).

550. LUTZ, *THE ORIGINS*, *supra* note 32, at 7, 19.

551. Lermack, *supra* note 219, at 1415-17 (discussing Locke), Stewart Duncan, *Thomas Hobbes*, STANFORD ENCYCLOPEDIA OF PHIL. (Mar. 11, 2009), <https://plato.stanford.edu/entries/hobbes/>; Stewart Duncan, *Baron de Montesquieu, Charles-Louis de Secondat*, STANFORD ENCYCLOPEDIA OF PHIL. (July 18, 2003) <https://plato.stanford.edu/entries/montesquieu/>; Stewart Duncan, *John Locke*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 2, 2001), <https://plato.stanford.edu/entries/locke/>; Stewart Duncan, *Jean Jacques Rousseau*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 27, 2010), <https://plato.stanford.edu/entries/rousseau/>; Stewart Duncan, *Baruch Spinoza*, STANFORD ENCYCLOPEDIA OF PHIL. (June 29, 2001), <https://plato.stanford.edu/entries/spinoza/>. *See, e.g.*, THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at xviii, xx, xxi, and xxiv (John Adams and John Quincy Adams referenced Hobbes, Locke, Montesquieu, and Rousseau numerous times in their papers).

552. Immanuel Kant, *What Is Enlightenment?*, COLUMBIA U., <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html> (last visited Feb. 8, 2020).

553. History.com Editors, *Enlightenment*, HISTORY.COM (Dec. 16, 2009), <https://www.history.com/topics/british-history/enlightenment>.

554. For an example of European influence on the settlers, *see* CHENEY, *supra* note 41, at 251 (Plymouth colonist “William Brewster would eventually have a collection of four hundred books that included the works of Aristotle, Machiavelli, and Francis Bacon[.]”).

Samuel Rutherford (circa 1600-1661) became a minister in Scotland and espoused Presbyterianism, another theological structure whereby each congregation would be governed by its own lay members.⁵⁵⁵ Episcopalians, who believed in governance of the church by bishops, controlled the church in Scotland and removed Rutherford from his ministerial position.⁵⁵⁶ However, Presbyterianism gained traction, and Rutherford subsequently held several important positions in the church and educational institutions.⁵⁵⁷ *Lex, Rex* (*The Law and The Prince*), which Rutherford issued in 1644, “used religious arguments and biblical references to call for limitations on the power of kings and for constitutionalism.”⁵⁵⁸ As the title denotes, the law comes before the crown, meaning that the monarch must obey the law.⁵⁵⁹ Drawing from religious principles, this book asserted “that democracy might then be the best form of government wherein liberty might be defended against tyranny.”⁵⁶⁰ Relying on prior philosophers, Rutherford argued that under natural law, men are born free (women, of course, were still largely deemed subordinate to men), and therefore men only provisionally concede power to rulers.⁵⁶¹ His writings also justified revolt against unjust tyrants, which influenced not only subsequent philosophers such as John Locke, but also greatly influenced American colonial statesmen leading up to the American Revolution.⁵⁶² Moreover, according to his letters, Samuel Rutherford was also well-aware of the Pilgrims and their accomplishments, referring to them as “the Independents.”⁵⁶³

555. *Samuel Rutherford*, UNDISCOVERED SCOT., <https://www.undiscoveredscotland.co.uk/usbiography/r/samuelrutherford.html> (last visited Feb. 8, 2020).

556. *Id.*

557. *Id.*

558. *Id.*; David Kopel, *Origins of the Declaration of Independence: Samuel Rutherford's 'Lex, Rex'*, THE WASH. POST (July 2, 2016 4:42 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/02/origins-of-the-declaration-of-independence-samuel-rutherfords-lex-rex/>.

559. David Kopel, *Origins of the Declaration of Independence: Samuel Rutherford's 'Lex, Rex'*, THE WASH. POST (July 2, 2016 4:42 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/02/origins-of-the-declaration-of-independence-samuel-rutherfords-lex-rex/>.

560. Cooper, *supra* note 30, at 545.

561. David Kopel, *Origins of the Declaration of Independence: Samuel Rutherford's 'Lex, Rex'*, THE WASH. POST (July 2, 2016 4:42 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/02/origins-of-the-declaration-of-independence-samuel-rutherfords-lex-rex/>.

562. *Id.*

563. SAMUEL RUTHERFORD, JAMES ANDERSON & A.A. BONAR, RUTHERFORD'S LETTERS: LETTERS OF THE REV. SAMUEL RUTHERFORD, PROFESSOR OF DIVINITY AT ST. ANDREWS 630, 735-36 (William Whyte & Co. ed., 1848).

Significantly influenced by Rutherford's *Lex, Rex*, **Thomas Hobbes** (1588–1679) built upon and took these ideas further.⁵⁶⁴ Thomas Hobbes published the *Leviathan* in 1651, in which he asserted that, without government, all individuals would follow their own selfish desires, which would come into conflict with other individuals.⁵⁶⁵ In this “state of nature,” which entails constant violence and war, life would inevitably be “solitary, poore, nasty, brutish and short.”⁵⁶⁶ Therefore, as a matter of self-preservation, individuals must enter into a social contract to permit a sovereign government to create law and order, which will then use fear, torture, and harsh punishments to extract obedience from its subjects.⁵⁶⁷ When Hobbes was writing the *Leviathan*, he must have known of the Pilgrims and quite possibly had heard of the Mayflower Compact being written in nearly a “state of nature,”⁵⁶⁸ when the mutinous Strangers had threatened to abandon the colonial project because the leaders of the religious congregation had no legal authority over them.⁵⁶⁹ Recoiling from that state of nature, the voyagers agreed to enter into a mutually beneficial agreement with each other, to which all would be bound.⁵⁷⁰ The Plymouth colonial government had strengthened and solidified in the subsequent decades, justifying that political experiment.⁵⁷¹ As one scholar has noted, “Hobbes expressed the new modern view [of the secular covenant] quite simply: ‘A commonwealth is said to be instituted when a multitude of men do agree and covenant, every one with every one . . . to the end to live peaceably among themselves and be protected against other men.’”⁵⁷²

564. *Samuel Rutherford*, UNDISCOVERED SCOT., <https://www.undiscoveredscotland.co.uk/usbiography/r/samuelrutherford.html> (last visited Feb. 8, 2020).

565. See Editors of Encyclopedia Britannica, *Political Philosophy*, BRITANNICA (May 4, 1999), <https://www.britannica.com/biography/Thomas-Hobbes/Political-philosophy>; *Hobbes's Leviathan*, BRITISH LIBR., <https://www.bl.uk/collection-items/hobbess-leviathan> (last visited Feb. 8, 2020).

566. Lermack, *supra* note 219, at 1412.

567. See *id.* at 1412, 1412 n. 51.

568. *Id.* at 1417.

569. Sarah Pruitt, *How the Mayflower Compact Laid a Foundation for American Democracy*, HISTORY.COM (Aug. 5, 2019), <https://www.history.com/news/mayflower-compact-colonial-america-plymouth> (“The [Mayflower Compact] agreement also drew on the secular tradition of the social contract, the idea of covenants between men themselves, which went back to ancient times, but would later be made more famous by philosophers like Thomas Hobbes, John Locke and Jean-Jacques Rousseau.”).

570. Lermack, *supra* note 219, at 1417 (“Finding themselves on a ship beyond the reach of British authority, the Pilgrims looked into the face of the state of nature and recoiled. They believed that government was necessary to keep people from yielding to the depravity in their nature, and they knew that they would need leadership to deal with the harsh winter ahead. On November 21, 1620, the Pilgrims formed themselves into a “civill body politick” and drafted a written agreement.”).

571. See Elazar, *supra* note 5, at 23–24.

572. *Id.* at 20.

John Locke (1632-1704) was also influenced by Rutherford's *Lex, Rex*,⁵⁷³ popularizing the secular notion that everyone, even the king, is subject to the law, that the people hold ultimate sovereignty, and that the people are thus permitted to rebel against a tyrannical monarch.⁵⁷⁴ Locke published his seminal *Second Treatise on Government* in 1690, seventy years after the Mayflower Compact.⁵⁷⁵ He recognized that groups of people throughout history have separated themselves from their previous societies in order to establish new societies, undoubtedly influenced by the colonial experience in the New World.⁵⁷⁶ In contrast with Hobbes' view that humans were by nature constantly violent and self-serving, Locke "argued that people were compassionate, sociable, and could see the dangers of unchecked conflict."⁵⁷⁷ He believed that all individuals have certain natural rights, such as the right to acquire property. And since *all* people have certain rights, Locke's theory of social contract also supports the concept of equality.⁵⁷⁸ People also intuitively recognize the benefits of compliance with social norms that would keep the peace and preserve everyone's rights. However, since individuals' property rights will at times conflict with each other, and since some individuals will not comply with the peaceful social norms nor respect the rights of others, a government is necessary to adjudicate competing claims, as well as to punish people who threaten the peace and violate the rights of others.⁵⁷⁹ As aptly summarized:

the purpose of government is to protect those rights. The social contract, therefore, creates only a limited obligation to obey. As long as the sovereign governs in accordance with natural law, people must accept governmental action. If the sovereign violates natural law,

573. *Samuel Rutherford*, UNDISCOVERED SCOT., <https://www.undiscoveredscotland.co.uk/usbiography/r/samuelrutherford.html> (last visited Feb. 8, 2020).

574. *See* Lermack, *supra* note 219, at 1414 (stating the theory of the social contract "evolve[d] and [became] associated with rights, limits on government, and the sense that the government may use brute force only in an exercise to achieve what is right and just.").

575. *See* Martinez, *supra* note 41, at 463 (discussing John Locke and the doctrine of social contract in Locke's *Second Treatise on Civil Government*, published in 1690. The Pilgrims wrote the Mayflower Compact 70 years before John Locke's treatise.); *id.* at 469 (stating the Mayflower Compact was signed in 1620); *id.* at 479 n. 112 ("Locke's *Second Treatise of Government* was published fifty years later than the American colonists passed their Bill of Rights.").

576. Lermack, *supra* note 219, at n. 79 ("Locke noted that history recorded many instances of people renouncing allegiance to an existing civil society and founding a new one from scratch.").

577. *Id.* at 1413 (quoting JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (Peardon ed., Liberal Arts Press 1952) (1690)).

578. *Id.* at n. 60 ("To the extent that all people have the same natural rights, social contract theory has also been used to justify the important principle of equality.").

579. *Id.* at 1410, 1413-14 ("The social contract . . . solidifies the important principle that governmental power comes from the people and rests on the consent of the governed. It leads to the important normative conclusion that because the people have given their consent to the existence and powers of the government, they have also created an obligation to obey it.").

people are relieved of the obligation of obedience. Indeed, Locke argued that people possess a natural right to rebel against a tyrannical government.⁵⁸⁰

Thus, Locke helped to crystalize and popularize political theories in the secular realm that had been previously developed through Calvinism and other Protestant religious theories, such as natural rights, consent of the governed, and resistance to unjust governments.⁵⁸¹ At the same time that Locke's political thought was shaped by the colonial experiment in the New World, Locke's theories in turn permeated political thinking in the colonies, shaping the colonists conceptualization of themselves and their relationships with the monarch and parliament in Great Britain.⁵⁸²

Other political theorists in Europe, though not necessarily explicitly drawing from the Mayflower Compact, also had an immense impact upon political concepts in the American colonies. For example, **Baron de Montesquieu** (1689-1755) developed the theory that political power was in constant threat of becoming despotic.⁵⁸³ Therefore, governments should be split into numerous branches with different functions, each of which would form a check on the authority of the others.⁵⁸⁴ In this manner, none of the spheres of political power could exercise complete power, and therefore, the government as a whole could not fall prey to its inclinations toward tyranny.⁵⁸⁵ Montesquieu's political theories played a significant role in the development of governmental structures across the Atlantic, as the colonial leaders contemplated the best forms of governance for the future of their political systems.⁵⁸⁶

Scholars have referred to the Pilgrims and the Mayflower Compact as an example of the political theory described in *The Social Contract and Discourses* by **Jean Jacques Rousseau** (1712-1778).⁵⁸⁷ Rousseau promoted the

580. *Id.* at 1414.

581. Martinez, *supra* note 41, at n. 35 ("Foster also notes that Locke merely clarified the known Calvinist principles of fundamental law, natural rights, contracts and consent of the people, and resistance to tyranny.").

582. Lermack, *supra* note 219, at 1414 ("Eighteenth century America was strongly influenced by Locke.").

583. Stewart Duncan, *Baron de Montesquieu, Charles-Louis de Secondat*, STANFORD ENCYCLOPEDIA OF PHIL. (July 18, 2003) <https://plato.stanford.edu/entries/montesquieu/>.

584. *Id.*

585. *See id.*

586. *Id.*; Elazar, *supra* note 5, at 20 ("In this form, covenant acquired a fully separate political justification which, through Locke, Montesquieu and the covenanter settlers of America, became the basis for the formation of the United States as reflected in the preambles of the Declaration of Independence, the U.S. Constitution, and the American state constitutions.").

587. *Jean-Jacques Rousseau*, MINN. LIBRS. PUB. PROJECT, <https://mlpp.pressbooks.pub/introphil/chapter/jean-jacques-rousseau/> (last visited Feb. 8, 2020).

sovereignty of individual human beings as central to their freedom and personal development.⁵⁸⁸ He advocated for a political system that would help ensure both liberty and equality in a society where all individuals maintain their own autonomy and freedom.⁵⁸⁹ He argued this can only be achieved in a governmental system that is directed by the will of the people through a social compact,⁵⁹⁰ echoing the importance of a democratic state and governmental structures that allow for the general will to predominate.⁵⁹¹ Moreover, the law must have universal application, reflecting previous political theorists that no person is above the law, not even the rulers.⁵⁹²

Moreover, the governmental structures, themselves, continued to evolve gradually throughout Europe, mirroring this evolution in political thought and the emerging governance structures in the New World.⁵⁹³ As one example, England experienced the Glorious Revolution in 1688,⁵⁹⁴ which led to the English Declaration of Rights in 1688 and the English Bill of Rights in 1689.⁵⁹⁵ Some scholars credit the English Bill of Rights as providing impetus for the U.S. Bill of Rights, which were adopted as the first ten amendments to the U.S. Constitution.⁵⁹⁶ As a summary of the English Bill of Rights:

“Some of the key liberties and concepts laid out in the articles include:

- Freedom to elect members of Parliament, without the king or queen’s interference

588. Stewart Duncan, *Jean Jacques Rousseau*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 27, 2010), <https://plato.stanford.edu/entries/rousseau/>.

589. *Id.*

590. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES*, Ch. VI: The Social Compact (J.M Dent & Sons et al. eds., 1923) (1761), <https://oll.libertyfund.org/titles/rousseau-the-social-contract-and-discourses>.

591. Stewart Duncan, *Jean Jacques Rousseau*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 27, 2010), <https://plato.stanford.edu/entries/rousseau/>.

592. *Id.*; Lermack, *supra* note 219, at 1415-16 (discussing Jean-Jacques Rousseau — 1762: THE SOCIAL CONTRACT and “noble savages”).

593. Elazar, *supra* note 5, at 4 (“during the sixteenth and seventeenth centuries, the Scots and the English Puritans not only conceived of civil society in covenantal terms, but actually wrote national covenants to which loyal members of the body politic subscribed.”); *see also* Editors of Encyclopedia Britannica, *Instrument of Government*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Instrument-of-Government-England-1653> (The Instrument of Government, adopted by Oliver Cromwell under which he governed Great Britain from 1653-1657, entailed “[t]he first detailed written constitution adopted by a modern state.”); Martinez, *supra* note 41, at 462.

594. History.com Editors, *Glorious Revolution*, HISTORY.COM (Feb. 19, 2018), <https://www.history.com/topics/british-history/glorious-revolution>.

595. Martinez, *supra* note 41, at 463 (noting the English Declaration and Bill of Rights in 1688 and 1689).

596. History.com Editors, *English Bill of Rights*, HISTORY.COM (Mar. 6, 2018), <https://www.history.com/topics/british-history/english-bill-of-rights>.

- Freedom of speech in Parliament
- Freedom from royal interference with the law
- Freedom to petition the king
- Freedom to bear arms for self-defense
- Freedom from cruel and unusual punishment and excessive bail
- Freedom from taxation by royal prerogative, without the agreement of Parliament
- Freedom of fines and forfeitures without a trial
- Freedom from armies being raised during peacetimes.”⁵⁹⁷

Political philosophers in Europe writing after the establishment of the Plymouth Colony by the Pilgrims were undoubtedly influenced by the Pilgrims’ political experiment.⁵⁹⁸ And of course, the ideas continued to travel back and forth across the Atlantic, leading up to the American Revolution and the ensuing new United States, as reflected in both the federal government and state governments.⁵⁹⁹ The U.S. Constitution was strongly influenced not only by Separatist and Puritan concepts, but also by “concepts of French constitutionalism, European ideals, and solid roots in the Enlightenment (particularly the Scottish Enlightenment) . . . [as well as by] the British tradition of the common law . . . [and] the new concept of education introduced by the Reformation.”⁶⁰⁰ The next section will continue to explore the development of American political institutions through the Revolutionary War and beyond.

C. THE MAYFLOW COMPACT’S INFLUENCE ON THE REVOLUTIONARIES

As indicated above, the British monarchy maintained a relatively hands-off approach to the colonies for much of the 1600s.⁶⁰¹ Therefore, the colonial

597. *Id.*

598. See generally SEAN DELANEY, TRANSATLANTIC PRINT CULTURE AND THE RISE OF NEW ENGLAND LITERATURE 1620-1630 (April 2013), <https://repository.library.northeastern.edu/files/neu:1463/fulltext.pdf>.

599. LUTZ, THE ORIGINS, *supra* note 32, at 9 (“A host of medieval and Renaissance thinkers contributed to the constitutional tradition upon which the Americans built, as did many writing during the seventeenth and eighteenth centuries in England, Scotland, and France.”).

600. Martinez, *supra* note 41, at 462.

601. LUTZ, THE ORIGINS, *supra* note 32, at 63 (between the 1630s and 1688, “Britain’s North American colonies spent those years, the first half century of their existence, developing almost complete home rule.”); Rebecca Beatrice Brooks, *18th Century Massachusetts*, HIST. OF MASS. BLOG (Aug. 12, 2016), <https://historyofmassachusetts.org/18th-century-massachusetts/>.

societies, economies, political systems, and assemblies of representative government were allowed to grow, evolve, and become more sophisticated independently for several generations.⁶⁰² Influenced both by their own experiences cultivating the seeds of democracy and that of the governments in neighboring colonies, as well as by the development of secular political thought by influential minds in Europe, the New World settlers were beginning to establish principles of freedom and equality, along with limitations on government to prevent tyranny and subordination.⁶⁰³ Remaining true to their heritage from New England and other areas of the New World, the colonists maintained an ethic of hard work, frugality, and moderation, as well as other moral standards such as justice, honesty and personal as well as civic virtue.⁶⁰⁴ Their political structures included not only strong local governments, but also complicated colonial systems including elected representative assemblies with two chambers to ensure checks and balances, governors, and a judicial branch with trial courts and appellate courts implementing common law.⁶⁰⁵ Although initially judges had ruled with “absolute power” in the 17th century throughout most of the colonies, Maryland and New York had adopted the practice of common law, which spread to other colonies in the 18th century.⁶⁰⁶

Importantly, the colonists achieved many of these advances through written documents, many of which encompassed fundamental constitutional elements.⁶⁰⁷ The fact that these documents were ensconced in writing was a

602. Martinez, *supra* note 41, at 473 (“In time, the representative assemblies of the colonies increased in number and became more competent.”).

603. See Anastaplo, *supra* note 40, at 60 (In North America, “people, up and down the Atlantic Coast (not the Puritans alone), effectively governed themselves . . . Among the things secured by law and which Americans now take for granted, are limitations upon government and vindications of individual rights.”).

604. Walter Niegorski, *The Significance of the Non-Lockean Heritage of the Declaration of Independence*, 21 AM. J. JURIS. 156, 175-175 (1976) (quoting Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, 24 WM. & MARY Q. 7 (January, 1967)) (The Puritan Ethic maintained similarities with ancient republican virtue at the time of the Revolution, which has been described “as calling ‘for diligence in a productive calling, beneficial both to society and to the individual. It encouraged frugality and frowned on extravagance.’”); see also LUTZ, *THE ORIGINS*, *supra* note 32, at 87.

605. Anastaplo, *supra* note 40, at 60 (In North America, “people, up and down the Atlantic Coast (not the Puritans alone), effectively governed themselves . . . Among the things secured by law and which Americans now take for granted, are limitations upon government and vindications of individual rights.”); Martinez, *supra* note 41, at 478 (“By 1776, colonial ideas of government were well established. Colonists had polished the ideas of an elected government, limitations on the government’s power, a governor’s office, a bi-cameral representative assembly, written constitutions, a strong local government, a common law, and a system of judicial law focused on higher courts of justice.”).

606. Martinez, *supra* note 41, at 462 n. 17 (citing to CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* 34 (1953)).

607. Lutz, *From Covenant*, *supra* note 117, at 106 (By 1722, the colonists had written some 86 “constitution-like documents”).

crucial factor, signifying that everyone—including those who held governmental power—were subject to obey the strictures of those written documents—that no person is above the law, as foreshadowed centuries earlier through the Magna Carta in England.⁶⁰⁸ However, although limited government was important in both England and America, they differed in that America embraced written constitutions.

In England the common law was the primary means of limiting governmental power, whereas in America the means was different. The idea of limited government does in part derive from [the common law]. But in the American constitutional tradition, what replaced common law was a new political technique, the written constitution. No matter how important common law was for the operation of the American legal system, the written constitution that framed the system sprang from ideas, principles, and practices evolved primarily in America.⁶⁰⁹

As the legislative bodies in each of the thirteen colonies grew more experienced and highly developed, they each functioned along the lines of the House of Commons in Great Britain's Parliament, eventually claiming the same rights and benefits.⁶¹⁰ As a result, the government in Great Britain became wary of the colonial legislatures, as the members of the British Parliament did not want their primacy of political status to be diminished.⁶¹¹ Nor did they desire the colonies to be treated as equal states in a federal system, which would have threatened the very structure of the British Empire, in which Great Britain was dominant over subordinate dependencies throughout the globe.⁶¹²

In addition to political rivalries, other points of tension arose between Great Britain and the colonies. For example, starting with the Board of Trades in 1696, the British government began attempting to force trade policies upon

608. See THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at 20-21 (in which John Adams referenced the Magna Carta in an essay railing against the outrages perpetrated by the British Government).

609. LUTZ, THE ORIGINS, *supra* note 32, at 63.

610. Martinez, *supra* note 41, at 473-74 ("They began to claim for themselves all the privileges and functions of the English House of Commons."); see also LUTZ, THE ORIGINS, *supra* note 32, at 39, 63.

611. LUTZ, THE ORIGINS, *supra* note 32, at 39, 63.

612. Martinez, *supra* note 41, at 473-74 ("This caused a great amount of tension. The existence in each colony of a scale model House of Commons 'affected the very constitution of the British Empire itself, for it asserted that the empire was not a single state made up of a mother country and her dependencies, but rather a group of states equal in status, with coordinate legislatures and a common king. In this context, the American colonists supported the existence of a federal system."); LUTZ, THE ORIGINS, *supra* note 32, at 63.

the colonies that were more favorable to Great Britain, which grew increasingly in the 1700s.⁶¹³ In the mid-1700s, the settlers confronted numerous struggles with warfare, particularly the French and Indian War from 1754-1763.⁶¹⁴ The war contributed to economic volatility and increased British taxes, leading to further political conflicts with England.⁶¹⁵ In 1765, John Adams published a series of articles railing against the Stamp Acts, entitled *A Dissertation on the Canon and Feudal Law*.⁶¹⁶ In the third article of this series, he describes how, in the early colonial period, people involved in the Reformation in Europe and in England had begun to resist the tyranny of both canon and feudal law that had long worked together to oppress them, and that “It was this great struggle, that peopled America.”⁶¹⁷ Just as the oppression by the king and Anglican Church had caused the early settlers in Plymouth and elsewhere to “fly to the wilderness for refuge, from the temporal and spiritual principalities and powers, and plagues, and scourges, of their native country,”⁶¹⁸ the contemporary king and church were attempting to exert the same power over the colonists across the ocean.⁶¹⁹ Of the early colonists, John Adams wrote that “After their arrival here, they began their settlements,

613. Martinez, *supra* note 41, at 471 (“The colonial period had two distinct stages. The first began with the first settlement (Jamestown, Virginia in 1607) and continued until the restoration of the Massachusetts Charter in 1691. This stage is marked by a solid implantation of habits of self-government. The second stage ran from the creation of the Board of Trade in 1696 (the mission of which was to make the colonies profitable for England, assuring a favorable balance of Trade) until the Declaration of Independence in 1776, when the imperial administrative pressure became more suffocating. By that time, English efforts to revoke American autonomy were too late. American English colonists had enjoyed political autonomy for decades, and had firmly established habits of self-government.”).

614. Rebecca Beatrice Brooks, *18th Century Massachusetts*, HIST. OF MASS. BLOG (Aug. 12, 2016), <https://historyofmassachusetts.org/18th-century-massachusetts/>; Rebecca Beatrice Brooks, *History of the French and Indian War*, HIST. OF MASS. BLOG (May 24, 2018), <https://historyofmassachusetts.org/french-and-indian-war/>.

615. Rebecca Beatrice Brooks, *18th Century Massachusetts*, HIST. OF MASS. BLOG (Aug. 12, 2016), <https://historyofmassachusetts.org/18th-century-massachusetts/>.

616. John Adams, *A Dissertation on the Canon and the Feudal Law*, No. 1, MASS. HIST. SOC’Y, <http://www.masshist.org/publications/adams-papers/index.php/view/ADMS-06-01-02-0052-0004> (last visited Feb. 8, 2020); *see also* THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at 11-24.

617. John Adams, *A Dissertation on the Canon and the Feudal Law*, No. 1, MASS. HIST. SOC’Y, <http://www.masshist.org/publications/adams-papers/index.php/view/ADMS-06-01-02-0052-0004> (last visited Feb. 8, 2020).

618. *Id.*

619. THOMAS JAMES NORTON, THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 197-98 (Little, Brown & Co. ed., 1922) (“In the reign of Charles II, Parliament, for the purpose of compelling all persons to attend the established Church, passed (1665) the Conventicle Act making every one over sixteen years of age who attended a conventicle (any meeting for religious worship at which five persons were present besides the household) subject to imprisonment, with transportation beyond the seas for the third offence. During the same reign it passed the Test Act requiring oaths in support of the established religion Those acts hastened emigration to America, as did intolerance in continental countries The established Church of England had been set up in several of the Colonies and taxes were levied for its support.”).

and formed their plan both of ecclesiastical and civil government, in direct opposition to the cannon [sic] and the feudal systems,”⁶²⁰ foreshadowing the colonies’ eventual fracture from England and establishment of their own, independent national government. Yet the British government continued to exercise more significant power over the colonies, causing the previously largely independent colonists to bristle under the new yoke of control from across the ocean.⁶²¹

Others in the colonies began to evoke the memory of the early settlers, and particularly the colonists who arrived aboard the Mayflower and established Plymouth Colony, to stir up sentiments of patriotism toward America and indignation against the British encroachments upon their liberties.⁶²² For example, the first “Forefathers’ Day” celebrating the 149th anniversary of the landing of the Mayflower at Plymouth took place on December 22, 1769, in preparation for the 150th anniversary celebration the following year.⁶²³ The colonists’ pride in their ancestors and their history began to shape into a national story replete with virtues such as adventure, independence, self-determination, liberty, equality, self-governance, hard work, perseverance, and freedom.⁶²⁴

Since then, “many generations have learned America began at that spot”⁶²⁵ known as Plymouth Colony, or more precisely as Plymouth Rock, whom a 95 year old gentleman identified in 1741 as the rock where his father, a settler in 1623, had told him the first Pilgrims landed in 1620.⁶²⁶ On Forefather’s Day in 1774, the Sons of Liberty extracted the rock which broke in half; and they left half remaining in the ground and placed the other half in

620. John Adams, *A Dissertation on the Canon and the Feudal Law*, No. 1, MASS. HIST. SOC’Y, <http://www.masshist.org/publications/adams-papers/index.php/view/ADMS-06-01-02-0052-0004> (last visited Feb. 8, 2020).

621. See Witte, *supra* note 237, at 43 (“In the later seventeenth century, English authorities tried repeatedly to impose their will on colonial religion and politics through new forms of legislation and review. They succeeded only at the turn of the eighteenth century with the passage of a new provincial charter in Massachusetts and with the reinforcement of royal control in the other New England colonies. For some four generations, therefore, the Puritans enjoyed both homogeneity and the hegemony to carry out their theological and political experiments.”).

622. See Sargent Bush, Jr., *America’s Origin Myth: Remembering Plymouth Rock*, 12 AM. LITERARY HIST. 745, 747-48 (2000) (noting “the annual Forefathers’ Day celebration in Plymouth, held on the anniversary of the landing, 22 December . . .” “The first observance of Forefathers’ Day in Plymouth did not occur until 22 December 1769, no doubt anticipating the approaching sesquicentennial of the landing while also reflecting the growing tendency in those years to think in terms of separating America from England.”).

623. See PHILBRICK, *supra* note 42, at 350.

624. Bush, Jr., *supra* note 622, at 747 (“For over a century and a half, from the late eighteenth to the early twentieth centuries, the landing at Plymouth and the people who experienced it were the mirror in which Americans of various stripes saw their best selves reflected.”).

625. *Id.* at 745 (“many generations have learned America began at that spot.”).

626. PHILBRICK, *supra* note 42, at 350-51; GRAGG, *supra* note 7, at 225

the town square.⁶²⁷ After both halves had been diminished by souvenir-seekers chipping away at them over the years, and the upper half cracked yet again, in 1880 both halves were reunited and cemented together, and “1620” was carved on its face.⁶²⁸

The colonists perceived the charters that had originally established the colonies and their governments to be contracts between the monarch and colonies.⁶²⁹ When King George III began unilaterally to change the charters, meddle with the colonial legislative assemblies, and supplant colonial laws and governments, the colonists viewed this as a breach of contract by the king.⁶³⁰ Colonial leaders continued to develop and disseminate political doctrines supporting their claims to representation in government, the importance of the consent of the governed, and the famous charge of no taxation without representation.⁶³¹ They grounded these claims in the historical documents developed since the beginning of the colonial experience.⁶³² For example, Thomas Jefferson noted the importance of the Mayflower Compact in a compilation he made around 1775 listing significant historical documents of colonial America, starting with this 1620 text and running through manuscripts penned in 1772.⁶³³ Most of the colonists did not want to break with England until after the rejection of the Olive Branch Petitions.⁶³⁴ Perhaps this reflected the political theorists who posited that the governed have an obligation to obey government and work with government to redress any grievances, unless those in power had committed acts so egregious that the subjects were entitled to throw off the despotic abuse of authority.⁶³⁵

Nevertheless, the delegates from the colonies to the Continental Congress in Philadelphia eventually determined that the relationship with Great Britain had deteriorated beyond repair, as exemplified by the Boston Tea

627. PHILBRICK, *supra* note 42, at 350-51.

628. CHENEY, *supra* note 41, at 282-83.

629. *See* Lermack, *supra* note 219, at 1418-19.

630. *See id.*

631. THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at 24 (“After the Stamp Act, John Adams entered politics . . . In these ‘Instructions’ one can see the principle of ‘no taxation without representation.’”); LUTZ, THE ORIGINS, *supra* note 32, at 39 (“[T]he colonists would argue that Parliament had no power to tax them since they had their own legislatures under the king.”).

632. *See* LUTZ, THE ORIGINS, *supra* note 32, at 70-71.

633. *See* Shelley, *supra* note 442, at 49-50.

634. History.com Editors, *Congress Adopts Olive Branch Petition*, HISTORY.COM (Nov 13, 2009), <https://www.history.com/this-day-in-history/congress-adopts-olive-branch-petition>.

635. Elazar, *supra* note 5, at 18-19 (“Only after rulers had usurped power or done something to break the normal constitutional relationship between governors and governed was it necessary to go through some formal covenantal act in order to re-establish the principles upon which the relationship was built.”).

Party,⁶³⁶ forced quartering of British soldiers,⁶³⁷ and so on, leading to the American Revolution from 1775-1783. The colonial leadership took over important communication lines, abolishing the royal postal service and employing the same riders in the service of transporting correspondence between the colonies.⁶³⁸

The Continental Congress charged the leaders of each of the colonies with drafting and adopting new constitutions and new state governments that would be independent from Great Britain.⁶³⁹ At the same time the individual colonies were crafting their constitutions for each new state, the members of the Continental Congress worked on writing the Declaration of Independence listing the king's violations of the colonial charters and other infractions and signifying the separation of these new states from the royal monarchy and the United Kingdom. The Continental Congress then drafted the Articles of Confederation to formalize cooperation among the newly independent states in limited spheres, such as defense from attacks by foreign nations.⁶⁴⁰ The state and federal documents clearly influenced each other. For example, George Mason penned the Virginia Declaration of Rights with input from James Madison.⁶⁴¹ This document, adopted on June 12, 1776, became the basis for Thomas Jefferson's development of the Declaration of Independence, as well as many of the preambles setting forth individual rights in numerous state constitutions.⁶⁴² And importantly, all of these documents drew upon the instruments the early settlers had created throughout the colonial period:

In American constitutionalism, there was more continuity and from an earlier date than is generally credited. The early state constitutions did not suddenly spring into being. Neither did the United

636. THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at 34-35 (John Adams referenced the Boston Tea Party in opposing taxation without representation in the British Parliament).

637. *Id.* at 33 (John Adams referenced the Boston Massacre in an argument demonstrating "the danger of standing armies.").

638. Shelley, *supra* note 442, at 52.

639. LUTZ, THE ORIGINS, *supra* note 32, at 100.

640. Articles of Confederation art. 2 ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled."); Articles of Confederation art. 3 ("The said States hereby severally enter into a firm league of friendship with each other, for their common defense . . ."); *see also* Lermack, *supra* note 219, at 1421.

641. *The Virginia Declaration of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/found-ing-docs/virginia-declaration-of-rights> (last visited Feb. 8, 2020).

642. LUTZ, THE ORIGINS, *supra* note 32, at 120-21.

States Constitution. The continuity was rooted not only in documents and instruments but also in a way of viewing and approaching politics.⁶⁴³

Notably, throughout the war for independence, the Continental Congress also designated at least one day of thanksgiving each year in a reflection of the Thanksgiving Day tradition that had begun with the original settlers in Plymouth.⁶⁴⁴

1. Declaration of Independence

After debating numerous drafts and amendments, the Second Continental Congress ratified the final iteration of the federal Declaration of Independence on July 4, 1776.⁶⁴⁵ Although people from the different colonies varied widely in their origins and economies, and thought of themselves as members of distinct political entities (e.g., as a Virginian or a Rhode Islander), they united together through their separation from Great Britain.⁶⁴⁶ As described more recently, “the Declaration is the document that establishes our nation as a body politic, in much the same way as the Mayflower Compact gave birth to that earlier community.”⁶⁴⁷ As the opening paragraphs of the Declaration indicate:

The unanimous Declaration of the thirteen united States of America, When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of

⁶⁴³ LUTZ, THE ORIGINS, *supra* note 32, at 49.

⁶⁴⁴ History.com Editors, *Thanksgiving 2020*, HISTORY.COM (Oct. 27, 2009), https://www.history.com/topics/thanksgiving/history-of-thanksgiving#section_2.

⁶⁴⁵ *Declaration of Independence: Primary Documents in American History*, LIBR. OF CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/declarind.html> (last visited Feb. 8, 2020).

⁶⁴⁶ Elazar, *supra* note 5, at 10 (“In politics, covenant connotes the voluntary creation of a people and body-politic. The Declaration of Independence is an excellent example of this kind of covenant. Through it, the diverse inhabitants of the thirteen colonies reaffirmed that they had consented to become a people.”).

⁶⁴⁷ Cooper, *supra* note 30, at 549.

Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter and abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.⁶⁴⁸

This venerated manuscript did not glorify self-centered individualism, but instead reflected the selfless virtues extolled by the founders of our nation, such as equality and justice, as well as freedom.⁶⁴⁹ These characteristics are reflective of those of the Pilgrims, such as moderation, self-discipline, community-oriented values, and equality.⁶⁵⁰ As mentioned above, many people within the colonies did not want to go to war with England before the Revolution and would have preferred a peaceable severance.⁶⁵¹ Regarding their “Brittish brethren,” the Declaration emphasizes that the people in the former

648. THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776).

649. Nicgorski, *supra* note 604, at 177 (“the Declaration of Independence did not suggest to all Americans a heady and vigorous individualism. Sacrifice, restraint, virtue, and justice were hallmarks of other authentic American traditions that joined in the Revolution and entered the stream of American life.” As opposed to simply laissez-faire individualism, “America has rebounded with a greater passion for equality.”).

650. Anastaplo, *supra* note 40, at 106 n. 230 (“The great modern statement in favor of equality is to be found in the Declaration of Independence, anticipated in this respect somewhat by expressions of various Christian sentiments.”).

651. *Id.* at n. 95 (“Notice that, in the opening lines of the Declaration of Independence, the term ‘Separation’ is used to describe what the Colonies propose, as a body, to do with respect to Great Britain”).

colonies “hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.”⁶⁵²

Similarly, although the Pilgrims had fled the persecution based on their religious beliefs they had experienced in England, the Mayflower Compact made it clear that they still wanted to maintain strong and positive relationships with their king and former homeland.⁶⁵³ Moreover, just as the Mayflower Compact augured not only the principle of the consent of the governed but also participation in governance,⁶⁵⁴ so too did the Declaration of Independence.⁶⁵⁵ Thomas Jefferson, who was the primary author along with Benjamin Franklin, John Adams, and others, acknowledged that he was drawing upon many political theorists from throughout the ages in authoring the Declaration of Independence, including John Locke—who had asserted the right of the people to take government power back if a ruler becomes tyrannical.⁶⁵⁶ Jefferson incorporated many natural law principles into the document, foreshadowing the natural law principles incorporated into the state and federal constitutions.⁶⁵⁷ Other famous signers included John Hancock with his bold signature, as well as Samuel Adams, perhaps now best known for the ale

652. THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776).

653. See GRAGG, *supra* note 7, at 189 (referencing “King James, to whom the signers acknowledged their submission”).

654. *Id.* at 190-91. The Mayflower Compact signers promised to “*Covenant and Combine ourselves together into a Civil Body Politic . . . by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.*”

655. Anastaplo, *supra* note 40, at 59 (“[T]here is recognized and exercised one critical right, perhaps the most critical in a republic, the right not only of consent but also of consultation.”).

656. *Origins of the Declaration of Independence: Samuel Rutherford’s ‘Lex, Rex’*, THE WASH. POST (July 2, 2016 4:42 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/02/origins-of-the-declaration-of-independence-samuel-rutherfords-lex-rex/>

(“Thomas Jefferson later explained that the Declaration of Independence did not aim to express new principles, but was based on ‘the American mind,’ including ideas expressed by ‘the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c.’ (Letter to Henry Lee, May 8, 1825.)”; see also Cooper, *supra* note 30, at 550 (“[W]hile the Declaration is much shorter in comparison, it contains essentially the same argument for defending liberty that Rutherford made in opposition to the tyranny of Charles I in *Lex, Rex*.”); Lermack, *supra* note 219, at 1423 (“Government power comes from ‘we the people’ who retain the Lockean right to take it back.”).

657. Elazar, *supra* note 5, at 10 (“Over the centuries, covenant, natural law and constitutionalism became to a degree intertwined. When, for example, the Americans formally declared themselves as independent people in the Declaration of Independence (itself a covenant creating a new relationship based on natural rights precepts), they then saw constitution making as a way of further covenanting or compacting together in order to create civil instruments designed to carry out the Declaration’s premises. The resulting state and federal constitutions were seen as compacts embodying the principles of natural law, especially in their Declarations of Rights. The propriety of subsequent legislation was, therefore, to be judged in light of its “constitutionality,” or in other words, its conformity to both the natural law and the covenant, one step removed.”).

designated in his name.⁶⁵⁸ The Declaration of Independence was subsequently adopted into numerous state constitutions.⁶⁵⁹

2. *State Constitutions*

Following the instructions of the Continental Congress to develop constitutions to establish their new political status as independent states rather than colonies dependent on Great Britain, the leaders of each of the colonies engaged in a groundbreaking exercise in statecraft—literally crafting new states.⁶⁶⁰ These exciting political episodes drew heavily upon the experiences the colonists had encountered over the previous decades, including their charters from the royal monarch.⁶⁶¹ For example, the constitutions of the three states with the largest Puritan populations, Massachusetts, Connecticut, and Rhode Island, were based upon the English charters adopted by the colonies, with the simple change of removing references to the English monarchy.⁶⁶² In turn, some of those colonial charters had incorporated elements of even earlier documents and agreements drawn up by the colonists, such as the Mayflower Compact, the Pilgrim Code of Law, and the Fundamental Orders of Connecticut.⁶⁶³

In addition, like the Mayflower Compact, the new state constitutions gave plenary powers to the state governments, as opposed to the specifically enumerated powers that would later be delineated in the U.S. Constitution.⁶⁶⁴ Also reflecting the Mayflower Compact, they retained many elements of covenantal agreements, as did municipal governments within the colonies and

658. Christopher Klein, *The Sudsy History of Samuel Adams*, HISTORY.COM (Jan. 27, 2015), <https://www.history.com/news/the-sudsy-history-of-samuel-adams>.

659. Martinez, *supra* note 41, at 475.

660. LUTZ, *THE ORIGINS*, *supra* note 32, at 100.

661. Lutz, *From Covenant*, *supra* note 117, at 110 (“The early state constitutions adopted in 1776 could be viewed as ‘organic compacts’ of this type as they usually summarized what the colonists of each state had evolved over the previous one hundred and fifty years.”); *id.* at 105 (A constitution is “the outline of a form of government, that is, the specification of political institutions and fundamental principles of organization.” “it often was the recodification of institutions already in use in the respective states.”); *see also* Martinez, *supra* note 41, at 475 (“The character of the charters as written contracts between the King and the colonists would have persuaded the colonists to giving themselves a written contract, a constitution, that would regulate the main relationships among them and with their own governors once they decided to become independent from the English metropolis.”).

662. *See* LUTZ, *THE ORIGINS*, *supra* note 32, at 100.

663. Martinez, *supra* note 41, at 461 (In turn, “[t]he colonial charters stemmed from the political pacts written by the English colonists in North America (compacts) such as the Fundamental Orders of Connecticut and the Pilgrim Code of Law, and to some extent, the pre-constitutions like the Mayflower Compact.”).

664. Anastaplo, *supra* note 40, at 51 (The Mayflower Compact provides for plenary powers of government with specified limitations, instead of enumerated powers as in the U.S. Constitution; in this respect, it is more like state constitutions than the U.S. Constitution).

then states.⁶⁶⁵ Moreover, the local town governments retained significant authority, thus the state governments reflected the federal structure within the states, themselves.⁶⁶⁶ The state legislatures created and approved of the new state constitutions, which retained the basic essence of compacts, although the general population did not participate in their development or adoption.⁶⁶⁷

Though the drafters of the new state constitutions adopted many of the trappings of covenantal agreements, they deliberately chose to make the state governments much more secular,⁶⁶⁸ as opposed to the largely theocratic governance structures that predominated in some colonies, notably the Massachusetts Bay Colony in its earlier years.⁶⁶⁹ At the time of the Revolution, the population rejected state-imposed religion.⁶⁷⁰ The colonial protests against British rule were in part due to the establishmentarianism embraced by the government of Great Britain ensconcing the Church of England throughout the realm and its imperial holdings.⁶⁷¹ Religion flourished in the colonies, but many adhered to Protestant offshoots such as Presbyterianism and Methodism.⁶⁷² Desiring that the state not infringe upon people's religious beliefs and religious freedoms, the states repealed most of the religious laws that had previously been written into their statutes.⁶⁷³ Thus, the founders rejected the notion that the new states should represent one primary religion to which

665. Cooper, *supra* note 30, at 548-49 ("While the Mayflower Compact was the first political document to employ the church covenant form, it was not the last. 'Both town and colony governments were often derived in form and substance from covenants, which in turn were based upon what we now know as 'federal theology.' Over time, these agreements were secularized into colony/state constitutions, yet they still retained the elements of covenant. Eventually, these ideas were incorporated into the Articles of Confederation, and later the Constitution.'").

666. Lutz, *From Covenant*, *supra* note 117, at 106 ("most government is still left at the local level . . . local government is left intact to carry on the bulk of government as it always had in America. In this regard, the . . . state constitutions . . . are themselves federative documents, federations of towns and counties.").

667. *Id.* at 122 ("Even though most of the early state constitutions were written and approved by legislatures instead of by the people directly, there was still a strong tendency to use the compact form.").

668. See, e.g., LUTZ, *THE ORIGINS*, *supra* note 32, at 104-105 (noting "the right to free exercise of religion" as an inalienable right in all of the first eighteen state constitutions).

669. Editors of Encyclopedia Britannica, *Massachusetts Bay Colony*, BRITANNICA (July 20, 1998), <https://www.britannica.com/place/Massachusetts-Bay-Colony> ("The Puritans established a theocratic government with the franchise limited to church members.").

670. Channing, *supra* note 196, at 198-99 (Around the time of the Revolution was "a time of reaction against state ecclesiasticism").

671. *Id.* at 199 ("indeed, the Revolution had been partly fought as a protest against the close connection of Church and State in England and in the empire.").

672. *Id.* ("The reaction brought to the surface men and women of most radical ideas in religion," causing the blossoming of sects such as Methodism and Presbyterianism.).

673. *Id.* ("The result was two-fold: great religious activity throughout the country among all classes of people, and the repealing of nearly every one of the religious laws on the statute books of the several states.").

everyone is expected to adhere, but instead embraced welcoming a diversity of religious beliefs, practices, and worldviews within the new nation.

Moreover, instead of creating social communities, as some of the prior initial colonial covenantal documents had done, these new state constitutions instituted explicit political relationships.⁶⁷⁴ As noted above, the drafters of the state constitutions were also influenced by the liberal political philosophy European theorists had disseminated throughout both continents advocating for liberty, equality, participation in governance, and other virtues.⁶⁷⁵ The new constitutions incorporated concepts of state citizenship (in contrast with the colonists' status as subjects of the royal crown), the location of sovereignty, the institutions and offices comprising the state government, the allocation of authority among those institutions and offices, and specific restrictions curbing the authority of each arm of government.⁶⁷⁶ Through their state constitutions, the people within each region affirmed that they were "devoted to calm, deliberative processes for collective decision making, . . . dedicated to treating each other as fairly as possible, . . . determined to develop themselves as completely as possible through public education and the encouragement of civic and moral virtues, and . . . committed to living together as a community—which meant subordinating private interest to the good of the community."⁶⁷⁷

Not surprisingly, considering that the colonists were revolting against infringements upon their rights by the British crown, each of the state constitutions gave primary emphasis to the protection of rights—both in specificity and prominence of place at the beginning of the documents.⁶⁷⁸ These rights

674. Lutz, *From Covenant*, *supra* note 117, at 124 ("[O]ur founding documents, now called constitutions, no longer created communities as did our very first documents of foundation during the seventeenth century."); *id.* at 124 ("Essentially, the development of documents of foundation from covenants to modern constitutions has been one of movement away from a communitarian perspective toward a legalistic, contractual view of political communities.").

675. See, e.g., LUTZ, *THE ORIGINS*, *supra* note 32, at 86-89 ("Virtue, the Deliberative Process, and Majority Rule").

676. *Id.* at 124 ("By 1776, the notion of a constitution would include along with institutional description, a definition of citizenship, the placement of sovereignty, the establishment of a regime for ruling, the distribution of political power among offices and institutions, and some definition of the limits of governmental power."); *id.* at 106 (Other elements of constitutions include "the definition of citizenship, the placement of sovereignty, the establishment of a ruling regime, the distribution of and limits upon governmental power.").

677. *Id.* at 105 (Through their state constitutions, the people within each region affirmed that they were] "devoted to calm, deliberative processes for collective decision making, . . . dedicated to treating each other as fairly as possible, . . . determined to develop themselves as completely as possible through public education and the encouragement of civic and moral virtues, and . . . committed to living together as a community—which meant subordinating private interest to the good of the community.").

678. Lermack, *supra* note 219, at 1420-21 ("In addition to the listing of powers and prohibitions, all the state constitutions from this period provide a bill of rights . . . In fact, all the provisions of the 1791 federal Bill of Rights are anticipated in one or another of the state drafts. We can infer

were subsequently mirrored in all of the Bill of Rights added to the U.S. Constitution in 1791 as the first ten amendments.⁶⁷⁹ This emphasis highlighted that the primary purpose of government is the wellbeing of society—to serve the good of the people—as articulated by the political theorists in both Europe and the New World.

The Constitution of Massachusetts was established in 1780, almost a century after Plymouth Colony was merged into Massachusetts Bay Colony, nearly one and a half centuries after the Pilgrim Code of Law, and exactly 160 years after the Mayflower Compact.⁶⁸⁰ John Adams incorporated the concept of “a government of laws and not of men” in the state’s new constitution.⁶⁸¹

The members of each colony aligned themselves most strongly with their respective colonies, not with the Continental Congress or the colonies as a whole.⁶⁸² In fact, they used the term “state” as it was used in the international arena to designate individual nations.⁶⁸³ Each of the colonies had distinctive origins and included people from different backgrounds, such as the Quakers in Pennsylvania, the Dutch in New York (formerly New Amsterdam before the British appropriated it),⁶⁸⁴ and the Puritans in the four New England colonies.⁶⁸⁵

from the length of these documents, and from the fact that they are usually placed at the beginning of the state constitutions, that the protection of individual rights was a primary purpose of the government.”); LUTZ, *THE ORIGINS*, *supra* note 32, at 62.

679. Lermack, *supra* note 219, at 1420-21 (“‘In addition to the listing of powers and prohibitions, all the state constitutions from this period provide a bill of rights In fact, all the provisions of the 1791 federal Bill of Rights are anticipated in one or another of the state drafts. We can infer from the length of these documents, and from the fact that they are usually placed at the beginning of the state constitutions, that the protection of individual rights was a primary purpose of the government.’”).

680. *See generally* MASS. CONST.

681. *Origins of the Declaration of Independence: Samuel Rutherford’s ‘Lex, Rex’*, THE WASH. POST (July 2, 2016 4:42 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/02/origins-of-the-declaration-of-independence-samuel-rutherfords-lex-rex/> (“Independence Day can be a time for reflection about whether the United States will continue to be, in the words that John Adams put into the 1780 Massachusetts Constitution, ‘a government of laws and not of men.’”).

682. ELLIS, *supra* note 243, at xi (“In 1776 thirteen American colonies declared themselves independent states that came together temporarily to win the war, then would go their separate ways.”).

683. *Id.* (“the Articles of Confederation . . . was . . . what one historian has called a ‘Peace Pact’ among sovereign states that regarded themselves as mini-nations of their own, that came together voluntarily for mutual security in a domestic version of a League of Nations.”).

684. PHILBRICK, *supra* note 42, at 20 (mentioning the Dutch colony in Manhattan); *see also* History.com Editors, *New Amsterdam Becomes New York*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/new-amsterdam-becomes-new-york>.

685. History.com Editors, *The 13 Colonies*, HISTORY.COM (June 17, 2010), <https://www.history.com/topics/colonial-america/thirteen-colonies> (the four New England colonies that became states are Massachusetts, Connecticut, Rhode Island, and New Hampshire).

Each colony had its own, well-functioning executive, legislative, and judicial branches of government.⁶⁸⁶ Each of them was developing its own, independent constitution.⁶⁸⁷ The geographic region covered by each of the colonies was similar to the geographic region of the smaller European nation-states.⁶⁸⁸ The Continental Congress was perceived to be more akin to today's European Union, with each constituent member retaining nearly complete sovereignty, and only making concessions in certain arenas to the larger political union.⁶⁸⁹ However, after the states' experiment with the very loose affiliation under the Articles of Confederation, they ultimately decided to unite into one nation through the U.S. Constitution, which the founders based significantly upon the structures of the various state constitutions.⁶⁹⁰

3. *Articles of Confederation*

After a great degree of debate and deliberation, the Second Continental Congress approved the Articles of Confederation in 1777, which was not ratified by the states for several years, until the last state, Maryland, ratified it in 1781.⁶⁹¹ Many of the representatives of the thirteen states thought of their states as newly independent and equal nations, and their primary loyalty was to their respective states.⁶⁹² The states were stark rivals in certain key respects. For example, each state jealously guarded its own economic development and political distinctiveness and was wary of the other states.⁶⁹³ Moreover, all of the states were fearful of a new central government, in part because they did not want a repeat of the despotism King George III had

686. See LUTZ, *THE ORIGINS*, *supra* note 32, at 96-110 (Chapter 8. The First State Constitutions.).

687. See *id.* (Chapter 8. The First State Constitutions.); see also ELLIS, *supra* note 243, at 7.

688. James Martin, *Driving Across the United States Versus Europe*, TRIPSAVVY, <https://www.tripsavvy.com/so-just-how-big-is-europe-compared-to-the-us-anyway-3971019> (last updated Jan. 4, 2019).

689. ELLIS, *supra* note 243, at 7.

690. Martinez, *supra* note 41, at 461 ("Searching the origins of U.S. constitutional tradition leads us to state constitutions, the colonial documents of foundation (charters), and the previous texts on which those are based.").

691. LUTZ, *THE ORIGINS*, *supra* note 32, at 132; see also NCC Staff, *10 Reasons Why America's First Constitution Failed*, CONST. CTR. (Nov. 17, 2019), <https://constitution-center.org/blog/10-reasons-why-americas-first-constitution-failed>.

692. ELLIS, *supra* note 243, at xi ("the Articles of Confederation . . . was . . . what one historian has called a 'Peace Pact' among sovereign states that regarded themselves as mini-nations of their own, that came together voluntarily for mutual security in a domestic version of a League of Nations."); *id.* at xvi ("the allegiances and perspectives of most Americans were confined within local and state borders."); *id.* at 12.

693. *Id.* at 90-91 (referring to the Confederation Congress "as a political arena in which the states came together to display their mutual jealousies, almost a laboratory for the triumph of parochialism and provincialism.").

inflicted upon the colonies, many of the details of which they had meticulously recounted as grievances in the Declaration of Independence.⁶⁹⁴ Therefore, in the Articles of Confederation, they created a very weak central government consisting of a Congress, with no independent executive and judiciary.⁶⁹⁵ Like the Mayflower Compact, many local political agreements, and the state constitutions, the Articles of Confederation retained many attributes of a federal covenantal agreement,⁶⁹⁶ yet it was an exceedingly loose confederation.⁶⁹⁷

While awaiting the ratification process to wend its way through the new states, and at the same time waging an inter-continental war with Great Britain, the Second Continental Congress also made another significant move. It endorsed the creation of a compilation of the most significant historical documents within the colonies leading up to their independence as new states.⁶⁹⁸ In 1778, Ebenezer Hazard convinced the Continental Congress to enact a resolution supporting his transcribing and publishing a collection of historical documents chronicling America's colonial history from the first European settlements through the Revolution.⁶⁹⁹ Hazard had already begun to collect these important documents about the history of European settlement of America in the early 1770s, and compiling them took him twenty years.⁷⁰⁰ Not only archivists and historians but all Americans today owe Hazard a great debt of gratitude for preserving these vital annals of U.S. history.

694. *Id.* at xii (“creating a national government was the last thing on the minds of American revolutionaries, since such a distant source of political power embodied all the tyrannical tendencies that patriotic Americans believed they were rebelling against.”).

695. *Id.* at 133-34 (the court system was under the Congress and only dealt with issues between states, and a Committee of the States took the place of an executive); *see also* NCC Staff, *10 Reasons Why America's First Constitution Failed*, CONST. CTR. (Nov. 17, 2019), <https://constitution-center.org/blog/10-reasons-why-americas-first-constitution-failed>; ELLIS, *supra* note 243, at 7.

696. Cooper, *supra* note 30, at 548-49 (“While the Mayflower Compact was the first political document to employ the church covenant form, it was not the last. ‘Both town and colony governments were often derived in form and substance from covenants, which in turn were based upon what we now know as “federal theology.”’ Over time, these agreements were secularized into colony/state constitutions, yet they still retained the elements of covenant. Eventually, these ideas were incorporated into the Articles of Confederation, and later the Constitution.”).

697. LUTZ, *THE ORIGINS*, *supra* note 32, at 64; ELLIS, *supra* note 243, at xvii (discussing “the inherent disarray within that flimsy framework called the Articles of Confederation”).

698. Shelley, *supra* note 442, at 54-55, 58 (“The value of the resolution of Congress lay, of course, in the recognition by the national government of its responsibility and the duty in making archives and historical manuscripts safe and available and in financing their publication.”).

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The Articles of Confederation entered into force in 1781 upon ratification by all 13 of the self-proclaimed newly independent states, despite the fact that the Revolutionary War would continue for two more years.⁷⁰¹ The powers of the central government were severely limited, including the power to wage war with Great Britain, which was imperative to earn the freedom of the new confederation of states.⁷⁰² The new government had no authority to tax, and instead was reliant upon the good will of each of the states to contribute to the maintenance of the army, which most were reluctant to do, and several of which simply refused or gave a pittance.⁷⁰³ Moreover, the Confederation Congress had no authority over commerce, allowing each state to impose its own economic policies, leading to increasingly acrimonious tariffs and trade barriers among the states and a balkanization of the economy between the states.⁷⁰⁴ Although the continental army led by General George Washington ultimately defeated the British army in 1783,⁷⁰⁵ the rivalries among the states threatened to tear the frail confederation apart over the next several years.⁷⁰⁶ Most of the states refused to contribute funds to pay for the enormous war debts of the newly independent confederation.⁷⁰⁷ The economic hostilities threatened to break out into actual armed conflicts, and ultimately did during Shay's Rebellion between 1786 and 1787, during which

701. NCC Staff, *10 Reasons Why America's First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>; *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1779 to 1782*, LIBR. OF CONGRESS, <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1779-to-1782/> (last visited Feb. 21, 2020); *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1783 to 1784*, LIBR. OF CONGRESS, <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1783-to-1784/> (last visited Feb. 21, 2020).

702. *See, e.g.*, ELLIS, *supra* note 243, at 6-7 ("For three years the vast majority of states had failed to pay their share of taxes to support the Continental Army, leaving a legacy of confusion about where the power of the purse ultimately resided.").

703. *Id.*; *see also* NCC Staff, *10 Reasons Why America's First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>.

704. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1785 to 1786*, LIBR. OF CONGRESS, <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1785-to-1786/> (last visited Feb. 21, 2020).

705. *George Washington Papers: The American Revolution*, LIBR. OF CONGRESS, <https://www.loc.gov/collections/george-washington-papers/articles-and-essays/timeline/the-american-revolution/#1783> (last visited Feb. 21, 2020).

706. NCC Staff, *10 Reasons Why America's First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>.

707. NCC Staff, *10 Reasons Why America's First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>; *see also* ELLIS, *supra* note 243, at 34-35.

Daniel Shays, an American veteran of the Revolutionary War, led an armed uprising in protest of economic and civil rights injustices in Massachusetts.⁷⁰⁸

Despite these challenges, the Confederation Congress was able to achieve some initiatives. For example, it adopted the Northwest Ordinance of 1787, which created the Northwest Territory out of land attained from Great Britain, comprised of land that is now Ohio, Michigan, Indiana, Illinois, Wisconsin, and part of Minnesota.⁷⁰⁹ Again, the leaders of the confederation apparently gave little thought to the indigenous people living on that land, not hesitating to claim it for the government of the newly confederated states, though professing that “[t]he utmost good faith shall always be observed toward the Indians.”⁷¹⁰ The Northwest Ordinance established a government for the new territory and a mechanism for regions within the territory to enter into the union as new states.⁷¹¹ It also created a bill of rights for the new territory and included important protections such as “freedom of religion, right to a trial by jury, public support of education, and the prohibition of slavery.”⁷¹²

Notwithstanding this agreement, the animus between the thirteen original states grew to such an extent that it seemed a dissolution of the union might become inevitable.⁷¹³ In order to save the fledgling union, several leaders, including Alexander Hamilton, who is now celebrated in the eponymous Broadway musical, urged the development of a new constitution, leading to

708. NCC Staff, *10 Reasons Why America's First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>; History.com Editors, *Shays' Rebellion*, HISTORY.COM (Nov. 12, 2009), <https://www.history.com/topics/early-us/shays-rebellion>; see also ELLIS, *supra* note 243, at 100-02.

709. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1787 to 1788*, LIBR. OF CONGRESS <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1787-to-1788/> (last visited Feb. 21, 2020); Editors of Encyclopedia Britannica, *Northwest Ordinances*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Northwest-Ordinances>.

710. *The Plains and Plateau Culture Areas*, BRITANNICA (July 26, 1999), <https://www.britannica.com/topic/Native-American/The-Plains-and-Plateau-culture-areas#ref57833>.

711. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1787 to 1788*, LIBR. OF CONGRESS <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1787-to-1788/> (last visited Feb. 21, 2020); *Primary Documents in American History: Northwest Ordinance*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/northwest.html> (last visited Feb. 21, 2020).

712. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1787 to 1788*, LIBR. OF CONGRESS <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1787-to-1788/> (last visited Feb. 21, 2020).

713. NCC Staff, *10 Reasons Why America's First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>.

the Constitutional Convention, and convinced retired general George Washington to spearhead the assembly.⁷¹⁴ Founder John Jay remarked that Americans were “the first people . . . [who had] the possibility of deliberating and choosing the system of Government under which they should live,”⁷¹⁵ reflecting the situation aboard the Mayflower over a century and a half before.⁷¹⁶ Although the first few years of the experiment did not prove to be very promising, the prominent statesmen gathered together once again to try to come up with a mechanism for a national government that would work.⁷¹⁷

4. *U.S. Constitution*

On February 21, 1787, the Confederation Congress, which met in New York City, passed a resolution to establish a Constitutional Convention charged with developing a proposal to revise the Articles of Confederation.⁷¹⁸ The Constitutional Convention met in Philadelphia between May and September 1787. including George Washington, Alexander Hamilton, James Madison, Gouverneur Morris, and Benjamin Franklin were among the representatives of the thirteen states.⁷¹⁹ James Madison studied various forms of government from around the world before writing the U.S. Constitution.⁷²⁰ Importantly, he had been exposed to Enlightenment writers in college.⁷²¹ Enlightenment thinkers such as Locke and Montesquieu shaped the framers’ approach to creating the new federal government.⁷²² Since the nation-builders did not have contemporary models in Europe from which to draw in creating a new democratic government, they relied heavily on the writings of

714. NCC Staff, *10 Reasons Why America’s First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>; Editors of Encyclopedia Britannica, *Constitutional Convention*, BRITANNICA (JULY 20, 1998), <https://www.britannica.com/event/Constitutional-Convention>; see also ELLIS, *supra* note 243, at 52-55, 104-12.

715. Martinez, *supra* note 41, at 462.

716. LONG, *supra* note 191, at 6.

717. *Documents from the Continental Congress and the Constitutional Convention, 1774 to 1789: 1787 to 1788*, LIBR. OF CONGRESS <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1787-to-1788/> (last visited Feb. 21, 2020); NCC Staff, *10 Reasons Why America’s First Constitution Failed*, Const. Ctr. (Nov. 17, 2019), <https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed>; ELLIS, *supra* note 243, at 135-53.

718. *The Confederation Congress and the Constitution*, U. OF WIS.-MADISON, <https://csac.history.wisc.edu/document-collections/the-constitutional-convention/confederation-congress/> (last visited Feb. 9, 2020).

719. History.com Editors, *Constitutional Convention Begins*, HISTORY.COM (Feb. 9, 2010), <https://www.history.com/this-day-in-history/constitutional-convention-begins>; ELLIS, *supra* note 243, at 140, 147-48.

720. James Madison, *Ancient and Modern Confederacies*, LIBR. OF CONGRESS (1787), https://cdn.loc.gov/service/mss/mjm/02/02_1036_1063.pdf (last visited Feb. 9, 2020).

721. LUTZ, *THE ORIGINS*, *supra* note 32, at 55.

722. *Id.* at 67-68.

the Enlightenment thinkers,⁷²³ as well as the examples provided in the state constitutions and political experiences within the colonies,⁷²⁴ which in turn had relied on their colonial charters and other historical documents,⁷²⁵ leading all the way back to the Mayflower Compact,⁷²⁶ and even further back to

723. *Id.* at 96, 139-47; *see also* ELLIS, *supra* note 243, at 25 (“European thinkers over the past century had drafted the blueprint for a new political architecture, which was now readily available for Americans to implement.”).

724. LUTZ, *THE ORIGINS*, *supra* note 32, at 96 (“there was no European precedent or model for it in 1787. Its form and content derived largely from the early state constitutions, as borrowings and as reactions.”); Anastaplo, *supra* note 40, at 106 (“A people’s considerable experience with self-government seems to be relied upon in the Constitution, an experience which develops (among other things) a sense of the need for restraint with respect to those inevitable political differences that must be examined candidly. Effective self-government also requires considerable confidence among a people in the capacity of government to do good by serving ends for which the efforts of government are useful if not even essential.”); *see also* Lutz, *From Covenant*, *supra* note 117, at 102 n. 5 (“The basic stance taken in this article, that American political documents of the late eighteenth century are essentially elaborations upon seventeenth century colonial documents and a differentiation of symbols contained within these earlier documents, is an adaptation of the thesis in a book written by WILLMOORE KENDALL AND GEORGE CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* (Baton Rouge: Louisiana State University Press, 1970).”); Martinez, *supra* note 41, at 476 (“Consequently, the evolutionary process of American constitutionalism between the first decades of the 17th century and 1787 could be summed up in the following way:

- 1) The religious covenants were secularized and turned into political compacts.
- 2) The first elements in covenants and compacts, that is the creation of a people, a frame of Government, and the position of fundamental values, were incorporated in the preambles and bills of rights of numerous constitutions.
- 3) The second part of the compacts, which set up a framework of government, mixed with the charters’ elements that had the nature of contract between the people and the government created by the compact (once the people replaced the monarchy as sovereign.”).

725. LUTZ, *THE ORIGINS*, *supra* note 32, at 138.

726. Cooper, *supra* note 30, at 548-49 (“While the Mayflower Compact was the first political document to employ the church covenant form, it was not the last. ‘Both town and colony governments were often derived in form and substance from covenants, which in turn were based upon what we now known as “federal theology.”’ Over time, these agreements were secularized into colony/state constitutions, yet they still retained the elements of covenant. Eventually, these ideas were incorporated into the Articles of Confederation, and later the Constitution.”); *see also* Lutz, *From Covenant*, *supra* note 117, at 102 (“The beginning of American constitutional history, then, must be sought in those documents establishing local self-government on American shores during the early seventeenth century.”).

the Magna Carta.⁷²⁷ They also drew upon lessons from the Iroquois Confederacy, and Benjamin Franklin “invited the Great Council members of the Iroquois to address the Continental Congress in 1776.”⁷²⁸

Instead of generating a list of proposed amendments to the Articles of Confederation, the statesmen meeting in Philadelphia came up with an entirely new structure of government—one that would create a single, unified nation, instead of an amalgamation of largely independent states.⁷²⁹ The meetings were held in strict secrecy, so the members of the Constitutional Convention would not be unduly influenced by outside pressures.⁷³⁰ As George Washington had won tremendous popularity throughout the states by virtue of his conduct during the Revolutionary War, some clamored for him to become king of the new nation, a notion to which he strongly demurred.⁷³¹ Famously, when the negotiations were nearing the end, as Benjamin Franklin left Independence Hall one evening a Mrs. Powell inquired, “Well, Doctor, what have we got, a republic or a monarchy?” Franklin rejoined, “A republic, if you can keep it.”⁷³²

To alleviate concerns of many that the federal government would become too strong, the drafters adopted Montesquieu’s framework of the separation of powers,⁷³³ which had also been incorporated into the state constitutions. Therefore, as opposed to having only a legislature, as under the Articles

727. Martinez, *supra* note 41, at 463 n. 30 (quoting EDWARD S. CORWIN, CORWIN ON THE CONSTITUTION 99 (Richard Loss ed., 1981)) (“the constitutional fathers regarded the Magna Carta as having been from the first a monument of English liberties . . .”); Martinez, *supra* note 41, at 479 (“The Bill of Rights in the Constitution contains twenty-eight rights. Of these twenty-eight, four come from the Magna Carta, but most of them had been already written by 1791 in the Constitutions of Virginia, Maryland, Massachusetts, and others . . . they did not come so much from the tradition of the British Common Law as from the Bills written by the English colonists in America. Such detailed lists very often had in their margins several references to biblical passages from which, supposedly, the rights derived. A devoted Christian . . . can translate to the languages of civil rights the Biblical teachings about fairness and equity among men.”).

728. Terri Hansen, *How the Iroquois Great Law of Peace Shaped U.S. Democracy*, PBS (Dec. 17, 2018, 9:48 AM), <https://www.pbs.org/native-america/blogs/native-voices/how-the-iroquois-great-law-of-peace-shaped-us-democracy/>.

729. ELLIS, *supra* note 243, at 135-53

730. *Id.* at 138.

731. Matthew Spalding, *The Man Who Would Not Be King*, THE HERITAGE FOUND. (Feb. 5, 2007), <https://www.heritage.org/commentary/the-man-who-would-not-be-king>.

732. *A Republic, If We Can Keep It*, THE WASH. TIMES (July 30, 2002), <https://www.washingtontimes.com/news/2002/jul/30/20020730-035159-6129r/>.

733. See THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS *supra* note 4, at xxi (documenting references by John Adams and John Quincy Adams to Montesquieu).

of Confederation,⁷³⁴ the authors added an executive branch headed by a President, as well as a judicial branch headed by the U.S. Supreme Court.⁷³⁵ Although the Constitution does not mention the power of judicial review, meaning the power of the federal courts to declare that an act of the legislative branch or the executive branch was beyond its powers under the Constitution and therefore was unconstitutional, this power was likely presumed, as the state courts had already been exercising it.⁷³⁶ Moreover, Alexander Hamilton in Federalist Paper 78 asserted that the federal courts retain the power of judicial review.⁷³⁷ The constitution split the new Congress into two chambers—the House of Representatives and the Senate—to try to ensure that all new legislative proposals would be subject to a slow and deliberative process within the bicameral legislature.⁷³⁸ The members of the House of Representatives were to represent the interests of the general public, as they are elected every two years by popular vote within their districts.⁷³⁹ The members of the Senate were originally designed to represent the state governments, which initially selected the Senators, until the 17th Amendment made the Senators also directly elected by the people.⁷⁴⁰

The Constitution limits the powers of the federal government by enumerating those powers, as opposed to the general grant of plenary authority retained by the state governments, as confirmed in the 10th Amendment.⁷⁴¹

734. History.com Editors, *Articles of Confederation*, HISTORY.COM (Oct. 27, 2009), <https://www.history.com/topics/early-us/articles-of-confederation>.

735. Vincent Ostrom, *Hobbes, Covenant, and Constitution*, 10 PUBLIUS 83, 93-94 (1980) (“Another method of distributing authority in a democratic constitution is to allocate the prerogatives of government among different types of decision structures. In the American experience this was typically done by distinguishing legislative, executive, and judicial functions, and assigning authority so that each decision structure is subject to limits exercised by other decision structures. This system of reciprocal vetoes gives rise to what is characterized as a system of checks and balances . . .”).

736. Lermack, *supra* note 219, at n. 144 (discussing judicial review, supreme law of the land, “trumping federal legislation and state-made law including state constitutions”); Martinez, *supra* note 41, at 463 (Judge Edward Coke “added the notion of judicial review.”); *see also* Editors of Encyclopedia Britannica, *Bonham’s Case*, BRITANNICA (July 20, 1998), <https://www.britannica.com/event/Bonhams-Case>.

737. NORTON, *supra* note 619, at 130 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

738. LUTZ, *THE ORIGINS*, *supra* note 32, at 91-92.

739. Editors of Encyclopedia Britannica, *House of Representatives*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/House-of-Representatives-United-States-government>.

740. Editors of Encyclopedia Britannica, *United States Senate*, BRITANNICA (July 20, 1998), <https://www.britannica.com/topic/Senate-United-States-government>; David N. Schleicher & Todd J. Zywicki, *The Seventeenth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvii/interps/147> (last visited Feb. 21, 2020).

741. Gary Lawson & Robert Schapiro, *The Tenth Amendment*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-x/interps/129>; *Reserved Powers*, CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-10/reserved-powers> (last visited Feb. 21, 2020).

And instead of a strict divide between the branches to employ the separation of powers, the Constitution entails a complex system of intertwining checks and balances.⁷⁴² By adopting a constitutional framework to constrain the powers of government, both the federal and state constitutions created a system whereby the people in governmental offices must abide by the constitution.⁷⁴³

One such mechanism of checks and balances is periodic elections of all members of Congress and of the President, to help ensure the will of the people is reflected in the government,⁷⁴⁴ and also to help bring out the best in the people within government.⁷⁴⁵ However, the founders did not embrace true democracy, as they distrusted direct democracy and the potential for “mob rule” it may engender.⁷⁴⁶ Indeed, direct democracy, where all people would need to develop expertise and vote on every issue, would be impossible in a large nation, or even a small nation in today’s complex world.⁷⁴⁷ Therefore, the founders created a representative government, through which the people

742. Ostrom, *supra* note 735, at 95 (“people can participate in the organization and governance of diverse communities of interest without having a single unit of government that exercises sovereign authority. Rather, people can participate in diverse units of government, each of which exercises limited authority.”); LUTZ, *THE ORIGINS*, *supra* note 32, at 9, 85.

743. Ostrom, *supra* note 735, at 91-92 (“The American Revolution marked the beginning of an effort to fashion a system of fundamental law that applied to the conduct of government itself. These efforts were carried on in each of the American states and in the organization of a confederation known as the United States of America. The principles of organization were those that might be characterized as applying to a popular government or a democracy.”); LUTZ, *THE ORIGINS*, *supra* note 32, at 85.

744. Again, originally the general public directly elected the members of the House of Representatives, and indirectly influenced the selection of the Senators by electing the members of their state governments. After ratification of the 17th Amendment, the people now directly elect their Senators, as well. See generally U.S. CONST. amend. XVII.

745. Anastaplo, *supra* note 40, at 25 (“all of the arrangements that were developed for selecting the officers of government were designed with a view to permitting the enduring interests and sentiments of the people to be ascertained — with a view, that is, to bringing out the best in the people.”).

746. Jeffrey Rosen, *America is Living James Madison’s Nightmare*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/>; See also George Friedman, *The Founding Fathers Never Intended to Create a Direct Democracy*, HUFFPOST (Nov. 17, 2016, 6:09 PM), https://www.huffpost.com/entry/the-founding-fathers-never-meant-to-create_b_13051196; *The Nature of Government: What Is a Democracy?*, UShistory.org, <https://www.ushistory.org/gov/1c.asp> (last visited Feb. 21, 2020); ELLIS, *supra* note 243, at xviii (“The term democracy remained an epithet until the third decade of the nineteenth century. It meant mob rule, the manipulation of majority opinion by demagogues, and shortsighted political initiatives on behalf of the putative ‘people’ that ran counter to the long-term interests of the ‘public’”).

747. *The Nature of Government: What Is a Democracy?*, UShistory.org, <https://www.ushistory.org/gov/1c.asp> (last visited Feb. 21, 2020). For the distinction between direct democracy and representative democracy, see *Democracy (Ancient Greece)*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/democracy-ancient-greece/> (last visited Feb. 21, 2020). For examples of some state systems with various forms of direct democracy, see *Initiative, Referendum and Recall*, NCSL (Sept. 20, 2012), <https://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx>.

elect representatives in a republican form of government, and those representatives deliberate about and vote on the actual laws.⁷⁴⁸ The representative form of government allows for the general public to participate indirectly in the government of a large nation.⁷⁴⁹ The framers wrote the Constitution limiting government and ensuring that the government will protect the right to participation in a republican (i.e., representative) system.⁷⁵⁰

The nascent republic was not very representative, however.⁷⁵¹ Article I, Section 2, Clause 1 indicates that, “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”⁷⁵² Additionally, Article I, Section 4, of the Constitution indicates that, “The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations.”⁷⁵³ Therefore, the state governments controlled the qualifications for which members of the population were allowed to vote, which initially only included white male property-owners, who comprised merely about six percent of the population.⁷⁵⁴ Among those excluded from the franchise were slaves, Native Americans, women, and people under age 21, along with other non-white men and white males who did not own property—altogether making up about 94 percent of the population.⁷⁵⁵ Not very representative, indeed, but at the time it signified a bold experiment in progressive polity.

748. Ostrom, *supra* note 735, at 93-94 (another “type of limit specified in the American constitutions is the provision for the direct or indirect participation of citizens within the different decision structures of government. The election of legislative, executive, and judicial officials allows for the direct participation of citizens in selecting the basic personnel of government, and for the indirect representation of citizens in the councils of government.”).

749. LUTZ, *THE ORIGINS*, *supra* note 32, at 155 (A representative form of government enables “the direct involvement of a national citizenry in the government of a large country.”).

750. Lermack, *supra* note 219, at 1418-19.

751. Bradley A. Smith & Daniel P. Tokaji, *Article I, Section 2*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/762> (last visited Feb. 21, 2020); *Elections. . . the American Way*, LIBR. OF CONGRESS, <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/founders-and-the-vote.html> (last visited Feb. 21, 2020).

752. U.S. CONST. art. 1, § 2, cl. 1.

753. U.S. CONST. art. 1, § 4.

754. Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, THE NEW YORKER (Oct. 6, 2008), <https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> (“In the first Presidential election, only six per cent of Americans were eligible to vote.”); Bradley A. Smith & Daniel P. Tokaji, *Article I, Section 2*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/762> (last visited Feb. 21, 2020); *Elections. . . the American Way*, LIBR. OF CONGRESS, <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/founders-and-the-vote.html> (last visited Feb. 21, 2020).

755. *The Founders and the Vote*, LIBR. OF CONGRESS, <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/founders-and-the-vote.html> (last visited Feb. 9, 2020); see also Bradley A. Smith & Daniel P. Tokaji, *Article I, Section 2*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/762> (last

The Mayflower Compact has been recognized as a significant precursor to the U.S. Constitution.⁷⁵⁶ Under the Mayflower Compact 167 years earlier, the colonists had agreed to “Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation.”⁷⁵⁷ Similarly, in creating the new Constitution, the framers brought together into one nation the members of the disparate states in an attempt to create a new national ethos.⁷⁵⁸ Their goal was to effectuate a new patriotism and loyalty to the singular “United States” (the United States is . . .) instead of the amalgamation of independent states that had combined for limited purposes under the plural moniker of the United States (the United States are . . .).⁷⁵⁹ Moreover, the constitutional drafters were fulfilling the foresight of the Pilgrims, who had agreed to “enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony.”⁷⁶⁰ During the revolutionary period, the colonists “thought it . . . meet and convenient” to create a new constitution, establish new offices, and subsequently to enact new federal laws “for the general good” of the fledgling independent country. Additionally, the Saints and Strangers, in signing the Mayflower Compact, pledged “all due submission and obedience” to the “just and [equal] [laws], ordinances, acts, constitutions and offices,” just as the new U.S. Constitution transplanted the principle of the consent of the governed into its framework.⁷⁶¹

However, some clear distinctions emerge between the Mayflower Compact and the new United States Constitution. For example, the Mayflower

visited Feb. 21, 2020); Grace Panetta & Olivia Reaney, *Today Is National Voter Registration Day. The Evolution Of American Voting Rights In 242 Years Shows How Far We’ve Come — And How Far We Still Have To Go*, BUS. INSIDER (Sept. 24, 2019, 8:25 AM), <https://www.businessinsider.com/when-women-got-the-right-to-vote-american-voting-rights-timeline-2018-10>.

756. Anastaplo, *supra* note 40, at 68 (“the Mayflower Compact is, in more ways than one, the ‘preamble’ to American constitutional developments, especially in its invocation of the self-evident truths that government is necessary among human beings and that it is good that all citizens should consult or should at least appear to consult together about what is fitting and proper for the community to do and to believe.”); Elazar, *supra* note 5, at 22 (“From their earliest beginnings, the people and politics comprising the United States have bound themselves together through covenants to erect their New World order, deliberately following biblical precedents. The covenant concluded on the Mayflower on November 11, 1620, remains the first hallowed document of the American constitutional tradition.”).

757. THE MAYFLOWER COMPACT (1620).

758. See generally ELLIS, *supra* note 243.

759. *Id.* at 11 (several founders advocated “a national picture of Americans as ‘a single people,’ no longer Virginians or Rhode Islanders, and the term United States as a singular rather than plural noun.”).

760. THE MAYFLOWER COMPACT (1620).

761. LONG, *supra* note 191, at 4-6.

Compact was an agreement in principle, but it did not create a specified structure of government nor particular duties and rights.⁷⁶² Therefore, once it had been signed aboard the ship, most likely the settlers did not need to consult its text frequently, although they certainly relied upon it to provide authority for the colony during its seven-decade existence.⁷⁶³ However, the U.S. Constitution directs the operations of the federal government and its relationship with the state and tribal governments, and therefore, people rely on it frequently to delineate the scope of rights, duties, and powers.⁷⁶⁴

As another stark contrast, whereas the settlers at Plymouth proclaimed in the Mayflower Compact that they had developed their autonomous political community in the New World “for the Glory of God and advancement of the Christian Faith and Honour of our King and Country,” the framers of the U.S. Constitution deliberately and conspicuously steered away from religion in the document,⁷⁶⁵ and decidedly renounced any allegiance to the king and Great Britain.⁷⁶⁶ Unlike some of the state constitutions, the preamble to the Constitution and the Constitution itself does not contain any mention of a deity.⁷⁶⁷ Also in accordance with European and American Enlightenment theorists, many of the framers of the Constitution specifically did not want to create a Christian theocracy in the United States.⁷⁶⁸ Although they borrowed many aspects of the historical documents used to govern the colonies, the constitutional drafters followed the trend toward secularism in political governance.⁷⁶⁹ In fact, the drafters left out any mention of Christianity at all.⁷⁷⁰

762. *Id.* at 4 (“It did not define the plan of government with any nicety”).

763. Anastaplo, *supra* note 40, at 55 (“the Compact seems to have been of considerable use in the early decades of Plymouth Colony, but it was superseded when that colony was absorbed in 1692 by the much larger Massachusetts Bay colony.”).

764. *Id.* at 56 (“Once the Plymouth community began to govern itself on land, the Compact itself probably did not have to be consulted. In this respect it is quite different from, say, the Constitution of the United States, which provides a constant guide for action.”).

765. Russell Shorto, *How Christian Were the Founders?*, THE N.Y. TIMES, Feb. 14, 2010, at 8, 13 (“the founders explicitly avoided religious language” in the Constitution.)

766. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

767. Anastaplo, *supra* note 40, at 80 (“It is perhaps appropriate that there is no invocation of the divine in the Preamble: the Constitution is a document for self-government; the people is on its own.”); NORTON, *supra* note 619, at 5.

768. Shorto, *supra* note 765, at 11 (“In fact, the founders were rooted in Christianity—they were inheritors of the entire European Christian tradition—and at the same time they were steeped in an Enlightenment rationalism that was, if not opposed to religion, determined to establish separate spheres for faith and reason”).

769. Elazar, *supra* note 5, at 9 (“Where settlers from those traditions were dominant, the new peoples were established by covenant and they in turn created constitutions which concretized the covenantal dimension through a network of political institutions. In the eighteenth century, the American Revolution translated the concept into a powerful instrument of political reform but only after merging it with the more secularized idea of compact. American constitutionalism is a product of that merger.”).

770. Shorto, *supra* note 765, at 11 (noting that when prominent founders such as Alexander Hamilton, George Washington, and Gouverneur Morris referred to religion, they did so in terms

The drafters made only one reference to religion in the original document, barring any type of religious requirements for government officials, anticipating and expecting that government officials would hold different beliefs about religion and would practice different religious faiths.⁷⁷¹ Although many of the Americans of European heritage—both early settlers like the Pilgrims and the colonists during the time of the Revolution—had certainly been influenced by Christianity,⁷⁷² many had also been influenced by political philosophy,⁷⁷³ much of which advocated for the separation of church and state.⁷⁷⁴ The founders also maintained different beliefs about religion.⁷⁷⁵ The Mayflower Compact indicated that its purpose was for the glory of the king and country, but no one is currently arguing that the United States should revert to being a colony of England.⁷⁷⁶ Likewise, the Mayflower Compact should not be misused in the present day to assert that the United States

that embraced all religions, using terms such as “God,” “Grand Architect,” and “Creator,” none of which have specifically Christian connotations.”); *see also* NORTON, *supra* note 619, at 5 (“Comment has been made that God is not mentioned in our Constitution. In the Declaration of Independence ‘firm reliance on the protection of Divine Providence’ is expressed, and in the Articles of Confederation it is mentioned that ‘it has pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of and to authorize us to ratify the said Articles of Confederation and perpetual union.’”).

771. U.S. CONST. art. VI (indicating that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

772. Elazar, *supra* note 5, at 14 (“The American Puritans and many Americans of the Revolutionary era, among others, were inspired by the biblical polity to seek federal arrangements for their polities.”).

773. Anastaplo, *supra* note 40, at 194 (the author considers “two principal sets of influence” on “the American constitutional system, . . . [and] the American way of life.” “One set of influences goes back to the Bible; the other draws upon the tradition of political philosophy. The former is very much Christian in its inclination, with all emphasis upon equality, charity, benevolence, and eventually privacy; the latter is more inclined toward an opening for excellence, and excellence which is guided by, and reflected in, the virtue of prudence and which finds productive expression in citizenship and public life.”).

774. Shorto, *supra* note 765, at 10-11 (Although “the phrase ‘separation of church and state’ is not in the Constitution . . . Thomas Jefferson, who penned it, thought it was . . . an accurate summation of the First Amendment.” Also noting Randall Balmer, a professor of American religious history at Barnard College).

775. Nicgorski, *supra* note 604, at 172 n. 56 (“Franklin’s respect for religion’s impact on morality led him to back away from that tenuous religion, mechanistic deism.”).

776. Shorto, *supra* note 765, at 8 (“The language in the Mayflower Compact . . . describes the Pilgrims’ journey as being ‘for the Glory of God and advancement of the Christian Faith’ and thus instills the idea that America was founded as a project for the spread of Christianity.”); *id.* at 8 (“In a book she wrote two years ago, Cynthia Dunbar, a [Texas State Board of Education] member, could not have been more explicit about this being the reason for the Mayflower Compact’s inclusion in textbooks; she quoted the document and then said, ‘This is undeniably our past, and it clearly delineates us as a nation intended to be emphatically Christian.’”); *id.* (the Enlightenment, which informed the intent and purpose of the founders of the country and drafters of the Constitution and Bill of Rights, “had in fact developed in opposition to reliance on biblical law.”).

should elevate Christianity above all other religious beliefs or to attempt to convert the United States into a Christian theocracy.⁷⁷⁷

In line with Enlightenment scholars in Europe, such as Adam Smith in his *Wealth of Nations* published in 1776,⁷⁷⁸ the constitutional drafters believed in a free market economy and frowned upon the economic obstacles the states had imposed, inhibiting free trade across their borders with each other.⁷⁷⁹ Therefore, one of the most significant powers they gave to the central government is the authority to control commerce between the states, as well as with foreign nations and indigenous tribal governments.⁷⁸⁰ The framers also gave the central government the power to raise revenue through taxation,⁷⁸¹ along with the power to spend that revenue for the “general welfare” of the nation.⁷⁸²

Initially the Constitution simply established the structure of the federal government and delineated the powers between the federal, state, and tribal governments.⁷⁸³ The anti-Federalists were very concerned that no individual rights had been included in the first document, so the Federalists agreed that the first action under the new Constitution would be to adopt specific amendments guaranteeing individual rights.⁷⁸⁴ Between 1787 and 1789, Alexander

777. See, e.g., Rob Port, *The Nativity Scene at North Dakota’s Capitol is Great but What Happens When the Muslims Want a Display?*, SAY ANYTHING BLOG (Dec. 4, 2019), <https://www.sayanythingblog.com/entry/the-nativity-scene-at-north-dakotas-capitol-is-great-but-what-happens-when-the-muslims-want-a-display/>. If the public supports voluntary prayer in public schools and government financing for faith-based organizations, under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, these forms of government-sanctioned supports for religion should also extend to Muslims, Sikhs, Hindus, Jews, Native Americans who practice traditional religions, and people of other religious beliefs, as well as to Christians. For example, government holidays should reflect the holidays of diverse faiths, and public school choral pieces and dramatic performances should feature pieces from a multitude of religions and beliefs.

778. *The Wealth of Nations*, AMAZON, <https://www.amazon.com/Wealth-Nations-Adam-Smith/dp/1505577128> (last visited Feb. 21, 2020).

779. See generally Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4 (1987).

780. Art I., § 8, Cl 3 *Commerce with Indian Tribes*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI_S8_C3_4/ (last visited Feb. 21, 2020).

781. Neil S. Siegel & Steven J. Willis, *The Taxing Clause*, CONST. CTR., <https://constitution-center.org/interactive-constitution/interpretation/article-i/clauses/751> (last visited Feb. 21, 2020).

782. Samuel R. Bagenstos & Ilya Somin, *The Spending Clause*, CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/755> (last visited Feb. 21, 2020).

783. Lesley Kennedy, *Before Drafting the Bill of Rights, James Madison Argued the Constitution Was Fine Without It*, HISTORY.COM (Sept. 6, 2019), <https://www.history.com/news/bill-of-rights-constitution-first-10-amendments-james-madison>; *Separation of Powers—State-Tribal Relations and Interstate Compacts*, NCSL, <https://www.ncsl.org/research/about-state-legislatures/separation-of-powers-tribal-interstate-relations.aspx> (last visited Feb. 21, 2020).

784. Lesley Kennedy, *Before Drafting the Bill of Rights, James Madison Argued the Constitution Was Fine Without It*, HISTORY.COM (Sept. 6, 2019), <https://www.history.com/news/bill-of>

Hamilton, James Madison, and John Jay published the Federalist Papers calling for ratification of the new Constitution.⁷⁸⁵ Even the ratification process signaled the importance of liberty,⁷⁸⁶ equality, broad participation in governance, and the consent of the governed, as state conventions were called in each of the states to enable the people to take part in the ratification process—not just the state legislatures.⁷⁸⁷ The ninth state ratified the Constitution in 1788, which was the threshold for its ratification, and it went into effect in 1789.⁷⁸⁸

The initial Congress under the new Constitution immediately took up the first set of amendments, which became the Bill of Rights, ratified in 1791.⁷⁸⁹ The rights embedded in the Bill of Rights all reflected those that had been included in the rights protected under the states' constitutions.⁷⁹⁰ And true to the founders' intent to ensure freedom of religion and the separation of church and state, first among the amendments was a guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷⁹¹ During his term as President, Thomas Jefferson explained this language as creating "a wall of separation between Church &

rights-constitution-first-10-amendments-james-madison; *The Bill of Rights: A Brief History*, ACLU, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Feb. 21, 2020).

785. History.com Editors, *Federalist Papers*, HISTORY.COM (Jan. 28, 2020), <https://www.history.com/topics/early-us/federalist-papers>.

786. Anastaplo, *supra* note 40, at 79-80 ("Constitutionalism . . . depends on the good sense, deliberation and will of the people. This giving of a rule to oneself can be seen as perhaps the most exalted form of liberty. Thus . . . one of the ends in ordaining and establishing this Constitution is that we should be the ones to do so.").

787. Lermack, *supra* note 219, at 1424-25 ("The ratification process was deliberately designed to encourage participation and to make the consent of the governed overt and explicit"); Lutz, *From Covenant*, *supra* note 117, at 121 ("the national Constitution . . . was approved by specially elected state conventions," which formed the basis for "the concept of a constitution as a higher law limiting government.").

788. *U.S. Constitution Ratified*, HISTORY.COM, <https://www.history.com/this-day-in-history/u-s-constitution-ratified> (last visited Feb. 21, 2020).

789. *Id.*

790. Lermack, *supra* note 219, at 1420-21 ("In addition to the listing of powers and prohibitions, all the state constitutions from this period provide a bill of rights In fact, all the provisions of the 1791 federal Bill of Rights are anticipated in one or another of the state drafts. We can infer from the length of these documents, and from the fact that they are usually placed at the beginning of the state constitutions, that the protection of individual rights was a primary purpose of the government.").

791. Piar, *supra* note 236, at 155 ("The more conventional approach to the Establishment Clause had prevented government from favoring one religion over another or conditioning the exercise of civil rights on religious belief." "In the mid-1980s the Court began to develop the so-called 'endorsement test' in Establishment Clause cases. This test . . . measures alleged establishments of religion to see whether they send a message of endorsement or disapproval of religion 'Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)).

State.”⁷⁹² Six of the twenty-seven rights embodied in the Bill of Rights derived from the Magna Carta,⁷⁹³ and “[t]wenty-one, or about 75 percent, were first found in colonial documents written before the 1689 English Bill of Rights.”⁷⁹⁴

The U.S. Constitution was, and certainly still is, imperfect. No human institution ever reaches perfection. The tragic arrangement the founders made with respect to slavery—known as the “Three-Fifths Compromise”—allowed slavery to continue and is one example of the abhorrent discrimination inherent in the original document.⁷⁹⁵ The fact that only 6% of the population of the country could vote, as well as the fact that 20% of the country’s people were enslaved, belied the founders’ claims of equality, liberty, and the consent of the governed.⁷⁹⁶ The colonizers’ usurpation of the land that had been

792. Shorto, *supra* note 765, at 6 (“[I]n 1801, [a] [group] of Baptist ministers in Danbury, Conn., wrote a letter to the new president, Thomas Jefferson, congratulating him on his victory. They also had a favor to ask. Baptists were a minority group, and they felt insecure In the colonial period, there were two major Christian factions, both of which derived from England. The Congregationalists, in New England, had evolved from the Puritan settlers, and in the South and middle colonies, the Anglicans came from the Church of England. Nine colonies developed state churches, which were supported financially by the colonial governments and whose power was woven in with that of the governments. Other Christians—Lutherans, Baptists, Quakers—and, of course, those of other faiths were made unwelcome, if not persecuted outright. There was a religious element to the American Revolution, which was so pronounced that you could just as well view the event in religious as in political terms. Many of the founders . . . were rebelling simultaneously against state-church oppression and English rule. The Connecticut Baptists saw Jefferson—an anti-Federalist who was bitterly opposed to the idea of establishment churches—as a friend. ‘Our constitution of government,’ they wrote, ‘is not specific’ with regard to a guarantee of religious freedoms that would protect them. Might the president offer some thoughts that . . . would shed light on the intent of the framers? In his reply, Jefferson said it was not the place of the president to involve himself in religion, and he expressed his belief that the First Amendment’s clauses—that the government must not establish a state religion (the so-called establishment clause) but also that it must ensure the free exercise of religion (what became known as the free exercise clause)—meant, as far as he was concerned, that there was ‘a wall of separation between Church & State.’”).

793. LUTZ, *THE ORIGINS*, *supra* note 32, at 62.

794. *Id.*

795. *The Bill of Rights: A Brief History*, ACLU, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Feb. 21, 2020); *The Constitution and Slavery*, CONST. RIGHTS FOUND., <https://www.crf-usa.org/black-history-month/the-constitution-and-slavery> (last visited Feb. 21, 2020); *Understanding the Three-Fifths Compromise*, CONST. ACCOUNTABILITY CTR., <https://www.theusconstitution.org/news/understanding-the-three-fifths-compromise/> (last visited Feb. 21, 2020); Donald Applestein, *The Three-Fifths Compromise: Rationalizing the Irrational*, CONST. CTR., <https://constitutioncenter.org/blog/the-three-fifths-compromise-rationalizing-the-irrational/> (last visited Feb. 21, 2020).

796. *The Constitution and Slavery*, CONST. RIGHTS FOUND., <https://www.crf-usa.org/black-history-month/the-constitution-and-slavery> (last visited Feb. 21, 2020) (“When the American colonies broke from England, the Continental Congress asked Thomas Jefferson to write the Declaration of Independence. In the declaration, Jefferson expressed American grievances and explained why the colonists were breaking away. His words proclaimed America’s ideals of freedom and equality, which still resonate throughout the world. Yet at the time these words were written, more than 500,000 black Americans were slaves. Jefferson himself owned more than 100. Slaves accounted for about one-fifth of the population in the American colonies. Most of them lived in the Southern

that of the Native Americans, as well as the slaughter⁷⁹⁷ and removal of Native Americans from their homelands, which continued well after the United States became an independent country,⁷⁹⁸ is another example. The decision to keep women subordinate to men under state and federal laws, and by banning women from government office and even from voting, ensuring they could not challenge the very laws that kept them subservient, is yet another example.⁷⁹⁹

Yet despite its numerous flaws, the Constitution was still revolutionary for its time.⁸⁰⁰ The drafters incorporated a significant measure of both liberty and equality into the national government.⁸⁰¹ They also recognized that the government must promote justice and the common good,⁸⁰² or it would (and should) fall, like the tyrannical grip on the colonies of King George III.⁸⁰³

colonies, where slaves made up 40 percent of the population.”); *Today Is National Voter Registration Day. The Evolution Of American Voting Rights In 242 Years Shows How Far We’ve Come — And How Far We Still Have To Go*, Bus. Insider (Sept. 24, 2019, 8:25 AM), <https://www.businessinsider.com/when-women-got-the-right-to-vote-american-voting-rights-timeline-2018-10>; *Map: The Growing New Nation*, PBS, <https://www.pbs.org/wgbh/aia/part3/map3.html> (last visited Feb. 21, 2020) (“In 1781, the estimated population of the United States was 3.5 million. About 575,000 of these were slaves. In 1801, the year Thomas Jefferson became president, the population of the United States was 5,308,000, with 900,000 slaves. In 1830, U.S. population was 12.8 million, with more than 2 million slaves.”).

797. As one example, in the mid-1700s, Lord Jeffrey Amherst, after which Amherst College in Massachusetts is named, advocated for biological warfare against Native Americans by distributing blankets infected with smallpox as gifts to Native American communities, along with encouraging the use of “every other method that can serve to extirpate this execrable race.” *Frequently Asked Questions*, AMHERST C., <https://www.amherst.edu/library/archives/faq#lordjeff> (last visited Feb. 9, 2020).

798. One well-known example is the Trail of Tears. History.com Editors, *Trail of Tears*, HISTORY.COM (Nov. 9, 2009), <https://www.history.com/topics/native-american-history/trail-of-tears>.

799. *The Bill of Rights: A Brief History*, ACLU, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Feb. 21, 2020) (“Women were second-class citizens, essentially the property of their husbands, unable even to vote until 1920, when the 19th Amendment was passed and ratified.”); see also *Today Is National Voter Registration Day. The Evolution Of American Voting Rights In 242 Years Shows How Far We’ve Come — And How Far We Still Have To Go*, Bus. Insider (Sept. 24, 2019, 8:25 AM), <https://www.businessinsider.com/when-women-got-the-right-to-vote-american-voting-rights-timeline-2018-10>.

800. Anastaplo, *supra* note 40, at 27 (“The deep-rooted dedication to equality has naturally elevated ‘the people,’ acting in its collective capacity, as the principal political authority. No one is entitled, by birth or otherwise, to speak or to act for the community independent of the will of the people.”).

801. *Id.* at 106 (“Perhaps distinctive to the Preamble is the inclusion of ‘the Blessings of Liberty’ among the ends of government, anticipating thereby the modern emphasis upon equality, civil liberties, and human rights.”).

802. THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at 30 (John Adams wrote “The good of the governed is the end, and rewards and punishments are the means, of all government.”).

803. Anastaplo, *supra* note 40, at 28 (“It was also recognized in the Convention that if an arrangement is not just, it cannot be expected to endure.”).

Additionally, the Constitution contributed to the development of internationally recognized human rights, both through its first ten amendments—the Bill of Rights—as well as its recognition of international law—the law governing relations between nations.⁸⁰⁴ Countries around the world have replicated aspects of the U.S. Constitution:⁸⁰⁵ “In 1787 the only written constitutions in the world existed in English-speaking America; today, almost every nation feels it necessary to have such a document.”⁸⁰⁶ The Federalist Papers, written by Alexander Hamilton, James Madison, and John Jay explaining and arguing for the ratification of the Constitution, have also been scrutinized across the globe.⁸⁰⁷

The framers kept the document skeletal, so it could withstand the test of time and be adapted to the needs of the changing country, because they knew the country would inevitably change.⁸⁰⁸

If it is reasonable to speak of a founding era that lasted from about 1765 to 1805, during which the theory and institutions informing the state and national constitutions took definite form, it is also reasonable to see the era of constitution writing from 1776 to 1787 as resting firmly upon developments in America that began in 1620. In sum, there is no reason to conclude that in a given year giants in American political thought bequeathed THE WORD, which Americans must obey regardless of their experiences, commitments, needs, or circumstances. Just as American constitutionalism developed continually from 1620 to 1789 on the basis of American circumstances and commitments, it has continued to do so since 1789. The commitments remain essentially the same, though changing circumstances have required constitutional evolution. Equally important, those who wrote the United States Constitution required that citizens complete the project.⁸⁰⁹

Scholars have noted that the men who drafted the constitution, as well as the men who approved of it through the ratification process in the Confederation

804. *Id.* at 109 (“The Constitution takes it for granted that there are offences against the law of nations. This suggests that no people or state is a law to itself, that there are standards that transcend national interests or the national will.”).

805. NORTON, *supra* note 619, at viii-ix (“There is no more interesting fact to be learned about our Constitution than that of its influence upon the nations of the world . . . our Constitution has been copied in whole or in part throughout the earth.”).

806. LUTZ, THE ORIGINS, *supra* note 32, at 1.

807. NORTON, *supra* note 619, at 187-88.

808. Lermack, *supra* note 219, at 1435 (The originalist approach “makes sense only on the assumption that the framers were wise enough to foresee and preemptively respond to problems that would surface today.”).

809. LUTZ, THE ORIGINS, *supra* note 32, at 168.

Congress, the state legislatures that called the state conventions, and the state conventions themselves, were not of one mind about the meaning of the new Constitution,⁸¹⁰ and most did not believe in an interpretive strategy that would ossify one particular set of beliefs about its meaning.⁸¹¹ The drafters intentionally created the Constitution with flexibility, so it would endure and remain relevant despite all of the inevitable changes in society, the economy, communication, travel, and the world.⁸¹² Therefore, one must understand the history of the Constitution, including its historical antecedents, in order to understand how it has evolved and continues to do so. As one scholar highlighted:

The principles vital to the Constitution of the United States and to American constitutionalism invite, if they do not even require, continual reexamination by citizens. Such inquiry extends to the influential documents that precede the Constitution, such as the Magna Carta, the Mayflower Compact, the Declaration of Independence, and the Articles of Confederation.⁸¹³

The founders also considered an educated citizenry to be crucial to the success of the new democracy and its continued existence.⁸¹⁴ If people are to

810. Lutz, *From Covenant*, *supra* note 117, at 102 (Covenant theology should neither be downplayed nor overplayed in shaping the U.S. Constitution, “since no one idea or tradition monopolized American thinking.”).

811. Lermack, *supra* note 219, at 1405-06 (The Founders “did not have a singular voice . . . [and] said contradictory things.”); *id.* at 1406-07 (quoting J. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985) (Moreover, “The framers themselves ‘did not believe such an interpretive strategy to be appropriate.’”); Joseph J. Ellis, *The Explanations*, BRITANNICA, <https://www.britannica.com/topic/Founding-Fathers/The-explanations#ref261052> (last updated June 20, 2007) (describing the wide range of diverse opinions about and different interpretations of the Constitution among the framers, from before the Constitution was ratified through the first several decades of the 1800s, confirming that they did not have a singular “original intent” with respect to the meaning of the Constitution’s text).

812. ELLIS, *supra* note 243, at 219-20 (“The last word must belong to Jefferson: ‘Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it and labored with it. It deserved well of its country But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered . . . institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him as a boy as civilized society to remain ever under the regime of their barbarous ancestors.’ Jefferson spoke for all the most prominent members of the revolutionary generation in urging posterity not to regard their political prescriptions as sacred script. It is richly ironic that one of the few original intentions they all shared was opposition to any judicial doctrine of ‘original intent.’ To be sure, they all wished to be remembered, but they did not want to be embalmed.”).

813. Anastaplo, *supra* note 40, at 18.

814. *Id.* at 25 (“there were indications that if the people were to be as good as a people could be—or if the people were to be able to use the constitution being prepared for them—they would have to remain, or perhaps even to become, a people of a proper quality. Thus, there was an awareness that properly-trained citizens would be needed.”).

make wise decisions about whom to select to represent them at the national level, as well as in state and local government, they must be able to understand the important issues and the candidates' approaches to those issues, in order to hold the government accountable to the will of the people.⁸¹⁵ In addition to being knowledgeable about their representatives' views on important issues, laws, and policies, the general population must also know about and understand the constitutional framework under which the government officials operate.⁸¹⁶ Only citizens with education about (1) the structure of government, (2) the limitations within which the government must operate, and (3) the rights provided by the Constitution to the people, will be able to recognize and defend against transgressions of government officials who tread outside of their constitutional bounds.⁸¹⁷

In order to celebrate the ratification of the new United States Constitution and the country's victory in its war for independence from Great Britain, President George Washington, issued the first national proclamation of Thanksgiving in 1789, an echo of the Pilgrims.⁸¹⁸

D. POST-REVOLUTION SIGNIFICANCE OF THE MAYFLOWER COMPACT

The charm of the Mayflower story grew in national prominence after the Revolution, as the leaders of the newly independent country continued conscientiously to develop the distinctiveness of the United States' unique national character.⁸¹⁹ The Mayflower Compact ascended in significance as the

815. *Id.* at 199 ("Self-government is no doubt critical to the American way of life. After all, the most celebrated article of the Bill of Rights, the First Amendment, ratifies and organizes the insistence in the Declaration of Independence that government rests upon the consent of the governed, that the people have the duty and the right to examine fully the public business, and so to arrange the powers of government as may seem to them most likely to secure the proper ends of civil society.").

816. *See, e.g.,* THE SELECTED WRITINGS OF JOHN AND JOHN QUINCY ADAMS, *supra* note 4, at 75 (John Adams wrote about his desire "to see rising in America an empire of liberty . . . let us try the experiment, and preserve our equality as long as we can. A better system of education for the common people might preserve them from such artificial inequalities as are prejudicial to society, by confounding the natural distinctions of right and wrong, virtue and vice.").

817. Ostrom, *supra* note 735, at 92 ("If we distinguish the set of rules that apply to the organization and conduct of government in a democracy as a fundamental law that is constitutive of a democracy as a system of government, we can then distinguish a constitution from ordinary law. A constitution would apply to the organization and conduct of government. Ordinary law would represent subsidiary forms of legislation taken by those exercising subordinate governmental prerogatives under the terms of a democratic constitution.") ("the Americans, in fulfilling the aspirations of the American Revolution, turned to processes of constitutional decision making to fashion a system of government where those who exercised governmental authority would themselves be subject to law.").

818. History.com Editors, *Thanksgiving 2020*, HISTORY.COM (Oct. 27, 2009), https://www.history.com/topics/thanksgiving/history-of-thanksgiving#section_2

819. Bush, Jr., *supra* note 622, at 747-48 ("Following the Revolution, in the search for a distinct cultural identity, the newly independent Americans located the arrival of the Mayflower and the signing of the Mayflower Compact as signal and prophetic events foreshadowing a noble future.

acclaimed foretelling of the new nation and the new Constitution.⁸²⁰ During the Forefathers' Day in Plymouth, first celebrated in 1769 and later became an annual event, prominent speakers gave rousing tributes to the Plymouth Colony settlers and their virtues.⁸²¹ Similar speeches and celebrations occurred in other regions of the country and were responsible for developing our country's communal notion of the Plymouth settlement and the Mayflower Compact.⁸²² Artists in the United States and abroad depicted the settlers departing from Europe, aboard the ship, signing the Mayflower Compact, landing at Plymouth Rock, interacting with the indigenous population—particularly Samoset, Squanto, and Chief Massasoit, and celebrating the first Thanksgiving.⁸²³ While whitewashing the negative aspects of colonization, the commitment to retelling and keeping alive the story mirrored the desire to foster similar positive characteristics in the current citizenry in addition to creating a common, national culture.⁸²⁴

For example, in 1802 John Quincy Adams provided the Forefathers' Day speech, in which he commended the upright and honorable qualities of the Plymouth settlers, noting that they laid the foundation for the United States without knowing it.⁸²⁵ Echoing the Enlightenment philosophers, Adams proclaimed that: "Man . . . was not made for himself alone . . . He was made for his country by the obligations of the social compact."⁸²⁶ Moreover, highlighting the Mayflower Compact, he explained:

One of these remarkable incidents is the execution of that instrument of Government by which they formed themselves into a body-politic, the day after their arrival upon the coast, and previous to their first landing. This is perhaps the only instance, in human history, of that positive, original social compact, which speculative

The very real hardihood of those first settlers took on heroic significance. By the beginning of the nineteenth century, Forefathers' Day in Plymouth had become an annual event.").

820. *Id.* ("Following the Revolution, in the search for a distinct cultural identity, the newly independent Americans located the arrival of the Mayflower and the signing of the Mayflower Compact as signal and prophetic events foreshadowing a noble future. The very real hardihood of those first settlers took on heroic significance. By the beginning of the nineteenth century, Forefathers' Day in Plymouth had become an annual event.").

821. *Id.* at 748 (Speakers such as "John Quincy Adams, Webster, Edward Everett, Lyman Beecher, Wendell Phillips, Charles Sumner, Henry Cabot Lodge").

822. *Id.* at 748-49 ("It helped keep historians' minds focused on New England as the point of origin for all of American culture, a primary goal of Plymouth's Pilgrim Society and various New England Societies that celebrated the landing.").

823. *Id.* at 749 ("Painters, chiefly but not exclusively American, rendered the landing, the signing of the Mayflower Compact, and the embarkation from Holland.").

824. *Id.* at 752 ("a willingness to use the watershed moment to buttress the desire for righteous behavior in the present").

825. Quincy Adams, *supra* note 153, at 11; PHILBRICK, *supra* note 42, at 352.

826. Quincy Adams, *supra* note 153, at 6.

philosophers have imagined as the only legitimate source of government.⁸²⁷

Further on in his speech, John Quincy Adams remarked: “Here was a unanimous and personal assent by all the individuals of the community, to the association by which they became a nation,”⁸²⁸ and through the Mayflower Compact— “[t]he instrument of voluntary association executed on board the Mayflower, testifies that the parties to it had anticipated the improvement of their nation.”⁸²⁹

On the bicentennial of the Mayflower’s landing in 1820, Daniel Webster delivered a powerful speech for the Forefathers’ Day celebration,⁸³⁰ first popularizing the term “Pilgrims.”⁸³¹

We have come to this Rock, to record here our homage for our Pilgrim Fathers; our sympathy in their sufferings; our gratitude for their labors; our admiration of their virtues; our veneration for their piety; and our attachment to those principles of civil and religious liberty, which they encountered [numerous hardships] . . . to enjoy and to establish. And we would leave here, also, for the generations which are rising up rapidly to fill our places, some proof that we have endeavored to transmit the great inheritance unimpaired; that in our estimate of public principles and private virtue, in our veneration of religion and piety, in our devotion to civil and religious liberty, in our regard for whatever advances human knowledge or improves human happiness, we are not altogether unworthy of our origin.

The nature and constitution of society and government in this country are interesting topics, to which I would devote what remains of the time allowed to this occasion. Of our system of government the first thing to be said is, that it is really and practically a free system.

827. *Id.* at 17.

828. *Id.* at 18.

829. *Id.* at 20.

830. Bush, Jr., *supra* note 622, at 748; PHILBRICK, *supra* note 42, at 350-52.

831. Anastaplo, *supra* note 40, at 34-35 (“These first settlers, initially referred to as the Old Comers and later as the Forefathers, did not become known as the Pilgrim Fathers until two centuries after their arrival. A responsive chord was struck with the discovery of a manuscript of Gov. William Bradford referring to the ‘saints’ who had left Holland as ‘pilgrims.’ At a commemorative bicentennial celebration in 1820, orator Daniel Webster used the phrase Pilgrim Fathers, and the term became common usage thereafter.”); *id.* at 35 (“The term ‘pilgrim’ . . . may be found in Governor Bradford’s description of the departure of the Separatist band from Leyden: ‘So they left the goodly and pleasant citie, which had been ther resting place near 12 years; but they knew they were pilgrimes, and looked not much on those things, but lift up their eyes to the heavens, their dearest cuntrie, and quieted their spirits.’”).

It originates entirely with the people and rests on no other foundation than their assent . . . Our ancestors began their system of government here under a condition of comparative equality in regard to wealth, and their early laws were of a nature to favor and continue this equality.⁸³²

The United States owes to this speech the fact that we now refer to the small band of settlers at Plymouth Colony as “Pilgrims.”⁸³³ He also used the occasion to rail against the institution of slavery and call for its abolishment. A prominent lawyer, statesman, and orator, Webster later identified the Mayflower Compact as “the first written constitution in the country.”⁸³⁴

In 1834, American historian George Bancroft expounded upon the signing of the Mayflower Compact, noting,

This was the birthplace of constitutional liberty. The middle age had been familiar with charters and constitutions; but they had been merely compacts for immunities, partial enfranchisements, patents of nobility, concessions of municipal privileges, or limitations of the sovereign power in favor of feudal institutions. In the cabin of the Mayflower humanity recovered its rights, and instituted government on the basis of “equal laws” for the “general good.”⁸³⁵

That same year, Plymouth Rock was relocated to the front of Pilgrim Hall.⁸³⁶ The next year, French political researcher Alexis de Tocqueville published *Democracy in America* based on his travels in 1831-1832 throughout the United States examining its governmental system and historical development.⁸³⁷ Born into an aristocratic family, the prevalence of equality in American society and government greatly impressed Tocqueville.⁸³⁸ Moreover, he

832. *Plymouth Oration*, DARTMOUTH, www.dartmouth.edu/~dwebster/speeches/plymouth-oration.html (last visited Feb. 9, 2020).

833. Anastaplo, *supra* note 40, at 34-35.

834. *Id.* at 66-67.

835. Motley, *supra* note 29, at 478-79 (quoting GEORGE BANCROFT, I., HISTORY OF THE UNITED STATES 310); *see also* LAURIC HENNTON, WHIG HISTORY, DEMOCRATIC HISTORY: BANCROFT VS MOTLEY 314 (2005), https://www.persee.fr/doc/cchav_0184-1025_2005_num_39_1_1438.

836. PHILBRICK, *supra* note 42, at 352-53.

837. *See* Anastaplo, *supra* note 40, at 34; *see also* Cooper, *supra* note 30, at 547 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 43 (1862)) (“[n]o sooner had the emigrants landed on the barren coast . . . than it was their first care to constitute a society, by subscribing the [Mayflower Compact].”); Bush, Jr., *supra* note 622, at 745-46 (“Alexis de Tocqueville, who visited America in 1831-1832, remarked on the way a democratic society selects the objects of its veneration For Tocqueville, America’s making an icon of Plymouth Rock was a triumph for democratic values.”); Cooper, *supra* note 30, at 548, citing Tocqueville, DEMOCRACY IN AMERICA, at 46-47 (“showing that the commitment to public education was founded on religious principles.”).

838. Martinez, *supra* note 41, at 462 n. 23 (Tocqueville “nothing amazed [him] more than the equality of conditions.”). *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA Vol. 1 (1862).

was taken with the Pilgrim story, noting: “Puritanism . . . was scarcely less a political than a religious doctrine. No sooner had the emigrants landed on the barren coast . . . than it was their first care to constitute a society, by passing the [Mayflower Compact, which he then quoted].”⁸³⁹

The following decade, German-born author Therese Albertine Luise von Jakob Robinson published a 700-page history of New England under the pseudonym Talvj (the acronym created by her birth name).⁸⁴⁰ Upon quoting the Mayflower Compact, she offered “Thus, then, did the cabin of the Mayflower become the birth-place of the first democratic constitution of the present free states, which is yet regarded by their remote descendants with joyful pride as the foundation of their freedom and independence.”⁸⁴¹ Not everyone believed in the sentiment of predestination encouraged by these authors. For example, an American author and diplomat John Lothrop Motley published “Polity of the Puritans,” in which he dismissed Talvj’s interpretation and doubted that the Mayflower Compact had much significance at all.⁸⁴²

Yet the Mayflower Compact and Pilgrim story have been firmly implanted within American folklore and are interwoven with various narratives and events throughout American history. For example, in 1848, Elizabeth

839. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* Vol. 1 (1862); see also Cooper, *supra* note 30, at 547 (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 42-43 (1862)) (“Puritanism, was not merely a religious doctrine, but it corresponded in many points with the most absolute democratic and republican theories.”).

840. Motley, *supra* note 29, at 472-73.

841. *Id.* at 478.

842. *Id.* (“The New England fathers, however, had no notion of establishing a democracy.” “The Plymouth colony, which was the first organized band of religious emigrants who arrived in New England, was, as is well known, but a little refugee congregation of dissenters, one hundred and one in number, men, women, and children all told. The Plymouth rock compact was drawn up ex necessitate, and was rather intended as a solemn agreement among a very few individuals to stand by and support each other, under very trying circumstances, than as a formal annunciation of political principles”); *id.* at 479 (“If told, that their modest little agreement would be regarded, after two centuries and a half, by twenty millions of white men with their three millions of slaves as ‘the foundation of their freedom and independence,’ and that this document of mutual engagement, which was drawn up for a temporary purpose, while they were waiting for ‘a concession of municipal privileges’ from the crown, was intended ex propria vi to supersede all ‘charters, patents, and concessions,’ we believe they would be as much puzzled to understand American liberty as American slavery, and would believe themselves to be about as much the founders of the one as of the other.”); *id.* at 481 (“The fact is, as everybody knows, that these colonists drew up this document as a temporary compact, because they were in a state of anarchy.” “[T]oo much political importance has been attached to the history of the Plymouth Colony.”); *id.* at 485 (“It is a proof of the vigor and truth of the democratic principle, that, although it was so far from the thoughts of the pilgrim fathers, it nevertheless established itself at a later day; —that ‘humanity did recover its rights,’ although not in the cabin of the Mayflower”); see also Editors of Encyclopedia Britannica, *John Lothrop Motley*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/John-Lothrop-Motley>.

Barrett Browning wrote “The Runaway Slave at Pilgrim’s Point” to draw attention to and protest against the cruelty of slavery.⁸⁴³ Henry Wadsworth Longfellow, who was a descendant of Mayflower passengers John Alden and Priscilla Mullins Alden, published *The Courtship of Miles Standish* in 1858.⁸⁴⁴ Sarah Josepha Hale, a prolific author and leader of an initiative for the United States to recognize Thanksgiving as a national holiday for over three decades, finally prevailed as President Abraham Lincoln established Thanksgiving as a national holiday in 1863, the same year that he issued the Emancipation Proclamation freeing the slaves in the rebelling states during the height of the Civil War.⁸⁴⁵ That same year, Ralph Waldo Emerson, renowned poet and abolitionist, published “Boston Hymn” in *The Atlantic* magazine, both extolling the virtues of the Pilgrims and their heritage, as well as decrying the institution of slavery.⁸⁴⁶ Continuing the quest for “equal laws” for the “general good” started in the Mayflower Compact, the Reconstruction Amendments between 1865 and 1870 abolished slavery throughout the country, established the right to equal protection of the laws, and granted men the right to vote regardless of “race, color, or previous condition of servitude.”⁸⁴⁷ Taken together, these amendments “are consistent with (if not even the natural culmination of) the initial dedication of the Constitution to liberty, equality, and republican government”⁸⁴⁸ and the rights proclaimed in the Declaration of Independence.⁸⁴⁹

Shortly after the Civil War, people in France gave the United States a Statue of Liberty to celebrate the end of slavery represented by the broken

843. ELIZABETH BARRETT BROWNING, *THE COMPLETE WORKS OF ELIZABETH BARRETT BROWNING* VOL. III 160-70 (Charlotte Porter et al. eds., 1900), https://www.sas.upenn.edu/~cavitch/pdf-library/EBrowning_Runaway.pdf; Bahar Saber, “*The Runaway Slave at Pilgrim’s Point*” in *the Liberty Bell*, *ECOLOGY & RELIGION IN 19TH CENTURY STUDIES*, <https://blogs.baylor.edu/19crs/2016/06/30/the-runaway-slave-at-pilgrims-point-in-the-liberty-bell/> (last visited Feb. 9, 2020); *Runaway Slave at Pilgrim’s Point*, MARYMOUNT U., <https://commons.marymount.edu/runawayslaveatpilgrimspoint/close-reading/> (last visited Feb. 9, 2020) (noting “the importance of Pilgrim’s Point within the work as a symbol of the hypocrisy of the founders who came seeking freedom from oppression but allowed for the establishment of slavery in the United States.”).

844. Bush, Jr., *supra* note 622, at 748 (discussing HENRY WADSWORTH LONGFELLOW, *THE COURTSHIP OF MILES STANDISH* (1858)); Editors of Encyclopedia Britannica, *John Alden and Priscilla Alden*, BRITANNICA (July 20, 1998), <https://www.britannica.com/biography/John-Alden-and-Priscilla-Alden#ref127460>; PHILBRICK, *supra* note 42, at 354.

845. PHILBRICK, *supra* note 42, at 354.

846. Ralph Waldo Emerson, *Boston Hymn*, *THE ATLANTIC* (Feb. 1863), <https://www.theatlantic.com/magazine/archive/1863/02/boston-hymn/303953/>.

847. *The Constitution: Amendments 11-27*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/amendments-11-27> (last visited Feb. 9, 2020).

848. Anastaplo, *supra* note 40, at n. 193.

849. *Id.* at 112.

chains at her feet, as a gesture of friendship between the countries, as a symbol of America as a nation comprised largely of immigrants and their descendants, and as a proclamation of America's continued willingness to embrace of the downtrodden fleeing dire circumstances in their former countries to the freedoms championed by the United States.⁸⁵⁰ Dedicated in 1886, this stirring monument is inscribed with the following stanza from the poem "The New Colossus" by Emma Lazarus:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost [sic] to me,
I lift my lamp beside the golden door!⁸⁵¹

The similarities between these two national icons—Plymouth Rock as the location where the Pilgrims first disembarked from the Mayflower and entered the New World, and Ellis Island near the home of the Statue of Liberty and the first stop for immigrants to America for many decades—have been frequently highlighted.⁸⁵² Yet the freedoms and aspirations embodied by both the Statute of Liberty and the Mayflower Compact remained in stark contrast with the continued discrimination in our country faced by Native Americans, African Americans, and more recent immigrants, among others.⁸⁵³ It is difficult to escape this uncomfortable juxtaposition, which itself provides the impetus to change our society to eliminate such discrimination.

America the Beautiful arose in 1893 from the lyrics by Katharine Lee Bates to become a beloved national ballad, depicting the Pilgrims in the second verse:

O beautiful for Pilgrim feet, whose stern impassioned stress
A thoroughfare for freedom beat, across the wilderness

850. Channing, *supra* note 196, at 198 (discussing 1900-1920 immigration from China and Japan). Note the obstacles to immigration to the United States over the years, e.g., Catholics, Asians in the early 1900s, current policies, and so on.

851. History.com Editors, *Statue of Liberty*, HISTORY.COM (Dec. 2, 2009), <https://www.history.com/topics/landmarks/statue-of-liberty>.

852. Bush, Jr., *supra* note 622, at 753 ("By now, the Rock, like New England, has lost its place of primacy as [a] national symbol. Late in the nineteenth century, the Statue of Liberty emerged as a new symbol of America's welcoming acceptance of immigrants. But the Rock . . . has not disappeared") ("Comparisons between Plymouth Rock and Ellis Island became more and more widespread").

853. See, e.g., PHILBRICK, *supra* note 42, at 355 (describing Native Americans referring to Thanksgiving as a National Day of Mourning).

America, America, God mend thine every flaw
 Confirm thy soul in self control, Thy liberty in law.⁸⁵⁴

Bates, a poet and English Professor at Wellesley College who had been teaching a summer class in Colorado, penned the words to describe her awe with the beauty of the countryside after ascending the pinnacle of Pikes Peak.⁸⁵⁵ The contradiction in this verse between the Pilgrim's quest for freedom—which helped beat a thoroughfare across the wilderness in America, which in turn wrought destruction, enslavement, and other atrocities upon the first inhabitants of America—is striking.

Henry Cabot Lodge delivered the tercentennial Forefathers' Day speech in 1920. Of the Mayflower Compact, he noted:

[H]ere was a constitution of government which is in its essence an agreement among those who accepted it, made by the people themselves—an idea which has traveled far and wide, even to the ends of the earth and around the habitable globe since the Mayflower lay at anchor off Provincetown. Here, too, written in this same small paper was the proclamation of democracy, something which had quite faded away in Europe and had never before been declared in the American hemisphere . . . Each and every man of them sacrificed a part of his own liberty that all might be free. "Liberty . . . is the power to discipline oneself," and this was the spirit which inspired the Englishmen who signed the Mayflower compact. No greater principle than this could have been established, for it is the corner stone of democracy and civilization.⁸⁵⁶

That same year, a half-century after men were given the right to vote regardless of race, the 19th amendment finally gave women the right to vote—doubling the electorate.⁸⁵⁷ In 2020, as the United States celebrates the 400th anniversary of the Mayflower Compact, our nation is also celebrating the 100th anniversary of female suffrage.⁸⁵⁸ Four years later, in 1924 Congress passed

854. Anastaplo, *supra* note 40, at 68 (noting "America the Beautiful's" last verse about the Pilgrims).

855. Eric Westervelt, *Greatness is Not a Given: "America The Beautiful" Asks How We Can Do Better*, NPR (Apr. 4, 2019, 4:26 PM), <https://www.npr.org/2019/04/04/709531017/america-the-beautiful-american-anthem>.

856. HENRY CABOT LODGE ET. AL, *THE PILGRIMS OF PLYMOUTH 27* (1920) <https://books.google.com/books?id=aLkTAAAYAAJ&pg=PA11&lpg=PA11&dq=henry+cabot+lodge+forefathers+day+speech+1920+pilgrims&source=bl&ots=Ih-pOoGB3nS&sig=ACfU3U3Pkq0Uw7cXKW0dPml745-wE49mPQ&hl=en&sa=X&ved=2ahUKEwiR9pj-rrjmAhVOj54KHTorCAMQ6AEwBHoE-CAkQAQ#v=onepage&q=mayflower%20compact&f=false>.

857. *See generally* Channing, *supra* note 196.

858. *See, e.g., Law Day 2020*, ABA, https://www.americanbar.org/groups/public_education/law-day/ (last visited Feb. 21, 2020) ("The Law Day 2020 theme is "Your Vote, Your Voice,

the Native American Citizenship Act, finally giving citizenship to all Native Americans within the United States, many of whom had been denied citizenship under a determination by the U.S. Supreme Court that the 14th Amendment clause establishing citizenship rights does not apply to Native Americans who are members of sovereign Indian tribes in the United States.⁸⁵⁹ However, many states still prohibited Native Americans from voting through their state laws for decades, as they had also done with African Americans and other marginalized groups.⁸⁶⁰

In January of 1965, Lyndon Johnson referred to the Pilgrims in his inaugural address:

They came here—the exile and the stranger, brave but frightened—to find a place where a man could be his own man. They made a covenant with this land. Conceived in justice, written in liberty, bound in union, it was meant one day to inspire the hopes of all mankind, and it binds us still. If we keep its terms, we shall flourish. The American covenant called on us to help show the way for the liberation of man. And that is today our goal. Thus, if as a nation there is much outside our control, as a people no stranger is outside our hope.⁸⁶¹

Later that same year, Congress passed the Voting Rights Act, which strengthened the right to vote for Native Americans as well as African Americans and other disenfranchised groups.⁸⁶²

References to the Pilgrim story have continued to inspire many people in the United States through the remaining decades of the twentieth century and into the present day. Examples include the *School House Rock* vignette telling the story of the Mayflower,⁸⁶³ the *Peanuts* video depicting the Mayflower voyage and the first Thanksgiving,⁸⁶⁴ and continued performances of the *Anything Goes* musical, which includes a song highlighting Plymouth

Our Democracy: The 19th Amendment at 100”); *Ruth Bader Ginsburg to Visit Omaha Next Year To Celebrate 19th Amendment*, THE DAILY REC. (Aug. 27, 2019, 12:00 AM), <https://www.omaha-dailyrecord.com/content/ruth-bader-ginsburg-visit-omaha-next-year-celebrate-19th-amendment>.

859. *Voting Rights for Native Americans*, LIBR. OF CONGRESS, <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/voting-rights-native-americans.html> (last visited Feb. 9, 2020).

860. *Id.*

861. Elazar, *supra* note 5, at 23.

862. *See Voting Rights for Native Americans*, LIBR. OF CONGRESS, <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/voting-rights-native-americans.html> (last visited Feb. 9, 2020).

863. *Schoolhouse Rock!: No More Kings* (ABC television broadcast Sept. 20, 1975).

864. *This is America, Charlie Brown: The Mayflower Voyagers* (CBS television broadcast October 21, 1988).

Rock and the Pilgrims.⁸⁶⁵ And dozens of books and articles have been published depicting the story of the Pilgrims, many especially highlighting the first Thanksgiving.

As suggested above, as with any human institution, the American mythology carefully constructed around the Pilgrims and the Mayflower Compact has been complicated and not always entirely benign.⁸⁶⁶ For example, orators such as Daniel Webster, although using the occasion of his Forefathers' Day speech to call for the abolition of slavery in the name of equality represented in both the Mayflower Compact and the U.S. Constitution, also regrettably vilified the indigenous population whose land was taken from them and in doing so supposedly justified such confiscation.⁸⁶⁷ John Quincy Adams similarly used his speech to malign the Native American inhabitants. In the early 1900s, the Mayflower Compact and Pilgrim story were used by members of the Protestant majority to oppose the immigration of Catholics from Ireland, Italy, Poland, and other countries.⁸⁶⁸ The Mayflower Compact has been used on opposite sides of numerous political debates throughout the centuries.⁸⁶⁹ And more recently, some scholars have questioned the continuing relevance and resonance of the Mayflower Compact.⁸⁷⁰

865. *Anything Goes* is a musical production written by Cole Porter in 1934, performed by the Summer Performing Arts program in Grand Forks, ND, in 2018, in which the author's daughter, Cosette Clement, helped manage the spotlighting. *Anything Goes Lyrics*, ALL MUSICALS, <https://www.allmusicals.com/lyrics/anythinggoes/anythinggoes.htm> (last visited Feb. 21, 2020).

866. PHILBRICK, *supra* note 42, at xv (describing "the nostalgic and reassuring legends that have become the staple of annual Thanksgiving Day celebrations.").

867. *Plymouth Oration*, DARTMOUTH, www.dartmouth.edu/~dwebster/speeches/plymouth-oration.html (last visited Feb. 9, 2020).

868. All About History Team, *Mayflower Pilgrims: How 1620 Came to Matter in Revolution and Racism*, HIST. ANSWERS (Aug. 17, 2018), <https://www.historyanswers.co.uk/people-politics/mayflower-pilgrims-how-1620-came-to-matter-in-revolution-and-racism>; see also Sean Sherman, *The Thanksgiving Tale We Tell Is a Harmful Lie. As a Native American, I've Found a Better Way to Celebrate the Holiday*, TIME (Nov. 19, 2018), <https://time.com/5457183/thanksgiving-native-american-holiday/> (the United States "saw a rise in nationalism, as European immigrants poured into the country, and the Protestant Americans who'd massacred indigenous people feared being displaced. Colonial ideology became the identity of what it was to be truly 'American,' and they began implementing teachings to clearly define 'Americanism' for the new immigrants.").

869. See Sargent, *supra* note 3, at 233-51.

870. Nicgorski, *supra* note 604, at 156 (quoting Albert Beveridge, *Sources of the Declaration of Independence*, 50 PA. MAG. OF HIST. AND BIOGRAPHY 307 (#4, 1926)) ("We are especially favored in having marked out for us the way of happiness and safety in our domestic life and in our foreign affairs. We have only to carry out the ideas of the Mayflower Compact, the Declaration of Independence, the Constitution of the United States, the Farewell Address of George Washington, and the Second Inaugural of Abraham Lincoln."); *id.* at 157 ("Some measure of the Declaration's increasing dominance is found in the extent to which favorable or even unembarrassed reference to the Mayflower Compact and the Farewell Address has dropped from public discourse during the twentieth century. Those documents and their ideas, as well as the whole Puritan experience, seem increasingly embarrassing to modern democratic America."); *id.* at 159 ("Rule of the people to the ends of ever-greater realization of individual liberty and equality seems increasingly to represent the whole heart and substance of the American political tradition. No wonder the Declaration of

Yet as noted above, many people throughout the United States still embrace the Pilgrim story today, which encourages them to embrace many of the Pilgrims' virtuous characteristics.⁸⁷¹ Hopefully the nation's continued examination of the legacy left by the Pilgrims and the Mayflower Compact—in the broader context of both the positive and negative aspects surrounding the founding and evolution of the United States—will help our country continue to build upon and expand the fundamental human rights of all people. As such, these human rights must include our neighbors who are descendants of the original inhabitants of this land, as well as our neighbors whose ancestors were brought here against their will through slavery, in addition to our neighbors of European descent.

V. THE MAYFLOWER COMPACT'S LESSONS FOR TODAY

As alluded to above, a broad examination of the Mayflower Compact's history of influence on the development of the U.S. Constitution, our system of governance, and the civic-mindedness of our nation's population will arguably allow us—as an increasingly multicultural populace—to embrace their aspirational characteristics and begin to heal the longstanding rifts among various segments of our society.⁸⁷² The events surrounding the 2020 quadricentennial celebrating the landing of the Mayflower, the signing of the Mayflower Compact, and the establishment of Plymouth Colony provide wonderful opportunities to continue these conversations.⁸⁷³ For example, the

Independence lives in a way that neither the Mayflower Compact nor the Farewell Address does. Its creedal section serves well to state the political ideas that really count, the primary regime characteristics of modern America.”).

871. Anastaplo, *supra* note 40, at 67 (“preeminent place that the founding of Plymouth has for subsequent generations”).

872. As one example, the General Society of Mayflower Descendants extended its support for the Mashpee Wampanoag Tribe Reservation Reaffirmation Act in 2019. *Wampanoag Tribal Lands*, MAYFLOWER NEWSL., (Society of Mayflower Descendants in Michigan) Winter 2019, at 5. The society's Governor General George Garmany highlighted “The General Society of Mayflower Descendants is made up of lineal descendants of the Mayflower Pilgrims. The Mashpee Wampanoag Nation is made of lineal descents of the Wampanoag Tribe. In 1621, our ancestors together signed a 54-year peace agreement that allowed both to survive and protect one another. This agreement between Europeans and Native Americans is the only example of cooperation in what was followed by a sad chapter in American history, and in light of the fact that our ancestors collectively chose to live in peace for 54 years, the General Society fully supports today's Mashpee Wampanoag tribe and joins in support of legislation known as the Mashpee Wampanoag Reservation Reaffirmation Act.” *Id.*

873. 2020 Commemoration, GEN. SOC'Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/2020-commemoration> (last visited Feb. 9, 2020).

General Society of Mayflower Descendants, founded in 1897, has been actively involved in coordinating 2020 anniversary activities,⁸⁷⁴ as has the Billington Family Society, which was founded in 2017.⁸⁷⁵ The estimated number of Mayflower descendants is astounding:

The Pilgrims' descendants have proven to be, if nothing else, fruitful. In 2002, it was estimated that there were approximately 35 million descendants of the Mayflower passengers in the United States, which represents roughly 10 percent of the total U.S. population.⁸⁷⁶

Hopefully many of these descendants will take this opportunity to delve deeply into the history shaped by our ancestors and learn both from our ancestors' virtues as well as their shortcomings.

The expansion of citizenship rights, voting rights, and participation in government continues the heritage of democracy, equality, and justice heralded in the Mayflower Compact four centuries ago. For example, the first Native American women were elected to Congress in 2018.⁸⁷⁷ Efforts to increase awareness about our nation's history have led to changes such as state and local celebrations of Indigenous Peoples' Day instead of Columbus Day.⁸⁷⁸ Native American voices discuss the complexities surrounding the Thanksgiving holiday in mainstream media and other venues.⁸⁷⁹ Many Americans are actively engaged in political processes at the local, state, and national level to protect human rights against governmental overreaching⁸⁸⁰

874. GEN. SOC'Y OF MAYFLOWER DESCENDANTS, <https://www.themayflowersociety.org/> (last visited Feb. 9, 2020).

875. BILLINGTON FAM. SOC'Y, <https://billingtonfamilyociety.com/> (last visited Feb. 9, 2020) (Note: The author's mother, Janet Lee (Mohr) Ernst, serves as the Elder on the Billington Family Society governing board.).

876. PHILBRICK, *supra* note 42, at 356.

877. Eli Watkins, *First Native American Women Elected to Congress: Sharice Davids and Deb Haaland*, CNN (Nov. 7, 2018, 12:01 AM), <https://www.cnn.com/2018/11/06/politics/sharice-davids-and-deb-haaland-native-american-women/index.html>.

878. AJ Willingham, *These States And Cities Are Ditching Columbus Day To Observe Indigenous Peoples' Day Instead*, CNN (Oct. 14, 2019, 9:39 AM), <https://www.cnn.com/2019/04/22/us/indigenous-peoples-day-columbus-day-trnd/index.html>.

879. Sean Sherman, *The Thanksgiving Tale We Tell Is a Harmful Lie. As a Native American, I've Found a Better Way to Celebrate the Holiday*, time (Nov. 19, 2018), <https://time.com/5457183/thanksgiving-native-american-holiday/>; Dennis Zotigh, *Do American Indians Celebrate Thanksgiving?*, Smithsonian Mag. (Nov. 26, 2019), <https://www.smithsonianmag.com/blogs/national-museum-american-indian/2019/11/27/do-american-indians-celebrate-thanksgiving/>; *American Indian Perspectives on Thanksgiving*, Nat'l Museum of the Am. Indian, https://americanindian.si.edu/sites/1/files/pdf/education/thanksgiving_poster.pdf (last visited Feb. 21, 2020); Julie Turkewitz, *Thanksgiving for Native Americans: Four Voices on a Complicated Holiday*, N.Y. Times (Nov. 23, 2017), <https://www.nytimes.com/2017/11/23/us/thanksgiving-for-native-americans-four-voices-on-a-complicated-holiday.html>.

880. Ostrom, *supra* note 735, at 95 ("Ample opportunity exists in a democratic society for some to use instruments of coercion to exploit others. The vices of injustice, ingratitude, arrogance, pride, and contempt—to paraphrase Hobbes—can no more be the legitimate basis for governing relationships in a democracy than in any other society."); *id.* at 99 ("If citizens as subjects acquiesce

and to enhance equality and the quality of life for all people—domestically and globally.⁸⁸¹ The Mayflower Compact also prefigured the spread of democracy and human rights to other countries.⁸⁸² And despite current U.S. policies discouraging immigration, a significant segment of the U.S. population favors welcoming people from other regions of the world to the United States, as exemplified by non-profit organizations in North Dakota such as the Global Friends Coalition in Grand Forks and Bismarck Global Neighbors.⁸⁸³

Widespread education and civic participation throughout society are vital to maintaining a flourishing democracy.⁸⁸⁴ Residents of the United States should participate actively in all levels of government, as it is the responsibility of all inhabitants to be informed and active members of society. Citizens and non-citizens may exercise some of these rights and privileges in different ways (e.g., some jobs and voting rights are restricted to citizens), yet all are vital to the strength and wellbeing of the United States. To foster civic participation, patriotic philanthropy has become popular, as civic-minded donors help entities preserve our national and cultural heritage. A prime example is the Theodore Roosevelt Presidential Library, which will be housed in the western part of North Dakota, where President Roosevelt spent

in the usurpation of authority by officials, unlimited prerogatives will prevail and a democracy will cease to exist.”).

881. *Id.* at 95 (“Critical problems in the constitution of a viable democracy turn upon the basis for common understanding that informs a theory of constitutional choice, and upon the capacity of citizens in a democracy to enforce the limits of constitutional law in relation to officials.”); *see also* AM. BAR ASS’N, <https://www.americanbar.org/> (last visited Feb. 9, 2020); AM. CONST. SOC’Y, <https://www.acslaw.org/> (last visited Feb. 9, 2020); FEDERALIST SOC’Y, <https://fedsoc.org/> (last visited Feb. 9, 2020).

882. Martinez, *supra* note 41, at 482 (“Calvinism gave constitutionalism much of its originality, making it possible to extend the solutions of American constitutionalism in other countries. Calvinism also gave constitutionalism its strength and coherence, that astonishing and unbroken line of continuity that has been maintained since the Mayflower Compact.”); *see also* Channing, *supra* note 196, at 193-94 (discussing transportation and communication explosion 1815-1865, as well as the movement of people, goods, and ideas spread democratic ideals throughout the world).

883. GLOBAL FRIENDS COALITION, <http://www.gfcoalition.org/> (last visited Feb. 9, 2020); BISMARCK GLOBAL NEIGHBORS, <https://www.bismarckglobalneighbors.org/> (last visited Feb. 9, 2020).

884. Ostrom, *supra* note 734, at 95 (“Critical problems in the constitution of a viable democracy turn upon the basis for common understanding that informs a theory of constitutional choice, and upon the capacity of citizens in a democracy to enforce the limits of constitutional law in relation to officials.”); *id.* at 96 (“Common understanding, if properly grounded, gives rise to common agreement. It is this level of common understanding and agreement that provides the metaphysical and moral foundations that inform constitutional choice in a democracy.”); *see also* Anastaplo, *supra* note 40, at 25 (noting the importance of educated citizenry: “there were indications by delegates that if the people were to be as good as a people could be—or if the people were to be able to use the constitution being prepared for them—they would have to remain, perhaps even to become, a people of a proper quality. Thus, there was an awareness that properly-trained citizens would be needed.”).

several formative years living in the Badlands.⁸⁸⁵ Moreover, educational institutions provide programs focusing on enhancing knowledge of the historical and current relationships between federal, state, and tribal governments and legal systems, such as the Northern Plains Indian Law Center, the Indian Law Certificate Program, and the Tribal Justice Institute at the University of North Dakota School of Law.⁸⁸⁶ Additionally, countless organizations throughout the United States contribute to civic education, such as the American Bar Association's Law Day,⁸⁸⁷ and the State Bar Association of North Dakota's mock trial program for high school students.⁸⁸⁸

President George Washington and many of the other founders of the United States believed deeply in the crucial role of an educated citizenry.⁸⁸⁹ Advocating for a national university, Washington indicated that a primary goal "should be, the education of our Youth in the science of *Government*. In a republic, what species of knowledge can be equally important? And what duty, more pressing on its Legislature, than to patronize a plan for communicating it to those, who are to be the future guardians of the liberties of the Country?"⁸⁹⁰ And as this article highlights, one of the most important components of education throughout our nation entails the foundational documents forming the bedrock of American democracy, including the Mayflower Compact. While writing this article, I was honored and humbled to receive an email message from U.S. Circuit Court Judge Ralph R. Erickson about a lecture I was giving on this topic, who gave me permission to reprint an excerpt from his message in this article:

Just a quick note to let you know that I am very interested in your lecture on the Mayflower Compact and the U.S. Constitution . . . Thanks for being willing to bring this topic to the fore—I am convinced that it is a significant problem that lawyers and law students never think about the pre-constitutional documents that color constitutional law (and the important post-constitutional ones as well).

885. THEODORE ROOSEVELT PRESIDENTIAL LIBR., <https://www.trlibrary.com/> (last visited Feb. 9, 2020).

886. *Northern Plains Indian Law Center*, U. OF N.D. SCH. OF L., <https://law.und.edu/npilc/index.html> (last visited Feb. 9, 2020).

887. *Law Day 2020*, AM. B. ASS'N, https://www.americanbar.org/groups/public_education/law-day/ (last visited Feb. 9, 2020) ("The Law Day 2020 theme is "Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100" celebrating women's right to vote).

888. *SBAND High School Mock Trial – You Be the Judge/Attorney Coach*, ST. B. ASS'N OF N.D., <https://www.sband.org/events/EventDetails.aspx?id=1279745&group=> (last visited Feb. 9, 2020).

889. Albert Castel, *The Founding Fathers and the Vision of a National University*, 4 HIST. OF EDUC. Q. 280, 281 (1964).

890. MICHAEL S. ROTH, *BEYOND THE UNIVERSITY: WHY LIBERAL EDUCATION MATTERS*, YALE UNIVERSITY PRESS 28 (2014).

I am convinced that if each of us had a better understanding of the Magna Carta, the English Bill of Rights, the Mayflower Compact, the Fundamental Orders of Connecticut, the Articles of Confederation, the Virginia Declaration of Rights, and the Northwest Ordinance, we would much better understand the Constitution and the liberties it guarantees to each of us.

In any event I really do appreciate your willingness to take on what might appear to many as arcane topic. It is very important.

Ralph R. Erickson
Circuit Judge
Eighth Circuit Court of Appeals⁸⁹¹

Together with the other foundational documents shaping our country's history and democratic evolution, the Mayflower Compact provides our nation today with important lessons as the United States continues to move forward toward even loftier heights. In bringing together the divergent groups aboard the Mayflower, the foundation that "Combination"⁸⁹² laid provides the impetus for greatness in the decades to come, as the United States continues to incorporate and reflect a mosaic of many different peoples. And as the Mayflower Compact itself counsels, strive together we must, for out of mutual cooperation, understanding and respect comes mutual strength.

891. Email message from the Honorable Ralph R. Erickson to the author on February 20, 2019 (on file with the author) (edited for brevity and clarity).

892. Lutz, *From Covenant*, *supra* note 117, at 106 ("The Mayflower Compact was actually not so named until 1793, and was known by the citizens of Plymouth as the 'Plymouth combination,' or the 'agreement between the settlers at New Plymouth.'").