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Daniel Defoe and the Written
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I INTRODUCTION

Today, as constitutionalism spreads around the globe, it is embodied *de rigueur* in written documents. Even places that sustained polities for centuries without a written constitution have begun to succumb to the lure of writtleness.¹ America, we think,

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¹ In the U.K., the Human Rights Act of 1998, which incorporated the European Convention on Human Rights into domestic law, has generated something akin to a bill of rights, but the Honorable Lord Goldsmith recently argued that even this document is insufficient and that a written constitution is necessary. *See generally* Rt. Hon. Lord Goldsmith, *Keynote Address: Global Constitutionalism Symposium*, 59 STAN. L. REV. 1155 (2007). Likewise, many have recently

spawned this worldwide force, inaugurating a radically new form of political organization when it adopted the U.S. Constitution as its foundational text. Yet the notion of the written constitution had, in fact, received an earlier imprimatur from the pen of Daniel Defoe, English novelist, political pamphleteer, and secret agent.² Plying his trades in the early eighteenth century, Defoe, now known largely as the author of *Robinson Crusoe*, in a number of disparate literary and political guises advocated the development of written documents setting forth the basic principles of a governmental order and restraining the power of legislative majorities. Just as the individualist ethos of *Robinson Crusoe* grabbed the American imaginary from the mid-eighteenth-century onwards, a conception of written constitutionalism similar to the one that he promulgated took root on American soil. This Article elaborates the contours of written constitutionalism that Defoe outlined and demonstrates the close alignment of some of Defoe's arguments with the scholarship of today, an alignment that suggests the persistence of a number of the mythic ideals of written constitutionalism that Defoe constructed in the early eighteenth century.

Examining Defoe's work provides, in addition, insight into the vexed relationship between written constitutionalism and

contended that Australia should adopt a written bill of rights. Stuart Rintoul, *Judge calls for right to quash unjust laws*, THE AUSTRALIAN (Sept. 14, 2007) (detailing several Australian judges' support for a written Bill of Rights).

Resistance to written constitutions does, however, remain in various quarters. For example, although a large number of Native American tribes adopted such documents pursuant to the Indian Reorganization Act of 1934, some insist that they remain unnecessary. See *Why the San Manuel Band Doesn't Need a Constitution 2* (stating that, "[h]istorically, San Manuel has never seen the need for a written constitution. Rather, our stability as a government has derived not from a written document but from a number of other factors directly related to our Tribe's unique characteristics," including the "strong kinship systems and long-term cultural identity" that derive from the tribe's small size) (on file with the author); see also Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1076 (2007) (referring to the "'boilerplate' constitutions' adopted after the passage of the Indian Reorganization Act"). Even at the time of the Founding, one writer lauded the Native Americans who had inhabited Vermont for maintaining a successful government without a written constitution: "A modern statesman would smile at this idea of Indian government: And because he could find no written constitution, or bill of rights, . . . pronounce it weak, foolish, and contemptible. But it was evidently derived from the dictates of nature, and well adapted to the state and situation of the savage. . . . The individual had all the security, in the public sentiment, custom, and habit, that government can any where afford him." SAMUEL WILLIAMS, THE NATURAL AND CIVIL HISTORY OF VERMONT 140-41 (1794).

² See generally MAXIMILLIAN NOVAK, DANIEL DEFOE: MASTER OF FICTIONS: HIS LIFE AND IDEAS (2003); PAULA R. BACKSCHEIDER, DANIEL DEFOE, HIS LIFE (1989).

judicial review, a conceptual pair often—and perhaps inappropriately—conflated. Perennial debates about the legitimacy of Chief Justice Marshall’s declaration of judicial review under the U.S. Constitution in *Marbury v. Madison* (1803) have been infused with new vigor by recent work reiterating the idea that judicial review and, in particular, judicial supremacy, largely constitute post-constitutional American innovations.³ More dramatically, some writers cast doubt on the primacy of judicial review by urging that the people themselves have been, and should be, construed as a more powerful source of authority in constitutional interpretation than the judicial branch.⁴ Partly in response to these arguments, several scholars have elaborated upon the English and American precursors to judicial review as we know it, demonstrating that the exercise of judicial review before *Marbury* was much more common than previously recognized and that colonial structures of judicial appeal bore substantial resemblance to what would later emerge as the practice of judicial review under the Constitution.⁵

Mary Bilder’s account of the origins of judicial review in the assessment of whether corporate bylaws and ordinances—and later acts of colonial legislatures—were repugnant to the laws of England furnishes one of the most compelling of these attempts to show that judicial review was far from unprecedented.⁶ Colonial

³ For an analysis of how the conception of judicial review was transformed from that of an exceptional and quasi-revolutionary activity into a regular practice of the federal judiciary in the United States during the period leading up to *Marbury*, see Gordon Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999). For the contention that, at the time of *Marbury*, “judges could not expound fundamental law authoritatively,” which entailed that “judges could not rest the invalidity of legislation on their interpretation of the Constitution over a contending legitimate one embodied in that legislation,” see Sylvia Snowiss, *The Marbury of 1803 and the Modern Marbury*, 20 CONST. COMMENT. 231, 237 (2003); see generally SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990).

⁴ See generally LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005) (elaborating the dynamics of non-judicial constitutionalism in the early republic through a micro-historical study of the first Supreme Court case to strike down a state law).

⁵ William M. Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005) (finding thirty-one cases preceding *Marbury* in which a statute was invalidated); Maeva Marcus, *Judicial Review in the Early Republic*, in LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA 25 (Ronald Hoffman & Peter J. Albert eds., 1996); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006).

⁶ Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, *supra* note 5; MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION (2004); see also JOSEPH SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950).

charters, which contained language requiring that colonial laws not be repugnant or contrary to English law, afforded a basis for Privy Council review of the colonies' enactments. Still, Bilder's model of corporate judicial review does not provide support for Chief Justice Marshall's emphasis in *Marbury* on the idea that judicial review constitutes a unique entailment of a *written* constitution.⁷ According to Chief Justice Marshall in *Marbury*, the intent of "all those who have framed *written* constitutions" must be to render them "the fundamental . . . law of the nation"; a legislative act "repugnant to the constitution" must, therefore, be void.⁸ As Marshall insisted, "[t]his theory is essentially attached to a written constitution."⁹ Despite the firm assertion of these points, and the repetition of the mantra "written constitution" no less than seven times in the *Marbury* opinion, Marshall provided few indicia of why the fact of writing would be intimately linked with the possibility of judicial review, or, even more fundamentally, why writing the constitution would itself be of value.

Simply invoking "fundamental law" does not suffice to distinguish the U.S. Constitution sufficiently from its predecessors; as John Reid, J.G.A. Pocock and others have elaborated, the British unwritten constitution had previously been seen as articulating principles of fundamental law as well.¹⁰ Another passage in the *Marbury* opinion does, however, indicate a somewhat different rationale for valuing a written constitution—the notion that writing provides a useful aid to memory. As Marshall explained, "The powers of the legislature are defined, and limited; and that those limits may not be *mistaken*, or *forgotten*, the

⁷ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁸ *Marbury*, 5 U.S. at 177 (emphasis added).

⁹ *Marbury*, 5 U.S. at 177.

¹⁰ See JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* (2005); J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 48 (2d ed., 1987) (referring to "the building-up of a body of alleged rights and privileges that were supposed to be immemorial, . . . coupled with the general and vigorous belief that England was ruled by law and that this law was itself immemorial, result[ing] in turn in that most important and elusive of seventeenth-century [English] concepts, the fundamental law"); see also JOHN W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 15 (1985) (reminding the reader that early references to "fundamental laws" should not automatically be assumed to refer to the "fundamental law" of today but that some elements of the early modern usage may have developed into the contemporary one).

Gordon Wood has also observed that "[t]he idea of fundamental law embodied in a written constitution by itself could never have accounted for the development of judicial review; indeed, emphasis on the fundamental character of the Constitution tended to inhibit the use of judicial review." Gordon Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 799 (1999).

constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”¹¹ The limitations upon legislative power do not derive from the written quality of the constitution, but are instead enshrined by it. The limitations upon legislative power that have been defined are recorded in order to preserve them for posterity and memory. From this scant basis provided by *Marbury*, advocates of constitutionalism have derived a strong faith in written constitutions, one that has pervaded not only the scholarly literature and popular imagination, but also resulted in the proliferation of written constitutions during the twentieth century. Marshall was not, however, the first to insist upon the significance of writing in the constitutional arena, and he may not bear sole responsibility for spawning the mythic status of written constitutionalism. As this Article details, Defoe’s writings in the earlier part of the eighteenth century rely on and articulate their own range of justifications for written constitutional or quasi-constitutional documents.

One caveat is in order—speaking of written constitutional or quasi-constitutional documents might suggest that the term “constitution” remained constant between the early eighteenth-century England of Defoe and the late-eighteenth-century context of the American Founding. The word’s signification experienced, however, considerable flux through the period. In 1776, Thomas Paine’s *Four Letters on Interesting Subjects* could maintain that written constitutions were the only ones worthy of the name and could even deny the accuracy of attributing a “constitution” to the English.¹² The possibility of this stance would hardly have occurred to a political thinker of Defoe’s time. According to the predominant political meanings of that moment, “constitution” could designate the arrangement of government—including the allocation of powers; something ordained or instituted; or the fundamental principles protecting the liberty of the subject.¹³ By presenting a variety of disparate appeals for something like a written constitution, Defoe therefore developed a new conception not only of the significance of writing but of what a constitution could be.

Analyzing Defoe’s political, literary and historical works carries a variety of implications for understanding written

¹¹ *Marbury*, 5 U.S. at 176 (italics added).

¹² See THOMAS PAINE, *FOUR LETTERS ON INTERESTING SUBJECTS*, letter III, at 15 (“All Constitutions should be contained in some written Charter; but *that* Charter should be the act of *all* and not of *one man*.”) (1776); *id.*, letter IV, at 18 (“The truth is, the English have no fixed Constitution.”).

¹³ *Constitution*, in THE OXFORD ENGLISH DICTIONARY; see also *supra* note 10 and accompanying text.

constitutionalism, as Part II argues. There are three principal ways in which the examples provided by Defoe help to illuminate aspects of the history and theory of written constitutionalism. First, Defoe's compositions were widely read in late-eighteenth-century America and may therefore have exerted a subterranean influence on both elites and the people themselves of the Founding Era; in this respect, Defoe may have provided a precedent for the American conception of the written constitution. Even absent such direct influence, Defoe's version of written constitutionalism can be seen as furnishing a cognate to the American vision, because it arose in response to somewhat similar circumstances, including the possible replacement of monarchical sovereignty with legislative supremacy. Finally, the differences between the account of written constitutionalism that emerges out of Defoe's works and the claims made for written constitutionalism today illuminate the contingency of what writing may mean for constitutionalism and demonstrate the ways in which the mythic entailments of writing are sometimes precisely that—myths. Furthermore, as this Part contends, examining cultural sources like the emergent eighteenth-century genre of the novel rather than the classical materials of historical analysis permits us access to a broader public apperception of the questions surrounding the U.S. Constitution. If inspecting the writings of the Founders or looking at late eighteenth-century legal procedure provides insight into a certain subset of authors and audiences for the Constitution, turning to the novel and other widely read genres can grant us access to the construction of the popular imaginary during the Founding Period.

In Part III, the Article turns to the development of Defoe's political stance against legislation in England and the colony of Carolina that penalized those who refused to participate in Church of England services or who engaged only in "occasional conformity" by depriving them of the privilege of serving in various offices. Through these writings, a sense of the potential efficacy of a written constitutional or quasi-constitutional document began to emerge. These texts remained, however, on the level of critique, suggesting a succession of means for stemming the flow of legislative power and protecting the individual believer against incursions upon his or her faith.

Part IV shifts focus to Defoe's later writings, including the novels and the quasi-historical *A General History of the Pyrates*. Although seemingly different in kind, these works bear a substantial relation to each other; the novels sometimes represented themselves as histories or autobiographies and *A General History of the Pyrates* partook more of the historiography of Herodotus than the rigor of today's historians. More importantly, however, these texts constructed a set of myths in which writing played a

central role.¹⁴ If Defoe's political tracts remained critical, while gesturing towards the role of written constitutionalism, these later and longer works nearly proselytized in favor of a foundational written text for the polity. Just as the proprietors of the Carolinas manufactured a vision of the economic and political life that could be achieved by potential colonists willing to emigrate from England,¹⁵ Defoe provided a series of narratives that demonstrated written quasi-constitutions in action. The rapid rise of the novel as a genre—one that Ian Watt claimed *Robinson Crusoe* itself inaugurated,¹⁶—and the concomitant expansion in readership and literacy on both sides of the Atlantic contributed to the power and reception of these mythic visions.

The Article concludes, in Part V, by analyzing the relationships among Defoe's account of the virtues of written constitutionalism, Chief Justice Marshall's vision of its importance, and those aspects of its significance identified by contemporary scholars. The recurrence of several common threads confirms the existence of a family resemblance among the three moments of written constitutionalism, yet the divergences between Defoe's and Marshall's accounts demonstrates that, counter to the latter's conclusions, there is nothing about a written constitution that inevitably entails judicial review.

¹⁴ I will use the term "myth" throughout not to name a falsehood—as surely it is true that we have a written constitution—but rather to designate an especially compelling account of the genesis and reasons for a particular phenomenon.

¹⁵ One pamphlet intended to advertise the virtues of the Carolinas to potential settlers contained a narrative that seemed almost to provide a roadmap for a Defoe novel; the author of the pamphlet speculated about the fate of a younger son who might fall into "unlawful ways . . . to maintain" himself were he to remain in England and fail to take advantage of the opportunities offered by the Carolinas. See *A Brief Description of the Province of Carolina* (1666), in *NARRATIVES OF EARLY CAROLINA: 1650-1708* (J. Franklin Jameson ed., 1911) at 66, 72. In *Moll Flanders*, Defoe analogously treats the question of the different possibilities available to an individual without resources in England and in the American colonies. See DANIEL DEFOE, *MOLL FLANDERS* 304-08 (2002) (1722) (describing Moll's attempt late in life, after serving time as a deported felon in Virginia, to go to Carolina with her husband and recounting how she eventually settled in Maryland).

¹⁶ For the claim that *Robinson Crusoe* was the first novel, see generally IAN WATT, *THE RISE OF THE NOVEL: STUDIES IN DEFOE, RICHARDSON, AND FIELDING* (1957). The question of what should be called the first novel and whether that designation even makes sense is, of course, disputed and is affected by critics' views about how the genre should be defined. See MICHAEL MCKEON, *THE ORIGINS OF THE ENGLISH NOVEL, 1600-1740*, at xix (2002) (1987) (stating that "I conceive [the novel's] emergence not as embodied within a single text or two, whether *Robinson Crusoe* or *Pamela* or *Shamela*, but as an abstract field of narrative possibility shaped by the dialectical engagement of its component 'parts'").

II DEFOE AS MYTH-MAKER, COGNATE, AND PRECEDENT

It was by a circuitous path that Defoe came to express his arguments for written constitutional or quasi-constitutional texts in the context of political tracts, the newly emerging genre of the realist novel, and semi-fictionalized histories. Born around 1660, the young Daniel lived through both the plague that swept London in 1665 and the Great Fire of the subsequent year before attending the Newington Green Academy run by religious dissenter Charles Morton, who would later become president of Harvard College.¹⁷ Defoe's parents were members of a congregation led by Samuel Annesley, who had become a nonconformist upon the passage soon after Charles II's ascent to the throne of the 1662 Act of Uniformity, requiring oaths and adherence to the tenets of the Church of England.¹⁸ Although Defoe ultimately abandoned pursuit of a ministry and left religious training,¹⁹ his early exposure to and investment in religious affairs traced a long trajectory in his later writings.

Despite marrying and entering upon the career of a merchant,²⁰ Defoe obtained neither steady prosperity nor a stable existence. Well before writing any of his novels, Defoe had participated in a rebellion against James II, been pilloried for publication of a satirical pamphlet adopting the false persona of a Church of England man, unsuccessfully attempted to take advantage of a new Bankruptcy Act, and served as a secret agent in Scotland for Queen Anne's Secretary of State Robert Harley.²¹ Throughout, religion and the liberty of the dissenters remained one of his central concerns. At the same time, however, the precise contours of his theories developed and transmogrified, in part evolving and, in part, addressing issues from a variety of disparate angles. As Paula Backscheider writes in her biography of Defoe, "In later years Defoe's tracts would be written from the points of view of an Anglican, a Dissenter, a Quaker, a Scot, a leader of the mob, a Whig, a Jacobite, and others."²² Given this multiplicity of voices, combined with the anonymous publication of many of

¹⁷ BACKSCHEIDER, DANIEL DEFOE, HIS LIFE, *supra* note 2, at 3-16.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 28-30.

²⁰ *Id.* at 30-34.

²¹ *Id.* at 35-40 (detailing Defoe's participation in the Monmouth Rebellion); *id.* at 94-125 (describing Defoe's 1702 pamphlet *The Shortest-Way with the Dissenters* and the imprisonment and pillorying that resulted from it); *id.* at 201-202 (analyzing Defoe's failed efforts to discharge his debts under the 1705 Act for Preventing Frauds Committed by Bankrupts); and *id.* at 159-60, 203-25 (explaining Defoe's evolving role as Robert Harley's emissary in Scotland).

²² *Id.* at 143-44.

Defoe's writings, care should be taken in attributing particular views to "Defoe" as author. This Article therefore brackets the issues of authorship surrounding some of Defoe's work in order to reconstruct the arguments for written constitutionalism that these texts might cumulatively be seen to provide, and which the elimination of one or two texts from the accepted canon of Defoe's writings would not affect.²³

Regardless of whether Defoe deserves credit for all of the works in the extensive canon, few writers in history have found themselves better situated to develop the mythic imagination of many generations across several continents than he. Whether the first novelist or only one of the first,²⁴ he was situated at the commencement of an explosion of fiction, an explosion that corresponded with and helped to construct an increase in literacy and an expansion in the class of those who could read.²⁵ His work was also received not only in England, but also, as a parodic pamphlet explained in 1720, just a year after the publication of *Robinson Crusoe*, spread "even as far as the *East and West-Indies*."²⁶

The popularity of Defoe's work—and, in particular, of *Robinson Crusoe* and its sequels—was especially striking in America. *Robinson Crusoe* was one of the first novels printed in America, and copies of its numerous English editions were doubtless imported as well, given the flourishing nature of the trans-Atlantic book trade.²⁷ Early American authors were

²³ The difficulty in identifying Defoe definitively as the author of some of the works within the canon emanates partly from the fact that many of his tracts and novels—even those that scholars unanimously consider to be his, such as *Robinson Crusoe* itself—were published anonymously or pseudonymously. The title page of the first edition of *Robinson Crusoe* thus reads "Written by Himself," referring to Crusoe, not Defoe. This practice was not especially unusual in the early eighteenth century, and remained familiar at the time of the American Founding. For questions about the authorship of particular texts, see *infra* notes 41, 171, and 173.

²⁴ See *supra* note 16 and accompanying text.

²⁵ See PATRICK BRANTLINGER, *THE READING LESSON: THE THREAT OF MASS LITERACY IN NINETEENTH-CENTURY BRITISH FICTION 1* (1998) (observing, following John Tinnon Taylor, that, "between about 1750 and the 1830s many people objected to novel-reading as an abuse of literacy likely to do moral damage to the readers and, indeed, to the national culture").

²⁶ See NOVAK, DANIEL DEFOE, *supra* note 2, at 565 (quoting *The Battle of the Authors Lately Fought in Covent-Garden, between Sir John Edgar, Generalissimo on One Side, and Horatius Truewit on the Other*).

²⁷ For the complicated history of the American editions of *Robinson Crusoe*, see generally LEANNE B. SMITH, *ROBINSON CRUSOE IN AMERICA* (May 1983) (unpublished Ph.D. dissertation, Yale University); CLARENCE S. BRIGHAM, *BIBLIOGRAPHY OF AMERICAN EDITIONS OF ROBINSON CRUSOE TO 1830* (1958). For discussion of the dynamics of book importation, see generally HUGH AMORY AND DAVID D. HALL, *THE COLONIAL BOOK IN THE ATLANTIC WORLD*, vol. 1 (1999); see also E. JENNIFER MONAGHAN, *LEARNING TO READ AND*

themselves influenced by the work. Charles Brockden Brown, one of the first American novelists, explained that, upon returning to *Robinson Crusoe* as an adult, he “no longer [saw] in it, the petty adventures of a shipwrecked man, the recreations of a boyish fancy; but . . . a picture of the events by which . . . desert regions are colonized, and the foundations laid of new and civilized communities.”²⁸

Although *Robinson Crusoe* did not represent simply “the recreations of a boyish fancy,” its popularity as a children’s book and adaptation into this form only served to enhance its influence. Rousseau, in advocating that *Robinson Crusoe* be deployed for educational purposes, was not simply domesticating Defoe. Rather, he was suggesting the most effective manner of constructing a new type of individual, and a new type of citizen. In America, the advent and rise of secular children’s books both enhanced literacy and assisted in training a different kind of reader.²⁹ As Cathy Davidson has indicated, this moment coincided with “a new relationship of audience to authority [] and different possibilities for political action and social change,” as well as “an increased sense of autonomy and an education not necessarily grounded in theocracy but in democracy.”³⁰ Just as America began to speak of “we the people” in the political sphere, the form and reception of literary materials suggested an extension of this “people” beyond the ranks of the elite. The emerging cultural significance of the very medium of print, as Michael Warner has argued, assisted in development of a particular conception and self-conception of the public, which carried implications even for understanding the Constitution itself.³¹

To the extent that Defoe did construct a myth of written constitutionalism, that myth may thus have acquired purchase not

WRITE IN COLONIAL AMERICA 302 (2005) (“Even as the volume of American book production rose, so did that of importation, which outstripped domestic production for the entire [eighteenth] century.”).

²⁸ Charles Brockden Brown, *Robinson Crusoe* (1804), in *THE ENGLISH LITERATURES OF AMERICA, 1500-1800*, at 697, 697-98 (Myra Jehlen & Michael Warner eds.) (1996).

²⁹ See MONAGHAN, *LEARNING TO READ AND WRITE IN COLONIAL AMERICA*, *supra* note 27, at 302-32 (discussing “the new world of children’s books”).

³⁰ CATHY DAVIDSON, *REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA* 141 (2004, expanded ed.).

³¹ See MICHAEL WARNER, *THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA* xi (“The politics of printed texts in republican American lay as much in the cultural meaning of their printedness as in their objectified nature or the content of their arguments. The force of the technology and the act of reading performed by the individual citizen were redetermined in the course of this social transformation.”) (1990); *id.* at 110 (“The printedness of the constitution, in short, was understood as precluding *any* official hermeneutics, especially an intentionalist one that would accord privilege to the views of the delegates.”).

simply by reaching individual Founders, but rather through its broader cultural dissemination. Significant members of the Founding Generation did, indeed, refer to Defoe's work—including his non-fiction,—which they might have read in American editions, or in those imported and included in the circulating libraries or on offer from the booksellers of the time.³² Thus Ben Franklin, who was exposed as a child to Defoe's *Essay on Projects*, claimed that he had “derived” from this work “impressions that have since influenced some of the principal events of my life.”³³ John Adams was also familiar with Defoe's writings and his library included not only a French edition of *Robinson Crusoe*, intended for John Quincy Adams' consumption as a youth, but also several other texts by Defoe.³⁴

³² The 1765 catalogue of books from the Library Company of Philadelphia includes an entry for “Defoe's Works, consisting of his true Born Englishman &c. 2 vol. Octavo.” A CATALOGUE OF BOOKS BELONGING TO THE ASSOCIATION LIBRARY COMPANY OF PHILADELPHIA 30 (1765). Likewise, the Rhode Island College Library possessed Defoe's *Jure Divino*, according to its 1793 catalogue. CATALOGUE OF BOOKS BELONGING TO THE LIBRARY OF RHODE ISLAND COLLEGE 5. A bookseller in New York and Philadelphia boasted copies of Defoe's *Plan of the English Trade and Commerce*. A CATALOGUE OF BOOKS SOLD BY RIVINGTON AND BROWN, BOOKSELLERS AND STATIONERS FROM LONDON, AT THEIR STORES, OVER AGAINST THE GOLDEN KEY, IN HANOVER-SQUARE, NEW YORK: AND OVER AGAINST THE LONDON COFFEE-HOUSE, IN PHILADELPHIA 65 (1762). Likewise, Ben Franklin sold a copy of Defoe's *Family Instructor*. A CATALOGUE OF CHOICE AND VALUABLE BOOKS, CONSISTING OF NEAR 600 VOLUMES, IN MOST FACULTIES AND SCIENCES 12 (1744).

Examples of American editions of Defoe's other works include selections from his *Journal of the Plague Year*, published in 1763, *Moll Flanders*, which appeared in 1773, and *The Family Instructor*, which came out in 1795. See THE DREADFUL VISITATION IN A SHORT ACCOUNT OF THE PROGRESS AND EFFECTS OF THE PLAGUE (Germantown, 1763); THE LIFE, DEATH & MISFORTUNES OF THE FAMOUS MOLL FLANDERS (Boston, 1773); and THE FAMILY-INSTRUCTOR (Philadelphia, 1795).

³³ BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 9 (2003) (1771).

³⁴ David McCulloch observes Adams' cognizance of Defoe's work several times in his biography. In a letter to her husband, Abigail Adams quoted from Defoe's *Kentish Petition*, using the phrase “all men would be tyrants if they could.” DAVID MCCULLOCH, JOHN ADAMS 104 (2001). Adams himself cited Defoe in a 1786 letter to John Jay. More generally, as McCulloch observes, “Mason, Wilson, and John Adams, no less than Jefferson, were . . . drawing on long familiarity with the seminal works of the English and Scottish writers John Locke, David Hume, Francis Hutcheson, and Henry St. John Bolingbroke, or such English poets as Defoe . . .” MCCULLOCH, JOHN ADAMS, *supra*, at 121.

Adams' library contained: *The History of the Union Between England and Scotland: with an appendix of original papers. To which is now added a life of the celebrated author, and a copious index* (1786); *Histoire des principales découvertes faites dans les arts et les sciences: sur-tout dans les branches importantes du commerce . . . , traduit de l'anglois* (1767); and a 1775 French adaptation of *Robinson Crusoe* by Feutry, that was inscribed “The Imitator to Mr. Adams for the benefit of his son John Quincy Adams.”

While Defoe's model of written constitutionalism may have provided a precedent for the experience of written constitutionalism in America through the vehicle of these members of the Founding generation, it is, I would contend, even more instructive to consider Defoe as the first recorder of a particular myth—that of the genesis and virtues of written constitutionalism. Whether causally connected with the American constitutional experiment or not, the myth that emerges from Defoe's works is one that presents a particularly compelling vision of why a polity might resort to a written constitution. Defoe's myth, while bearing certain resemblances to the one we possess today, also retains its own peculiarities. Examining it both thereby illuminates how something like our contemporary conception would have developed but also why the version to which we adhere now is not inevitable in all its configurations. To the extent that we are still captured by notions that resemble Defoe's, it is helpful to examine their genealogy; to the extent that we are not, it is useful to explore why we have come to associate disparate values with written constitutionalism.

Nor, even leaving aside any causal connections, is it entirely coincidental that both Defoe and the members of the American Founding generation developed convictions about the advantages of a written constitution. The experience at both historical moments of a turn away from monarchical and towards legislative power raised the compelling question of how this latter form of authority could be restrained. The early eighteenth-century England of Defoe thereby furnished a cognate to the late eighteenth-century American context of the Founders. In both instances, the written constitution provided a powerful ally against legislative overreaching—but the question might still remain as to whether it furnished a necessary, inevitable, or even sufficient one. It might, indeed, be possible to imagine an alternative history for America, one in which the principles of judicial review based upon common or natural law would have continued to develop after the Revolution without the intervention of any written constitution at all.

III FROM THE PROMISE TO THE TEXT

Defoe's vision of a written constraint on legislation emerged only gradually, as the culmination of various efforts to discern a source for the limitation of legislative—as opposed to monarchical—authority. The exact nature of Defoe's politics has been hotly contested; while earlier commentators identified him seamlessly with the liberalism of John Locke and read his work in

conjunction with Locke's articulation of the social contract in his *Two Treatises on Government*, revisionists have made a persuasive case for his allegiance to monarchical sovereignty.³⁵ The difficulty in situating Defoe politically derives from his complex relation to the historical moment of the early eighteenth century, a time at which parliamentary supremacy was being consolidated in England. The "Glorious Revolution" of 1688, through which William and Mary were invited to assume the crown of England, had led to a revolutionary settlement that cemented the sovereignty of parliament, although this circumstance was not immediately evident to all.³⁶ The effect of the emerging transformation did not appear to observers as uniformly benign. Indeed, Defoe's appeals both to the sovereign and to a constitution or charter represented attempts to locate some type of constraint on parliament's legislative power.

Defoe's first forays in this direction, which Philip Hamburger has insightfully analyzed, suggested that, when parliament exceeded its authority, power returned to the "people themselves," a theory that could well justify revolution.³⁷ It was in 1701-2, through the case of the Kentish prisoners and his pamphlet on *The Original Power of the Collective Body of the People of England* that Defoe most explicitly appealed to this residual power of the people, who retained their natural rights despite delegating powers to Parliament through the social contract.³⁸

This recourse to the people did not, however, exactly indicate a democratic element in Defoe's work but instead suggested the beginnings of an effort to limit legislative power. This Part focuses on the years following 1702, and Defoe's transition during this period from a more archaic vision of the sovereign's promise as constraining parliament in the English context to a seemingly prescient contractarian and proto-constitutional understanding of limits on legislative authority in the colonial context of the Carolinas. Although on first inspection this

³⁵ MANUEL SCHONHORN, *DEFOE'S POLITICS: PARLIAMENT, POWER, KINGSHIP AND 'ROBINSON CRUSOE'* (2006).

³⁶ G.M. TREVELYAN, *THE ENGLISH REVOLUTION, 1688-1689*, at 71 (1965) (1938) ("Apart from the dynastic change, which coloured everything in the new era, there were only two new principles of any importance introduced in 1689. One was that the Crown could not remove Judges; the other was that Protestant Dissenters were to enjoy toleration for their religious worship. Almost everything else was, nominally at least, only restoration, to repair the breaches in the constitutional fabric made by the illegalities of James II. But in fact the struggle between King and Parliament had been for ever decided.").

³⁷ See generally Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 *COL. L. REV.* 2091 (1994); see also DANIEL DEFOE, *THE ORIGINAL POWER OF THE COLLECTIVE BODY OF THE PEOPLE* 14 (1702).

³⁸ See generally Hamburger, *supra* note 37.

transformation appears radical and rapid, certain commonalities emerge. Indeed, Defoe's efforts at both moments shared the aim of discerning a power that would check the legislative branch. Furthermore, the contractarian model, rather than simply replacing that of the promise, incorporated some of its elements, including reliance on the sacrosanct quality of the oath. Defoe's constitutionalism thus remained continuous with certain aspects of monarchical theory.

The shift in Defoe's justifications emerges out of a comparison between his 1704 pamphlet, *A Serious Inquiry Into this Grand Question; Whether a Law to Prevent the Occasional Conformity of Dissenters, Would not be Inconsistent with the Act of Toleration, and a Breach of the Queen's Promise* ("A Serious Inquiry"),³⁹ and two works addressing the situation of religious dissenters in the Carolinas—his 1705 tract *Party-Tyranny: Or, An Occasional Bill in Miniature; As now Practised in Carolina, Humbly offered to the Consideration of both Houses of Parliament* ("Party Tyranny"),⁴⁰ and his 1706 argument *The Case of Protestant Dissenters in Carolina, shewing How a Law to Prevent Occasional Conformity There, has ended in the Total Subversion of the Constitution in Church and State* ("Case of Protestant Dissenters").⁴¹ These arguments, composed in a brief interval, provide insight into one possible trajectory for the historical development of a notion of written constitutionalism.

A. *A Serious Inquiry*

In *A Serious Inquiry*, Defoe first contends that the 1689 Act of Toleration, which, as part of the revolutionary settlement,

³⁹ DANIEL DEFOE, *A SERIOUS INQUIRY INTO THIS GRAND QUESTION: WHETHER A LAW TO PREVENT THE OCCASIONAL CONFORMITY OF DISSENTERS, WOULD NOT BE INCONSISTENT WITH THE ACT OF TOLERATION, AND A BREACH OF THE QUEEN'S PROMISE* (1704).

⁴⁰ DANIEL DEFOE, *PARTY-TYRANNY, OR, AN OCCASIONAL BILL IN MINIATURE; AS NOW PRACTISED IN CAROLINA, HUMBLY OFFERED TO THE CONSIDERATION OF BOTH HOUSES OF PARLIAMENT* (1705), in *NARRATIVES OF EARLY CAROLINA*, *supra* note **Error! Bookmark not defined.**, at 224.

⁴¹ *THE CASE OF PROTESTANT DISSENTERS IN CAROLINA, SHEWING HOW A LAW TO PREVENT OCCASIONAL CONFORMITY THERE, HAS ENDED IN THE TOTAL SUBVERSION OF THE CONSTITUTION IN CHURCH AND STATE* (1706). This work was published anonymously, but has been attributed to Defoe by a number of critics, although not unanimously. See NOVAK, DANIEL DEFOE, *supra* note 2, at 276-78 (2003); JOHN ROBERT MOORE, *A CHECKLIST OF THE WRITINGS OF DANIEL DEFOE* (1971); WILLIAM P. TRENT, *DANIEL DEFOE: HOW TO KNOW HIM* (1971); HENRY CLINTON HUTCHINS, *DANIEL DEFOE, 1660-1731: A BIBLIOGRAPHY* (1936); *but cf.* P.N. FURBANK & W.R. OWENS, *DEFOE DE-ATTRIBUTIONS: A CRITIQUE OF J.R. MOORE'S CHECKLIST 23-24* (2003).

granted a number of privileges to protestant dissenters,⁴² restrained Parliament from passing inconsistent legislation. Thus, Parliament's attempt to prohibit what was known as occasional conformity—or dissenters' conformity with the Church of England to the extent that it would enable them to hold public offices—violated the principles articulated by that Act.⁴³ Acknowledging, however, that the House was entitled to interpret its own prior acts and, presumably, overrule them, Defoe then turns to the argument he finds more compelling, that based upon the Queen's promise.

At the end of her first session of Parliament, Queen Anne had confirmed a commitment to the Act of Toleration in language that suggested a desire to attain civil peace by preventing religious strife: "I shall always wish that no differences of Opinion among those that are equally affected to my Service may be the Occasion of Heats and Animositities among themselves. I shall be very careful to preserve and maintain the Act of Toleration, and to set the minds of all my People at quiet."⁴⁴ In *A Serious Inquiry* and also in his letters to his sometimes patron, Secretary of State Robert Harley, Defoe insisted on the importance of the word of the Queen—a public declaration that could, if well phrased, assuage dissenters' concerns or, if inadvisably stated, occasion unrest.⁴⁵

As Defoe explains in *A Serious Inquiry*, "All the Dissenters dependance therefore, and all their Moral Security is plac'd, not in

⁴² An Act for Exempting their Majesties Protestant Subjects, Dissenting from the Church of England, From the Penalties of Certain Laws, 1 Will. & Mary c. 18 (1689).

⁴³ Defoe's 1704 pamphlet was composed in response to the introduction in Parliament of a proposal to prevent occasional conformity that had already been debated in 1702. Although Parliament did not pass such a law in 1704, it ultimately did so in 1711. See *An Act for Preserving the Protestant Religion*, 10 Anne c. 6.

Defoe's personal stance on occasional conformity was complex. He had deplored the activity as a religious matter in a 1698 pamphlet called *An Enquiry into the Occasional Conformity of Dissenters, In Cases of Preferments*, but he nevertheless fought against legislation prohibiting it. See BACKSCHEIDER, DANIEL DEFOE, *supra* note 2, at 84, 94.

⁴⁴ THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, vol. 3 (1742).

⁴⁵ In one letter to Harley, Defoe claimed that the dissenters' resistance to Queen Anne's government arose out of another sentence of her address at the dissolution of the first Parliament of her reign, the statement that "[m]y own Principles must always keep me entirely Firm to the Interests and Religion of the Church of England, and will encline me to countenance those who have the truest Zeal to support it." Letter to Robert Harley, Aug.-Sept. 1704, in GEORGE HARRIS HEALEY ED., THE LETTERS OF DANIEL DEFOE (1955) 50, 51; THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS, vol. 3 (1742). Defoe also claimed, however, that the rift could be healed by "[t]wo words at the Opening the Next session" or "[s]hou'd her Majtie Declare That as she had Often given her word to Maintain the Tolleration, So She should Never Consent to any Act that Seem'd to Restrain The present Liberty of the Dissenters." LETTERS OF DEFOE at 53, 55.

the Act of Toleration, for that may be Mortal, but in Her Majesty's Sacred Promise."⁴⁶ According to Defoe, "[t]he Royal Veracity of the Queen, more than once Repeated on this Head, is a Satisfaction to the Dissenters, that they shall Enjoy the full Benefit of the Act of Toleration . . . and it seems to me, that the Safety of the Dissenters has a greater Dependence upon this Head, than upon the Act of Toleration it self."⁴⁷ Not only would Queen Anne fail to assent to any attempt to undermine toleration, but the act of even proposing such a bill in Parliament is "to desire the Queen to break her Word."⁴⁸ Such an act of breaking her word would thrust the Queen into dishonor, a reputationally-based account of constraints on sovereignty that had been prominently espoused by sixteenth-century French political theorist Jean Bodin, among others.

Bodin's *Six Livres de la Republique* was widely received in seventeenth-century England, including by no less notable a figure than King James I, who propounded a divine right theory of monarchy and was subsequently believed to have launched England in the direction of its mid-seventeenth-century Revolution.⁴⁹ According to Bodin, the sovereign was not bound by the law, but could be limited by his own promise. Bodin distinguishes between laws made by a prince or his predecessors and those that he has himself promised to keep; whereas the prince will always be able to disregard the former, he may not be so entitled with respect to the latter.⁵⁰ Whether a prince is bound by his own promises seems, for Bodin, to depend on contract theory. The sovereign is not obligated to keep his word if he swore only to himself, but, "if a sovereign prince promises another prince to keep laws that he or his predecessors have made, he is obligated to keep them if the prince to whom he gave his word has an interest in his doing so—and even if he did not take an oath;" the same holds of a promise that the prince gives to his subjects.⁵¹ Monetary consideration is not required to render the contract valid, and the honor and dignity of the prince should keep him faithful to his promise: "For the word of the prince should be like an oracle, and his dignity suffers when one has so low an opinion of him that he

⁴⁶ DEFOE, A SERIOUS INQUIRY, *supra* note 39, at 28.

⁴⁷ *Id.* at 14.

⁴⁸ *Id.*

⁴⁹ See generally Bernadette Meyler, *Emplotting Politics: James I, Sir Edward Coke, and the 'Powder Treason,'* 25 STUDIES IN LAW, POLITICS, AND SOCIETY 37 (2002).

⁵⁰ JEAN BODIN, ON SOVEREIGNTY 13 (Julian H. Franklin ed. & trans., 1992).

⁵¹ *Id.*; see also *id.* at 15 ("Law depends on him who has the sovereignty and he can obligate all his subjects . . . but cannot obligate himself [by laws]. A contract between a prince and his subjects is mutual; it obligates the two parties reciprocally and one party cannot contravene it to the prejudice of the other and without the other's consent.").

is not believed unless he swears, or is not [expected to be] faithful to his promises unless one gives him money.”⁵² Hence whereas laws exclusively bind subjects, not the sovereign, the sovereign’s promises, when rendered to another individual, whether prince or subject, retain force over him as well.⁵³

Defoe adopts a similar logic in *A Serious Inquiry*, emphasizing the harm to the Queen’s reputation that would ensue from failing to fulfill her promise to maintain the Act of Toleration. Rather than a mere interpretation of the Act of Toleration, the current legislation constitutes a partial repeal; for Defoe, “to Limit the Extent of the Toleration, is to Repeal part of the Law; and consequently to Intrench upon her Majesties Promise.”⁵⁴ In consenting to it, the Queen would therefore “Injur[e] her own Honour” and would “lessen[] the Opinion the World has entertained of her Royal Word, and the Honesty of her Maintaining it.”⁵⁵ Because the Queen’s majesty consists, in part, of her honor and dignity, approving of parliamentary legislation that contradicted her prior promise would undermine her sovereign authority.

Defoe’s argument implicates not only the Queen’s honor conceived in isolation, but also the respective capacities of Parliament and Queen, a consideration of the separation of powers that was assuming increased salience as authority came to be consolidated in Parliament rather than the crown. Some supporters of the law to prevent occasional conformity had contended that an act of Parliament should be distinguished from a positive expression of the Queen’s will; according to this stance, “her Majesty will not fail to be as good as her Word, as far as Concerns her self, but that if it be done by an Act of Parliament, that is a general thing, is the Act and Deed of the People of *England*, that ’tis their own doing, not hers; even the Dissenters themselves do it, for they are properly said to Act in their Representatives.”⁵⁶ Defoe’s reply to this self-excusing defense of Parliament is two-fold—first, that “[t]he Queen’s Promise is not Negative, that she will *not take away* the Toleration, but it is positive, that *she will preserve it*, and Protect the Dissenters in the Enjoyment of their Liberty,” and, second, that the mode of the dissenters’ representation in Parliament does not eliminate the possibility of a law being passed against their will.⁵⁷ It is, in other words, the

⁵² *Id.*

⁵³ The sovereign can, however, be relieved under certain circumstances of the obligation he has incurred just as subjects can be relieved of the obligations entailed by unreasonable or unjust contracts. *Id.* at 14

⁵⁴ DEFOE, *A SERIOUS INQUIRY*, *supra* note 39, at 15.

⁵⁵ *Id.* at 14; 19.

⁵⁶ *Id.* at 15-16.

⁵⁷ *Id.* at 16.

Queen's responsibility to protect the liberty of those individuals or minority groups who cannot command a majority in Parliament.

Rather than insisting upon a judicial enforcement of the Queen's promise, however, Defoe instead suggests that the dissenters resort to a plea to the Queen—one that would remind her of her promise and suggest their reliance upon it.⁵⁸ Defoe's description of why the dissenters would be justified in so relying suggests that the promise has itself assumed a quasi-contractual status: "Nor can the Dissenters be blam'd for taking her Majesty at her Word; the Queen had certainly never made such a promise to us, but that she Intended these two things. 1. Punctually to perform it. 2. She Intended the Dissenters should believe, and depend upon it. The Dissenters can never Acquit her Majesty of this Promise; 'tis a Solemn Engagement to them, and in Justice to their Posterity, they can never quit their Claim to the Performance of it."⁵⁹ The dissenters' reliance upon the promise has rendered it quasi-contractual, and Defoe further indicates that the dissenters represent not only their own but their successors' interests, which they cannot abrogate by themselves.

In *A Serious Inquiry*, Defoe thus interprets the Queen's promise as a source of continuing obligation that Parliament should not view as subject to revision, and upon which the dissenters were entitled to rely. In responding to arguments about the dissenters' ability to represent their own religious interests in Parliament, Defoe also foreshadows certain elements of U.S. constitutionalism, including the impulse to protect minority interests against the activities of a majority and to view current interest-holders as maintaining rights for a future populace. *A Serious Inquiry* thereby presents the Queen and her promise as a foil to increasing parliamentary supremacy and indicates that, although the Queen's promise may not be *judicially* enforceable, it does serve to establish a moral right that can form the basis for the dissenters' petition.

B. Party-Tyranny

In two subsequent pamphlets addressing the plight of religious dissenters in the Carolinas, Defoe resorted less to Bodin's theories of sovereignty than to his own version of social contract theory in asserting a contract-based limitation upon the acts of a legislature.⁶⁰ The colony of Carolina had been established by a

⁵⁸ *Id.* at 20.

⁵⁹ *Id.* at 21.

⁶⁰ The most substantial discussion of Defoe's involvement in this controversy occurs in JAMES LOWELL UNDERWOOD, *THE CONSTITUTION OF SOUTH*

Charter that King Charles II had granted to the Lords Proprietors in 1663, a document that contained some specifications about the form of government for the colony as well as an allowance of a certain extent of religious liberty at the discretion of the proprietors.⁶¹ The proprietors had subsequently approved a series of Fundamental Constitutions that contained much more concrete protections for religious liberty than the Charter itself.⁶²

Far from becoming forgotten relics, these documents and the liberties they held out for the colonists were vigorously promoted by the Proprietors and their agents in advertising designed to encourage English men and women to uproot themselves and move to the Carolinas. A pamphlet from 1666 addressed younger brothers and others who, in the normal course of affairs, might find themselves without sufficient means were they to remain in England.⁶³ Although it began by extolling the natural virtues of the colony's climate, it then enumerated "the chief of the Privileges" granted to "such as shall transport themselves and their Servants in convenient time."⁶⁴ Not surprisingly, the first such privilege to be enumerated was one of religious freedom; as the tract stated, "There is full and free Liberty of Conscience granted to all, so that no man is to be molested or called in question for matters of Religious Concern; but every one to be obedient to the Civil Government, worshipping God after their own way."⁶⁵ In a subsequent document from 1682, Samuel Wilson, who had served as secretary to one of the Lords Proprietors, the Earl of Craven, provided "an account of the province of Carolina" explicitly aimed at promoting the virtues of the colony, yet claiming to be bound by "the Rules of Truth."⁶⁶ Wilson here emphasized that "no Money can be raised or Law made, without the consent of the Inhabitants or their Representatives" and that "the Lords Proprietors have there settled a Constitution of Government, whereby is granted Liberty of Conscience, and wherein all possible care is taken for the equal Administration of Justice."⁶⁷ These and other promotional

CAROLINA, VOL. 3: CHURCH AND STATE, MORALITY AND FREE EXPRESSION 30-35 (1992).

⁶¹ *Id.* at 3-18.

⁶² *Id.*

⁶³ See *A Brief Description of the Province of Carolina* (1666), *supra* note **Error! Bookmark not defined.**, at 72.

⁶⁴ *Id.* at 66, 71.

⁶⁵ *Id.* at 71.

⁶⁶ Samuel Wilson, *An Account of the Province of Carolina* (1682), in *NARRATIVES OF EARLY CAROLINA*, *supra* note **Error! Bookmark not defined.**, at 164, 164. Later in the document, Wilson seems a little less certain of the veracity of his own words. As he writes towards the end, "I think I have written nothing but truth, sure I am I have inserted no willful falsehood." *Id.* at 174.

⁶⁷ *Id.* at 166.

materials put forth by the proprietors or their associates thus placed significant weight upon the religious liberty established by the Charter and Fundamental Constitutions of Carolina.

Perhaps in part because of these promotional efforts, the Carolinas came to be populated by colonists of varying religious affiliations. The Reverend John Blair, who spent a brief stint in the Carolinas as an Anglican missionary during 1704, divided the religious adherents in the colonies into four categories.⁶⁸ Blair's taxonomy, presented from the vantage point of the established church, included:

[F]irst, the Quakers, who are the most powerful enemies to Church government, but a people very ignorant [of] what they profess. The second sort are a great many who have no religion, but would be Quakers, if by that they were not obliged to lead a more moral life than they are willing to comply to. A third sort are something like Presbyterians, which sort is upheld by some idle fellows who have left their lawful employment, and preach and baptize through the country without any manner of orders from any sect or pretended Church. A fourth sort, who are really zealous for the interest of the Church, are the fewest in number, but the better sort of people, and would do very much for the settlement of the church government there, if not opposed by these three precedent sects⁶⁹

The first three of these enumerated groups would have been clumped within the capacious category of "dissenters." Defoe's own religious beliefs do not emerge with pellucid clarity from his writings and have been the subject of some dispute, but would presumably have corresponded, at least in part, with those of some of the Carolina dissenters.⁷⁰

Despite the foundational documents that appeared to protect the religious liberty of the inhabitants of the Carolinas, the colonial legislature had, in 1704, passed an act prohibiting these dissenters from sitting in the assembly. In part, local disputes had led to enactment of the law. For a number of years, the Carolinas

⁶⁸ *Reverend John Blair's Mission to North Carolina, 1704*, in NARRATIVES OF EARLY CAROLINA, *supra* note **Error! Bookmark not defined.**, at 214. This document was written, in part, to justify his own failure in the Carolinas to his supporters, the Society for the Propagation of the Gospel in Foreign Parts, a context that may have distorted Blair's description of the colony. *Id.* at 214, 218.

⁶⁹ *Id.* at 216. A number of French Protestants had also apparently settled in the colony as well as some Jews. See Daniel Defoe, *Party-Tyranny: Or, An Occasional Bill in Miniature; As now Practised in Carolina, Humbly offered to the Consideration of both Houses of Parliament* (1705), in NARRATIVES OF EARLY CAROLINA, *supra* note **Error! Bookmark not defined.**, at 224, 245-46.

⁷⁰ See *supra* notes 17-19 and accompanying text.

had been controlled by dissenting governors.⁷¹ When one of these governors, Joseph Blake, died in 1700, the candidate chosen to replace him according to the established voting procedures was also a dissenter—Landgrave Joseph Morton.⁷² Because Morton had accepted a royal commission as an admiralty judge at the same time as holding a commission from the proprietors, some contended that he should be disqualified from becoming governor.⁷³ To the dismay of the dissenters, this argument was accepted, and James Moore, a member of the established church, became governor instead.⁷⁴ Moore soon began to pursue an effort to invade Florida, and, in doing so, contracted significant debts.⁷⁵ When, in 1703, Governor Moore attempted to raise funds from the legislature, the religious dissenters opposed this plan and summarily withdrew from the Commons House of Assembly when it allocated money for his campaign.⁷⁶ Their departure undermined the quorum necessary for passing legislation; although they offered to return the next day, their overture was rejected and their acts instead occasioned considerable unrest, resulting in physical attacks upon the dissenters.⁷⁷ As might be anticipated, the dissenters protested this treatment to the Governor, among others, but their concerns were neglected locally.⁷⁸ The dissenters therefore sent a representative—John Ash—to England, to present their cause to the proprietors.⁷⁹ The proprietors were unresponsive, and Ash died in an untimely fashion—but not before publishing a document partly detailing the dissenters’ plight.⁸⁰ The proprietors still remained unsympathetic when approached by Joseph Boon, who had been sent to replace Ash in his mission.⁸¹

Following Ash’s departure, the local government of the Carolinas had further aggravated the situation by passing a statute excluding religious non-conformers from sitting in the Commons House of Assembly and requiring that each person elected to such office swear that he is “of the Profession of the Church of England, as Establish’d by Law; and that I do conform to the Same, and usually frequent the said Church for the publick Worship of God . .

⁷¹ See NARRATIVES OF EARLY CAROLINA, *supra* note **Error! Bookmark not defined.**, at 267.

⁷² See John Ash, *The Present State of Affairs in Carolina* (1706), in NARRATIVES OF EARLY CAROLINA, *supra* note **Error! Bookmark not defined.**, at 269, 269.

⁷³ *Id.*; see also DEFOE, PARTY TYRANNY, *supra* note 40, at 237.

⁷⁴ *Id.*

⁷⁵ *Id.* at 272-73.

⁷⁶ See *id.* at 273; NARRATIVES OF EARLY CAROLINA, *supra* note **Error! Bookmark not defined.**, at 222.

⁷⁷ Ash, *supra* note 72, at 273-74.

⁷⁸ See DEFOE, PARTY-TYRANNY, *supra* note 40, at 247.

⁷⁹ See *id.*

⁸⁰ *Id.*; see also Ash, *supra* note 72 (the document in question).

⁸¹ DEFOE, PARTY-TYRANNY, *supra* note 40, at 247.

. and that I am not, nor for One Year past, have not been in Communion with any Church or Congregation, that doth not conform to the said Church of England, nor received the Sacrament of the Lord's Supper in such Congregation. . . .”⁸² It was this legislation that led to Defoe's involvement in the case on behalf of the dissenters, first by addressing Parliament in his anonymous tract *Party-Tyranny*, written on behalf of Boon,⁸³ and then by supporting their appeal to the Privy Council in *The Case of Protestant Dissenters*.

Rejecting the notion that the religious conflicts in the Carolinas were *sui generis* and should be explained and treated in isolation, Defoe, in his pamphlet *Party-Tyranny*, envisions the 1704 legislation as enabled, in part, by the prejudices against religious dissenters prevalent in England. He clearly analogizes the situation in the Carolinas to that in England—where statutes against occasional conformity had attracted great controversy—by calling the 1704 law in the Carolinas “an occasional bill in miniature.” He further maintains that the law represented “a Compendium of Various Kinds of Oppressions practiced on the English Subjects, by Fellow-Subjects in the Face of that Government, which being Establish't on the Neck of Tyranny, has openly declar'd against all sorts of Invasion of English Liberty.”⁸⁴ The Carolinas, he claims, were encouraged in their oppressive activities by viewing the bad example set by England itself.⁸⁵ At the same time as attributing the genesis of the situation in part to the domestic repression of religious dissenters, Defoe also infers domestic lessons from the state of affairs in the Carolinas. Thus Defoe appears to be presenting his remarks not only on behalf of the colonists from Carolina but also more generally to the English Parliament and Queen on behalf of domestic religious dissenters. As he extrapolates from the plight in the Carolinas that he describes, “England may here see the Consequence of Tackings, Occasional Bills, etc., in Miniature, and what the Designs of the Party are in general, viz. the absolute Suppression of Property, as well as Religion; or in short, both Civil and Ecclesiastical Tyranny.”⁸⁶ By figuring the problem facing the dissenters in

⁸² *An Act for the more effectual Preservation of the Government of this Province, by requiring all Persons that shall hereafter be chosen Members of the Commons House of Assembly, and sit in the same, to take the Oaths and subscribe the Declaration appointed by this Act; and to conform to the Religious Worship in this Province, according to the Church of England; and to receive the Sacrament of the Lord's Supper, according to the Rites and Usage of the said Church* (1705), quoted in Defoe, *Party-Tyranny*, *supra* note 40, at 253, 254.

⁸³ See Defoe, *Party-Tyranny*, *supra* note 40, at 260.

⁸⁴ *Id.* at 224-25.

⁸⁵ *Id.* at 261.

⁸⁶ *Id.* at 261.

Carolina as one related to a general trend of religious repression, Defoe deployed the dissenters' difficulties in part to support his own efforts to enforce limitations upon legislative power in England.⁸⁷

In *Party-Tyranny*, Defoe's method of achieving such limitations remains underdeveloped, and he relies primarily on Parliament to provide check on the local Carolina legislative authority. Defoe justifies the notion that the colonists in Carolina should be able to depend on Parliament's protection by opining that the Carolina Assembly's power has been rendered void by their disregard for the constitution of the colony, and that, therefore, power has devolved back to its origin, or, in other words, Parliament.⁸⁸ After first lauding the Constitution of Carolina—stating that, if it “were rightly Administred, it may be allow'd the best Settlement in America”—Defoe proceeds to explain the consequences of the fact that the promise of the text has not been carried out:

[W]hen any Body of Men Representative, or other Acting by, or for a Constitution, from whom they receive their Power, shall Act, or do, or make Laws and Statutes, to do anything destructive of the Constitution they Act from, that Power is *Ipsa facto* dissolv'd, and revolves of Course into the Original Power, from whence it was deriv'd.⁸⁹

Defoe's conception of this original power involves “the People,” but only insofar as they remain subjects of England: “[T]he People without doubt, by Right of Nature as well as by the Constitution, revolves under the immediate Direction and Government of the English Empire, whose Subjects they were before, and from whom their Government was deriv'd.”⁹⁰ According to this schema, engaging in acts that violate the constitution entails the immediate

⁸⁷ A reference to the situation in the Carolinas in one of Defoe's contemporaneous satires indicates how significant the conflict in the colony was to him. At the end of *The Consolidator*, a work purporting to reflect the author's experiences on the moon, the narrator appends a description of the lunar libraries, which, to his surprise, contain a number of texts “Translated from our Tongue, into the Lunar Dialect, and stor'd up in their Libraries with the Remarks, Notes and Observations of the Learned Men of that Climate upon the Subject.” See DANIEL DEFOE, *THE CONSOLIDATOR: OR, MEMOIRS OF SUNDRY TRANSACTIONS FROM THE WORLD IN THE MOON. TRANSLATED FROM THE LUNAR LANGUAGE, BY THE AUTHOR OF THE TRUE-BORN ENGLISH MAN* (1705). Among these volumes was included “*Ignis Fatuus* [meaning “foolish fire” or something misleading], or the Occasional Bill in Minature, a Farce, as it was acted by his Excellency the Lord *Gr . . . il's* [Granville] Servants in *Carolina*.” *Id.* The presence of this work in the lunar library, accompanied by commentary in hieroglyphics, further substantiates Defoe's belief that other polities could learn valuable lessons from the events that took place in the Carolinas.

⁸⁸ *Id.* at 225-226.

⁸⁹ *Id.* at 225-26.

⁹⁰ *Id.* at 226.

consequence of rendering legislative authority void and allowing power to revert to its original locus; if that original was, as Philip Hamburger notes in his treatment of *The Original Power of the Collective Body of the People*, the people themselves,⁹¹ it is here Parliament, in its capacity as legislative authority over subjects throughout the English empire. Not only are the particular acts themselves void because improper, but the authority of the legislature itself is nullified by the fact that it passed legislation not in conformity with the constitutional scheme. Under this model, judicial review is not required—instead, Defoe seems to assume that the “original power” should simply recognize that a constitutional breach has occurred and resume its supremacy.

Constitutional breach is, however, textually assessed even in *Party-Tyranny*. Defoe first summarizes the constitutional documents of Carolina, consisting in the Charter and the Fundamental Constitutions—the authorship of which he attributes to John Locke.⁹² He continues by inquiring whether the laws enacted by the colonial legislature “have the due Qualification requir’d by the Charter, viz. 1. To be consonant to Reason. 2. To the Utility of the Subject. 3. To the Preservation of Right and property: The Words expressly set down in the Charter. 4. Whether if not, they are not void in their own Nature.”⁹³ The answer to the first three questions is, clearly, no, for Defoe; only the response to the last seems to be affirmative. The questions themselves, however, demonstrate a particular stance on assessing the constitutionality of legislation and the results of that assessment; Defoe points to the text of the constitutional documents and “the words expressly set down in the Charter” as the source for the invalidation of the colonial legislatures’ acts. Although Defoe appeals to the English Parliament as the arbiter of the dispute, the crucial structural elements of his argument—from the vantage point of written constitutionalism—consist in his eagerness to review legislation for conformity to constitutional text and his assertion that a body outside the one behaving anti-constitutionally should assume the task of redressing grievances in such situations.

C. *Case of Protestant Dissenters*

Defoe’s pamphlet *Party-Tyranny* was not immediately successful, but the laws against which it was, in part, targeted, were eventually invalidated by the Privy Council in accordance with the procedures that legal historians Mary Bilder and Joseph

⁹¹ See *supra* note 38 and accompanying text.

⁹² *Id.* at 227-32.

⁹³ *Id.* at 233.

Smith have outlined.⁹⁴ Following a set of protests on both sides of the Atlantic, Queen Anne approved a representation from the Board of Trade—delegated by the Privy Council to opine on colonial affairs—“that two laws, one for the establishment of religious worship, the other compelling all members of Assembly to conform to the religious worship of the Church of England, are not consonant to reason and [are] repugnant to the laws of England, and are therefore not warranted by the Charters of 1663 and 1665, but were made without any sufficient power or authority derived from the Crown of England, and therefore do not oblige or bind the inhabitants of the colony”⁹⁵ The official language of the Queen and the Board of Trade thus resonated with the standard and general Privy Council rhetoric of repugnancy to the laws of England. Defoe offered an argument in *The Case of Protestant Dissenters* that instead insisted on the binding nature of specific provisions of the Charter and Fundamental Constitutions. Rather than invoking parliamentary support in this instance, as he had a year before in *Party-Tyranny*, Defoe wrote largely to a judicial audience as well as the general public.

The significance of the disparity between Defoe’s argument and the grounds for the Privy Council decision should not be underestimated. Although the Privy Council did disallow legislation on the basis of colonial charters, it relied, in doing so, on general provisions contained in these documents requiring that colonial legislation not be repugnant to the laws of England.⁹⁶ Defoe, by contrast, emphasized that the Charter and Fundamental Constitutions themselves provided specific protections for the liberties of the colonists that could not be abrogated. Defoe thus did not resort simply to an appeal to English law—or the Act of Toleration—but presented an argument based upon the notion that the constitutional documents of Carolina by their own terms required the colonial legislature to tolerate religious dissenters.

The political theory undergirding the *Case of Protestant Dissenters* consists in an amalgam of several strands of seventeenth-century social contract theory. Although the vision of the social compact that Locke presented in his *Two Treatises of Government* may have subsequently gained ascendancy in the popular imagination, other, quite distinct, variants of the theory coexisted with it. According to Locke’s model, the transition from the state of nature, in which all men are equal, to an organized and hierarchical political community, occurs in two steps.⁹⁷ First,

⁹⁴ See *supra* note 6 and accompanying text.

⁹⁵ ACTS OF THE PRIVY COUNCIL, COLONIAL SERIES 506-07 (1910).

⁹⁶ See BILDER, THE TRANSATLANTIC CONSTITUTION, *supra* note 3, at 2; SMITH, APPEALS THE PRIVY COUNCIL, *supra* note 3, at 465.

⁹⁷ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988).

individuals join together by consensus to establish a society; subsequently, they convene and set up institutions by majority vote. For Locke, as for Thomas Hobbes before him, the compact occurs between the individuals who constitute the political order. In Locke's theory, however, unlike in Hobbes', the right of resistance remains more societal than individual, and the government's act of injuring the society as a whole is more material than the burden that it places upon particular individuals.⁹⁸

Another thread of contractarian thought with roots stretching centuries back instead located the contract between the King and his subjects. According to this type of "constitutional contractarianism," which initially emphasized the obligations that the King incurred through his coronation oath, the sovereign assumed particular duties in his agreement to abide by the laws of the realm.⁹⁹ Defoe's construction of Queen Anne's promise to tolerate the dissenters arguably also fits within this framework, but most constitutional contractarianism focused upon the speech acts occurring on the moment that the sovereign ascended the throne rather than subsequent to that point. Towards the end of the seventeenth century, the constitutional contractarian model assumed a more precise form, when William and Mary accepted the Bill of Rights in 1689 upon ascending the English throne. As Robert Ferguson stated of this event in *A Brief Justification of the Prince of Orange's Descent into England*, "whatever there was of an *Original Contract* between former Kings and the free People of these Kingdoms, yet it is undeniable, there is a very *formal* and *explicite One* between K. *William* and them."¹⁰⁰ The obligations entailed by the customary oath of allegiance thus assumed an increasingly precise form.

The *Case of Protestant Dissenters* itself commences with a fairly Lockean emphasis on securing the liberty of the community by having each individual "submit, that his own actions as well as the Actions of all others should be bound by a stated and certain Rule."¹⁰¹ It is this "[f]reedom of acting according to a known and stated Rule" that constitutes liberty, and which all members of the community possess an interest in preserving. Liberty of conscience—or the ability of each person to "believe what appears

⁹⁸ Peter C. Myers, *Locke on the Social Compact, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* (Ronald J. Pestritto & Thomas G. West eds., 2003) 1, 18-19, 22-23.

⁹⁹ Martyn P. Thompson, *Locke's contract in context, in THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 73 (David Boucher & Paul Kelly eds., 1994); see also WILLIAM ATWOOD, *THE FUNDAMENTAL CONSTITUTION OF THE ENGLISH GOVERNMENT* (1690); ROBERT FERGUSON, *A BRIEF JUSTIFICATION OF THE PRINCE OF ORANGE'S DESCENT INTO ENGLAND* (1689).

¹⁰⁰ Ferguson, *A Brief Justification*, *supra* note 99.

¹⁰¹ *THE CASE OF PROTESTANT DISSENTERS*, *supra* note 41, at 3.

to him to be true, and to act pursuant to his Belief in matters relating to another Life,” unless he disturbs the peace—Defoe represents as the foundational liberty. Even in exigent situations where other liberties can be disturbed, a circumstance that Locke entertained, Defoe insists that religious liberty cannot be infringed.¹⁰²

Despite this initially Lockean presentation of the social compact, Defoe moves towards constitutional contractarianism by focusing not on the relationship among the colonists themselves, but between the Proprietors and the people. In particular, Defoe claims that the laws enacted by the colonial legislature contradict, and therefore breach, an “Original Contract between the Proprietors and the People that inhabit [the colony].”¹⁰³ Defoe’s theory of how the contract arises differs with respect to the two documents in an important way. Whereas the people of the colony are seen as third-party beneficiaries of the explicit agreement between the English sovereign and the Proprietors of Carolina that the Charter embodies, the people more directly bound the Proprietors to the first set of Fundamental Constitutions that they promulgated because the people accepted them.¹⁰⁴ In describing the genesis of both sources of obligation, Defoe invokes the formalities of contract law much more than most seventeenth- or eighteenth-century social contract theorists.¹⁰⁵

The Charter itself generates two successive contracts; as a grant from the sovereign to the proprietors, it “is immediately a Contract between the Sovereign and the Proprietors.”¹⁰⁶ Because

¹⁰² *Id.* at 4. Defoe’s assertions can, in this respect, be fruitfully compared with Locke’s statements in the *Second Treatise*. Locke there insists that “whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people.” LOCKE, *SECOND TREATISE*, *supra* note 97, at 131. He also provides, however, for the exercise of a prerogative power in certain exceptional circumstances, such as in the case of fire, “wherein a strict and rigid observation of the laws may do harm; (as not to pull down an innocent man’s house to stop the fire, when the next to it is burning).” *Id.* at 159. Defoe picks up the metaphor of fire, deploying it to justify his interest in religious liberty in the Carolinas, and maintaining that he must put out the fires of persecution before they reach his own home, England. *THE CASE OF PROTESTANT DISSENTERS*, *supra* note 41, at 6.

¹⁰³ *THE CASE OF PROTESTANT DISSENTERS*, *supra* note 41, at 11, 30.

¹⁰⁴ *Id.* at 30.

¹⁰⁵ Defoe does not mention the 1677 Statute of Frauds and Perjuries, 29 Car. II c. 3, which required that certain kinds of contracts—including those that could not be performed within a year and those made in consideration of marriage—be in writing in order to be enforced. The Statute of Frauds may, however, have formed another subterranean influence from within the law of contract on Defoe conception of the written constitution. Whereas writing served a principally evidentiary function under the Statute of Frauds, however, it acquired additional kinds of importance for Defoe.

¹⁰⁶ *Id.*

the sovereign is acting as representative of “his Liege and Free People who shou’d transplant themselves” to the colony, “and in Justice to those Inhabitants who were already there,” “all such Limitations of the Proprietors, in favour of the People” should also, however, “be consider’d as tacit Stipulations of the Proprietors with the People themselves.”¹⁰⁷ The people of the colony thus become third-party beneficiaries of the contract between King and Proprietors. Although Defoe does not expressly invoke this contract doctrine, its existence in the common law has been traced back well before the time of Defoe’s intervention in Carolina.¹⁰⁸

Substantively, this meant that the law prohibiting religious nonconformers from sitting in the colonial parliament should be invalidated based upon the Charter’s statements about the process for passing legislation. The Charter specified that the Proprietors could “make, ordain and enact laws; only of and with the Advice, Assent and Approbation of the Freemen of the said Province, or of the greater part of them, or of their Delegates or Deputys.”¹⁰⁹ Under the new act, however, true representation of the “freemen of the province” might never occur; a dissenter could be chosen by a majority of the voters for each place in the colonial parliament and yet never be seated because of the legislation prohibiting their participation in the legislature.¹¹⁰ As Defoe concludes, “this Act appears to be inconsistent with the Charter, in as much as, by virtue of it, Laws may be made without the Advice and Consent of the Freemen, or their Delegates.”¹¹¹

Defoe’s argument with respect to the Fundamental Constitutions bears more directly on particular provisions regarding religious liberty. The Fundamental Constitutions of 1669, Defoe contends, constituted an act by which the Proprietors obligated themselves, not simply by fiat, but by a type of contract to be performed upon acceptance. As Defoe writes, “the first Proprietors oblig’d themselves their Heirs and successors to observe perpetually [the Fundamental Constitutions], in the most

¹⁰⁷ *Id.*

¹⁰⁸ While the inauguration of third-party beneficiary theory in contract law has often been attributed to the 1680 English case *Dutton v. Poole*, similar decisions had, in fact, been rendered throughout the seventeenth century, and *Dutton* itself instead seemed to mark the decline of the doctrine, in part because the 1677 Statute of Frauds required a writing in several kinds of cases that had previously furnished the bulk of third-party beneficiary actions. VERNON V. PALMER, *THE PATHS TO PRIVACY: A HISTORY OF THIRD PARTY BENEFICIARY CONTRACTS AT ENGLISH LAW* 74-83 (1992). Despite the waning of third-party beneficiary theory in the context of the conventional arena of legal contracts, it appears to have provided a compelling source for Defoe’s understanding of constitutional obligations.

¹⁰⁹ *THE CASE OF PROTESTANT DISSENTERS*, *supra* note 41, at 33.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 34.

binding ways that cou'd be devis'd, in case the People shou'd accept 'em; if the People hereupon did accept 'em, they immediately became an express Contract between the Proprietors and the People; and must necessarily be consider'd as such."¹¹² The oaths that new inhabitants and also residents seeking office swore to abide by the Fundamental Constitutions constituted the acceptance that transformed the Fundamental Constitutions from a unilateral promise into a bilateral contract.¹¹³ The Fundamental Constitutions contained much more explicit protections for religious liberty and the establishment of dissenting churches than the Charter itself had; hence Defoe can argue, based upon them, that "this Act that *requires* Men to be of the Profession of the Church of *England* only, to make them capable of sitting in the Commons House of Assembly, is a direct violation of these Fundamental Constitutions."¹¹⁴

Nor can, in Defoe's view, either the Charter or the Fundamental Constitutions be abrogated by the simple act of the Proprietors. In the case of the Charter, it could be revoked only by the British sovereign; the Fundamental Constitutions were even more permanent, as the Proprietors could "never become disengag'd, till all such of the People, as have consented to 'em, consent to repeal 'em, in the same manner in which they consented to them; that is to say, till they consent to repeal them *in Person*."¹¹⁵ Only with this variety of popular constitutional convention would a new set of "constitutions" be created.

The textual focus of Defoe's argument is underlined by the arrangement of the pamphlet itself, which included an appendix containing all of the relevant documents for the reader's perusal. This was a technique that he employed relatively frequently, and the utility of which is best demonstrated by a tract reprinted in 1714 and entitled *A Brief Survey of the Legal Liberties of the Dissenters: and How far the Bill now Depending consists with Preserving the Toleration Inviolably: Wherein The present Bill is Published; and also the Toleration Act at large, that they may be compar'd with One Another*.¹¹⁶ This pamphlet contended that a proposed bill against occasional conformity was inconsistent with the Act of Toleration. In doing so, it instructed the reader in the task of comparing the two pieces of legislation. On the fifth page, Defoe asserts:

¹¹² *Id.* at 30.

¹¹³ *Id.*

¹¹⁴ *Id.* at 36-37.

¹¹⁵ *Id.* at 31.

¹¹⁶ Daniel Defoe, *A Brief Survey of the Legal Liberties of the Dissenters: and How far the Bill now Depending consists with Preserving the Toleration Inviolably: Wherein The present Bill is Published; and also the Toleration Act at large, that they may be compar'd with One Another* (1714).

Before we go on to Examine what may, or not be deem'd an Attempt upon, and Inconsistent with the *Religious Liberties* of the *Dissenters*, it may be very useful for us to enquire what those *Liberties* really are; to which Purpose, and that the *Dissenters* may know how far those *Liberties* do or do not extent, and when they are or are not Invaded, I believe it very much to the present Purpose to publish the said *Toleration Act* at large, which, altho' it be put at the End of this Tract, the Reader is desir'd to turn to it, and Peruse it before he goes on any farther."¹¹⁷

Addressing his reader as potentially a dissenter, Defoe encourages him to, as it were, carry a pocket constitution, and apprise himself of the text of his statutorily given rights. Defoe furthermore instructs him on how to perform an effective comparison of texts; rather than allowing the reader to wait until the end of his own argument to evaluate the evidence, Defoe encourages him to read and inform himself of it before assessing the merits of Defoe's position. Defoe's manner of interpretation is not, however, entirely literalist. A few pages later, Defoe "compare[s] . . . together" the two bills; although adopting the form of quotation, this comparison consists more in a conceptual than a literal one.¹¹⁸ As Defoe concludes the passage, "Thus the *Toleration* is *preserv'd*, and not *preserv'd* at the same Time. The *Letter* of the *Toleration* is preserv'd in Deed, but the *Substance* and *essential Parts* are destroy'd."¹¹⁹

* * *

Seeking a limit upon legislative authority, Defoe never settled upon a solution adequate to restrict Parliament's own capacity. What he did discover through analyzing the colonial context, however, was a structural mechanism by which it would be possible to bind legislative power—that of the written constitution. To this day, Defoe's England still maintains a norm of parliamentary sovereignty whereas in America Defoe's vision of constitutionalism flourished.

IV THE WRITTEN CONSTITUTION IN MINIATURE

Just as Defoe takes the plight of religious dissenters in the Carolinas as an example "in miniature" of a problem facing England, his literary writings furnish allegorical vignettes that

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 8.

¹¹⁹ *Id.* at 8-9

elaborate the theory of written constitutionalism. Whereas Defoe's political tracts take the form of critique, positioning a written constitutional or quasi-constitutional document as the most promising means for resisting legislative supremacy, his literary works instead provide a positive vision of the virtues of constructing a community around such a written constitutional text and promote the possibility of such an approach to politics. Thus, if *Robinson Crusoe* (1719)¹²⁰ helped spawn the myth of modern individualism, as Ian Watt has contended,¹²¹ Defoe's works of popular fiction and history likewise helped to bolster the myth of written constitutionalism. Writing already constitutes an act of some importance in *Robinson Crusoe*, as evidenced most prominently by Crusoe's reflections on his struggles to continue his journal as his ink gradually runs out. Yet it is the sequel, *The Farther Adventures of Robinson Crusoe* (1719),¹²² and Defoe's compositions on pirates that most concretely represent the written inscription of a social compact.

A. Crusoe, Writing, and Contract

A number of scholars have interpreted *Robinson Crusoe* and *The Farther Adventures of Robinson Crusoe* as presenting an allegory of individuals' emergence from the state of nature and entrance into the social contract.¹²³ As in the seventeenth century, when analogies between the social and the marital contracts proliferated,¹²⁴ Defoe's treatments of, on the one hand, the union between husband and wife and, on the other hand, the conjunction of members of the island's nascent society mutually illuminate each other. And just as the *Case of Protestant Dissenters* emphasized close analysis of the provisions of a written charter and constitution, the representations of the marital and social (or colonial) contracts in *The Farther Adventures* assume a much more textual form than their seventeenth-century counterparts.

Writing had already been endowed with a certain significance in *Robinson Crusoe* through Crusoe's attempt to memorialize his adventures in a journal. While Crusoe begins by reporting events as they unfold day by day, his dwindling supply of

¹²⁰ DANIEL DEFOE, *ROBINSON CRUSOE* (Michael Shinagel ed., 1993) (1719).

¹²¹ See generally IAN WATT, *MYTHS OF MODERN INDIVIDUALISM: FAUST, DON QUIXOTE, DON JUAN, ROBINSON CRUSOE* (1996).

¹²² DANIEL DEFOE, *THE FARTHER ADVENTURES OF ROBINSON CRUSOE* (2006) (1719).

¹²³ See generally Maximillian E. Novak, *Crusoe the King and the Political Evolution of His Island*, *STUDIES IN ENGLISH LITERATURE, 1500-1900* at 337 (1952).

¹²⁴ See generally VICTORIA KAHN, *WAYWARD CONTRACTS: THE CRISIS OF POLITICAL OBLIGATION IN ENGLAND, 1640-1674* (2004).

ink gradually forces him to diminish the frequency of his journal entries, and, eventually, to cease recording events entirely.¹²⁵ While his ink lasts, it serves in part the function of enhancing memory. Hence Crusoe envisions his journal as providing a “memorandum” of events—or literally, recording what must be remembered.¹²⁶ Soon after his ink runs out, Crusoe describes a substitute form of inscription, one that involves the material world rather than books; instead of memorializing in writing the fact that he had constructed a canoe too big to put into the water, Crusoe explains that he “was oblig’d to let [the canoe] lye where it was, as a *Memorandum* to teach me to be wiser next Time.”¹²⁷ In addition to supplementing memory, writing also enables Crusoe to corrolate events across time, as he states that “[a]s long as [the ink] lasted, I made use of it to minute down the Days of the Month on which any remarkable Thing happen’d to me, and first by casting up Times past: I remember that there was a strange Concurrence of Days, in the various Providences which befell me.”¹²⁸ Writing thereby allows Crusoe to engage in comparisons among recorded events.

Given Jean-Jacques Rousseau’s interest in and ambivalence about writing,¹²⁹ it is not surprising that his treatment of *Robinson Crusoe* would implicate both the novel’s own textuality and its representation of writing.¹³⁰ The presence or fullness that Rousseau idealizes and associates with speech over writing forms a crucial component of his theory in *The Social Contract*. The

¹²⁵ See DEFOE, ROBINSON CRUSOE, *supra* note 120, at 76 (“A little after this my Ink began to fail me, and so I contented myself to use it more sparingly, and to write down only the most remarkable Events of my Life, without continuing a daily *Memorandum* of other Things.”); *id.* at 97 (“My Ink, as I observed, had been gone some time, all but a very little, which I eek’d out with Water a little and a little, till it was so pale it scarce left any Appearance of black upon the Paper . . .”).

¹²⁶ *Id.* at 76.

¹²⁷ *Id.* at 99.

¹²⁸ *Id.* at 97.

¹²⁹ It is well known that Rousseau at least explicitly places priority upon speech over writing, viewing the latter as inferior to the immediacy of a hypothetically perfect form of speech; at the same time, he values writing as potentially capable of capturing that which inadequate speech was ineffectual at conveying. See JACQUES DERRIDA, OF GRAMMATOLOGY 141 (Gayatri Chakravorty Spivak trans., 1998) (“[Rousseau], straining toward the reconstruction of presence, . . . valorizes and disqualifies writing at the same time. At the same time; that is to say, in one divided but coherent movement. . . . Rousseau condemns writing as destruction of presence and as disease of speech. He rehabilitates it to the extent that it promises the reappropriation of that of which speech allowed itself to be dispossessed.”). For Rousseau’s reception of Defoe, see JEAN-JACQUES ROUSSEAU, ÉMILE: OR, ON EDUCATION 77-79 (Allan Bloom trans., 1979).

¹³⁰ Denise Schaeffer, *The Utility of Ink: Rousseau and Robinson Crusoe*, THE REVIEW OF POLITICS 64: 1 at 121 (2002).

construction of the social contract, for Rousseau, involves the alienation of each individual to the community, which, speaking as a totality, voices the general will.¹³¹ The sovereignty of the general will, for Rousseau, is never bound by “a law which it cannot infringe.”¹³² To the extent that the people are aggregated into a unitary body, “there neither is nor can be any kind of fundamental law binding on” them.¹³³ According to Rousseau’s account, a written constitution would therefore be superceded in all cases by a genuine act of the general will; this kind of constitutional moment would overthrow any written document.¹³⁴

Rousseau’s treatment of *Robinson Crusoe* in *Émile* is in keeping with his works’ ambivalent relation to writing. The education that *Émile* receives—that which Rousseau constructs as the ideal—is conspicuously devoid of books. *Robinson Crusoe* constitutes the one exception.¹³⁵ Although a number of scholars view *Robinson Crusoe* as a self-evident choice, given Rousseau’s desire to represent the education of the natural man, Denise Schaeffer has suggested instead that *Crusoe* is a “social man in nature” and that *Émile*’s tutor must introduce him to *Crusoe* in order to engender self-reflection.¹³⁶ *Crusoe*’s diary represents “the most important part of Defoe’s novel for *Émile*” because it demonstrates the possibility of becoming “an other self to oneself” by contemplating an earlier version of one’s own identity.¹³⁷ The genre of the diary or memoir—practiced by Rousseau himself in

¹³¹ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, bk. 1, ch. 6.

¹³² *Id.* at ch. 7.

¹³³ *Id.*

¹³⁴ Derrida describes Rousseau as criticizing representation by placing priority on the act of the general will; just as Rousseau was suspicious of writing because it deferred the presence of its author, he prefers the voice of the sovereign people to any act of their representative. DERRIDA, *supra* note 129, at 296. Hence “Writing is the origin of inequality. It is the moment when the *general will*, which cannot err by itself, gives way to *judgment*, which can draw it into ‘the seductive influence of individual wills. . . . It is therefore absolutely necessary that the general will expresses itself through *voices* without proxy. It ‘makes law’ when it *declares* itself in the voice through the ‘body of the people’ where it is indivisible.” *Id.* at 297. As Jed Rubenfeld further elaborates on this problem in *Freedom and Time: A Theory of Constitutional Self-Government*, “having posited that ‘the general will that should direct the state is not that of a past time but of the present moment,’ Rousseau is obliged to idealize the popular voice and the public tongue that would express this will (the general will of the present moment could not be expressed in a writing).” JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 47 (2001). Bruce Ackerman’s theory of constitutional moments most powerfully articulates how something like Rousseau’s notion of the general will could be reconciled with the written quality of the U.S. Constitution. See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

¹³⁵ See ROUSSEAU, *ÉMILE*, *supra* note 129, at 77.

¹³⁶ Schaeffer, *supra* note 130, at 130-37.

¹³⁷ *Id.* at 145-47.

the *Reveries*—thereby makes possible the writer’s confrontation with his former self and, in doing so, enables his self-consciousness.¹³⁸ The context in which Rousseau introduces and discusses *Robinson Crusoe*, renewing the ambivalent stance that Rousseau assumes elsewhere about writing and books, suggests the possibility that other members of Defoe’s eighteenth-century audience would be influenced by his account of the dynamics of writing in the constitutional context.

The novel that most clearly presents a form of quasi-constitutional writing and in which it is most transparently connected to a colonial situation akin to that of the American colonies is, however, not *Robinson Crusoe*, but its sequel, which appeared only months later than the original and was often printed with it.¹³⁹ In *The Farther Adventures of Robinson Crusoe*, Crusoe is overtaken by the desire to journey back to the colony that he had founded. He encounters, of course, a variety of mishaps on the way, including a few foundering ships, and winds up inviting the survivors of several disasters at sea onboard. There are two moments in particular when a written agreement plays a central role in the novel’s development, one involving a marriage contract and the other concerning the settlement of a government in the colony.¹⁴⁰ While these instances might appear quite disparate, analogies had often been drawn between marital and social contracts during the seventeenth century, as Victoria Kahn has most recently elaborated in *Wayward Contracts*.¹⁴¹ In pairing the analyses of marriage and government, Defoe thus draws upon a lengthy tradition.¹⁴² Earlier versions of the analogy had not,

¹³⁸ *Id.* at 146-47.

¹³⁹ See NOVAK, *supra* note 2, at 555, 562 (stating that “[t]he first two parts [of the Crusoe story] were often printed together; [the] third volume was ignored from the start”).

¹⁴⁰ See *infra* notes 147-165 and accompanying text.

¹⁴¹ See VICTORIA KAHN, *WAYWARD CONTRACTS: THE CRISIS OF POLITICAL OBLIGATION IN ENGLAND, 1640-74*, at 174-5 (2004) (“[I]n seventeenth-century England, as on the continent, the political relationship of subject and sovereign was regularly compared with marriage. This model of contract preserved an older sense of status and natural hierarchy while simultaneously addressing contemporary arguments for the voluntary nature of political obligation. . . . [W]ell before Hobbes elaborated his version of the original political contract the language of the marriage contract was appropriated by both royalists and parliamentarians in their debate over the conditions of legitimate sovereignty.”); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

¹⁴² Nor did Defoe represent the end-point of the tradition. One can find invocations of the analogy as late as John Quincy Adams’ 1842 lecture “The Social Compact, Exemplified in the Constitution of the Commonwealth of Massachusetts.” JOHN QUINCY ADAMS, *THE SOCIAL COMPACT, EXEMPLIFIED IN THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS* (1842). According to Adams, “the social compact, or body politic, founded upon the laws of Nature and of God, physical, moral, and intellectual, necessarily pre-

however, displayed as much interest as Defoe's narratives in the extent to which either kind of contract assumed a written form.

Although Crusoe speaks of his colony as a colony, he disclaims having officially colonized it, and instead insists that he has assisted in its formation as a kind of Lockean society emanating from the state of nature.¹⁴³ Locke himself had, as Jeremy Waldron has demonstrated, provided two separate genealogies of political community, one taking the form of political anthropology and the other of social contract theory.¹⁴⁴ Whereas the political anthropological account describes a gradual "shift from inchoate patriarchal authority to formal political institutionalization," that of the social contract involves a sudden transformation of the state of nature into the political order.¹⁴⁵ Both of these models play their part in the formation of Crusoe's political community in the colony.

At a number of points in the narrative, Crusoe emphasizes his role as that of a father to the polity that he has established. Rather than colonizing subject to the will of the British king, he instead constructs himself as the father of the people whom he constituted into a state; as he explains, "I pleased myself with being the patron of the people I placed there, and doing for them in a kind of haughty, majestic way, like an old patriarchal monarch, providing for them as if I had been father of the whole family, as well as of the plantation."¹⁴⁶ At the same time, however, Crusoe indicates that the other individuals on the island gradually agree to

supposes a *permanent* family compact formed by the *will* of the man, and the *consent* of the woman" *Id.* Elaborating upon the nature of this marital compact, Adams insists that "[t]he nuptial tie of nature then must be formed by mutual *consent*, but its permanency must be by the mutual pledge of *faith*, that is by covenant or compact." *Id.* at 24.

¹⁴³ The notion of the island would assume significance in James Otis' 1764 attempt to reconcile social contract theory with the colonial situation. See James Otis, *The Rights of the British Colonies Asserted and Proved*, in 3 THE RECEPTION OF LOCKE'S POLITICS 1 (Mark Goldie ed., 1999). While Otis tries to disaggregate the individual's natural freedom from the fact that he is born into society, he is obliged to acknowledge that "The truth is, as has been shewn, men come into the world and into society at the same instant." *Id.* at 24. Because the individual is born into society, he must first be isolated from it—like Crusoe—in order to re-enter the state of nature before engaging in a new social contract. As Otis writes, "If in such case, there is a real interval between the separation [of an individual from "a society of which they have formerly been members"] and the new conjunction, during such interval the individuals are as much detached, and under the law of nature only, as would be two men who should chance to meet on a *desolate island*." *Id.* (italics added).

¹⁴⁴ Jeremy Waldron, *John Locke: social contract versus political anthropology*, in THE SOCIAL CONTRACT FROM HOBBS TO RAWLS, *supra* note 99, at 51.

¹⁴⁵ *Id.* at 56.

¹⁴⁶ DEFOE, THE FARTHER ADVENTURES, *supra* note 122, at 100.

form a peaceful community, largely in order to establish and protect private property.

In order to secure this community, Crusoe himself generates a kind of charter, a document that is, conspicuously, written, a circumstance that derives additional significance from the fact that Crusoe had pined for ink after his rescued store ran out in the original *Robinson Crusoe*.¹⁴⁷ As Crusoe recounts, the inhabitants

desired one general writing under my hand for the whole, which I caused to be drawn up, and signed and sealed, setting out the bounds and situation of every man's plantation, and testifying that I gave them thereby severally a right to the whole possession and inheritance of the respective plantations or farms, with their improvements, to them and their heirs, reserving all the rest of the island as my own property, and a certain rent for every particular plantation after eleven years, if I, or any one from me, or in my name, came to demand it, producing an attested copy of the same writing. As to the government and laws among them, I told them I was not capable of giving them better rules than they were able to give themselves; only I made them promise me to live in love and good neighbourhood with one another; and so I prepared to leave them.¹⁴⁸

Although he leaves the decision about ordinary laws to the individuals of the community, he insists upon the foundational conditions of "love and good neighbourhood," then also urges upon them a promise that "they would never make any distinction of Papist or Protestant . . . and they likewise promised us that they would never have any differences or disputes one with another about religion."¹⁴⁹ Not only the arrangements of property, but also the ground rules of government are laid out within a document that resembles a charter or proto-constitution. As in Defoe's political writings, however, the contract does not eclipse the promise, but is instead supplemented by it.

Writing also figures prominently in the attempts by a Catholic French clergyman whom Crusoe has rescued at sea to formally marry four of the lapsed Protestant English inhabitants

¹⁴⁷ See *supra* notes 125-128 and accompanying text.

¹⁴⁸ DEFOE, *THE FARTHER ADVENTURES*, *supra* note 122, at 88. Defoe had foreshadowed this development in the brief summary of his hero's future life provided at the end of *Robinson Crusoe*; as Crusoe recounts, "I shar'd the Island into Parts with 'em, reserv'd to my self the Property of the whole, but gave them such Parts respectively as they agreed on; and having settled all things with them, and engaged them not to leave the Place, I left them there." DEFOE, *ROBINSON CRUSOE*, *supra* note 120, at 220.

¹⁴⁹ DEFOE, *THE FARTHER ADVENTURES*, *supra* note 122, at 90.

who had captured and “taken as . . . wives” several natives.¹⁵⁰ Before Crusoe returned to the island, various disputes had sundered the society, dividing both the Spaniards resident there from the Englishmen and coming between the Englishmen themselves, some of whom are represented as exceedingly lazy. On account of their slothfulness, some of the Englishmen decide to journey to the continent and enslave several natives there in order to delegate their work to others.¹⁵¹ When they return with a number of women, the Spanish governor seems most concerned to avoid faction amongst the male colonists and insists that

“all engage, that if any of you take any of these women as a wife, he shall take but one; and that having taken one, none else shall touch her; for though we cannot marry any one of you, yet it is but reasonable that, while you stay here, the woman any of you takes shall be maintained by the man that takes her, and should be his wife—I mean,” says he, “while he continues here, and that none else shall have anything to do with her.”¹⁵²

The allocation of a single “temporary wife” to each individual appears designed to avert conflict among the members of the polity; as Victoria Kahn and Carole Pateman have contended, the marriage covenant may not, in early modern discourse, be one between man and wife, but instead between men.¹⁵³ Not surprisingly given the arrangement, in which the women were never even provided with a nominal opportunity to consent, Crusoe refers to the “temporary wives” more as subjects or slaves than members of a marital community.¹⁵⁴ When the French priest appears on the scene, however, he deems inadequate the kind of marriage undertaken by the society’s members and begins to attempt to persuade Crusoe to urge them to enter into a more formal version of marriage.¹⁵⁵

Although the English inhabitants of the island are no longer devout, they seem to be ascriptively Protestant, and of unclear

¹⁵⁰ *Id.* at 68. Defoe adopts a notably more tolerant attitude towards Catholics in this work than elsewhere in his *oeuvre*. As Max Novak has remarked, “[f]or the most part, Defoe’s anti-Catholic attitudes remained a consistent element in his thinking throughout his life, but during the brief interval during which the Crusoe volumes were written, Defoe seemed to favour even the hated Catholic Church as an antidote to atheism and paganism.” Novak, Daniel Defoe, *supra* note 2, at 561.

¹⁵¹ DEFOE, THE FARTHER ADVENTURES, *supra* note 121, at 43.

¹⁵² *Id.* at 48.

¹⁵³ KAHN, WAYWARD CONTRACTS, *supra* note 141, at 206 (citing Carole Pateman’s argument in *The Sexual Contract* for the proposition that the marriage covenant is “a covenant between men” and discerning such a stance in John Milton’s *Doctrine and Discipline of Divorce*).

¹⁵⁴ *Id.* at 67.

¹⁵⁵ *Id.* at 75.

denomination. Crusoe and the French priest are impeccably polite to each other, and each agrees to tolerate the other's religion without attempting to convert him.¹⁵⁶ Nevertheless, the priest has qualms about attempting to perform marriages for the English colonists because the form of wedding that he would provide would inevitably bear the indicia of Catholicism.¹⁵⁷ The solution that the priest proposes to this quandary is to encourage the Englishmen to enter into a written contract of marriage.¹⁵⁸ The priest therefore instructs Crusoe to “‘legally and effectually marry them; and as, sir, my way of marrying may not be easy to reconcile them to, though it will be effectual, even by your own laws, so your way may be as well before God, and as valid among men. I mean by a written contract signed by both man and woman, and by all the witnesses present, which all the laws of Europe would decree to be valid.’”¹⁵⁹ In the face of the religious differences between the Englishmen on the island and the Catholic missionary priest, the legalistic form of the written contract becomes the mediating and effective instrument of marriage. When the conventions underlying the religious ceremony of marriage can no longer be sustained because of the combination of varying traditions, writing becomes the substitute.¹⁶⁰ Surprisingly, the priest emphasizes the importance of a written marriage contract almost more than that of a religious ceremony; only this written

¹⁵⁶ As Crusoe recounts, “I was astonished at the sincerity and temper of this pious Papist . . . and it presently occurred to my thoughts, that if such a temper was universal, we might be all Catholic Christians, whatever Church or particular profession we joined in; that a spirit of charity would soon work us all up into right principles; and as he thought that the like charity would make us all Catholics, so I told him I believed, had all the members of his Church the like moderation, they would soon all be Protestants.” *Id.* at 92.

¹⁵⁷ *Id.* at 78-79.

¹⁵⁸ *Id.* at 79.

¹⁵⁹ *Id.* at 68.

¹⁶⁰ The religious eclecticism of the Robinson Crusoe story and its ecumenical quality were emphasized by an early parody. In this tract, which consists of an imagined dialogue between Defoe himself and his characters Crusoe and Friday, Crusoe complains to the author about the lack of uniformity in his own religious position throughout the novels and his seeming tolerance of Catholics:

Thus, all the *English* Seamen laugh'd me out of Religion, but the *Spanish* and *Portuguese* Sailors were honest religious Fellows; you make me a Protestant in *London*, and a Papist in *Brasil*; and then again, a Protestant in my own Island, and when I get thence, the only Thing that deters me from returning to *Brasil*, is merely, because I did not like to die a Papist; for you say, *that Popery may be a good Religion to live in, but not to die in*; as if that Religion could be good to live in, which was not good to die in But tho' you keep me thus by Force a Sort of Protestant, yet, you all along make me very fond of Popish Priests and the Popish Religion

Charles Gildon, *The Life and Strange Surprizing Adventures of Mr. D— De F—* (1719), in DEFOE, ROBINSON CRUSOE, *supra* note 120, at 257, 259.

marriage contract can adequately both express the consent of the parties and bind them in the future. Thus the Frenchman opines that “‘the essence of the sacrament of matrimony’ . . . ‘consists not only in the mutual consent of the parties to take one another as man and wife, but in the formal and legal obligation that there is in the contract to compel the man and woman, at all times, to own and acknowledge each other.’”¹⁶¹ Although the Englishmen may have been temporarily excused from the obligation of entering into this written contract by their circumstances and the fact that they lacked “any pen and ink, or paper, to write down a contract of marriage, and have it signed between them,” that situation has been remedied and the arrival of ink on the scene means that they must officially marry.¹⁶² Nor is it adequate for the women to remain in the state of involuntary submission to which the first form of marriage had consigned them; instead, the priest indicates that they must now be persuaded to convert to Christianity and consent to the marriage—a consent that it is extremely difficult to envision as freely given under the circumstances.¹⁶³

While describing to his “temporary wife” the reasons why they should be formally married, Will Atkins, heretofore one of the most recalcitrant of the Englishmen, himself echoes the French priest’s rationale, citing the binding nature of the marriage compact; as Will reports the conversation to Crusoe, he “first told her the nature of our laws about marriage, and what the reasons were that men and women were obliged to enter into such

¹⁶¹ DEFOE, *THE FARTHER ADVENTURES*, *supra* note 122, at 68.

¹⁶² *Id.*

¹⁶³ *Id.* at 86. Defoe’s other writings do not give any encouragement to the notion that equality will miraculously follow the marriage either. In his novel *Roxana* (1724), the title character attempts to dissuade a suitor from the desire to marry her by expressing the notion that this arrangement will inevitably render her a subject and him the sovereign. See DANIEL DEFOE, *ROXANA, OR THE FORTUNATE MISTRESS* (John Mullan ed., 1996) (1724). Although Roxana represents herself as resisting the suitor for other reasons, her proto-feminist objections to the institution of marriage are persuasively phrased:

I told him, I had, perhaps, differing Notions of Matrimony, from what the receiv’d Custom had given us of it; that I thought a Woman was a free Agent, as well as a Man, and was born free, and cou’d she manage herself suitably, might enjoy that Liberty to as much Purpose as the Men do; that the Laws of Matrimony were indeed, otherwise, and Mankind at this time, acted quite upon other Principles; and those such, that a Woman gave herself entirely away from herself, in Marriage, and capitulated only to be, at best, but an *Upper-Servant* [W]hile a Woman was single, she was Masculine in her politick Capacity; that she had then the full Command of what she had, and the full Direction of what she did

Id. at 148-49. According to this account, marriage divests a woman of her “politick capacity” and renders her a mere servant; Roxana even refers at one point to a woman’s husband as her “monarch.” *Id.* at 150.

compacts as it was neither in the power of one nor other to break.”¹⁶⁴ When Will then details to her the Christian conception of God, and explains that “God has spoken to some good men in former days, even from heaven, by plain words; and God has inspired good men by His Spirit; and they have written all His Laws down in a book,¹⁶⁵” his wife becomes fascinated with the notion of this book, and refuses to rest until she has been given a physical copy of the Bible.¹⁶⁶

In this context, the written obligation seems to assume, for Defoe, a more binding quality than the spoken word. In addition, it demonstrates an ability to replace the rituals or ceremonies of a particular tradition with a medium more capable of including and reconciling disparate cultural contexts.¹⁶⁷ Writing therefore takes on a special significance within the multi-denominational colonial setting that Defoe describes.

B. Pyrates, the Polity, and Constitutional Review

A number of Defoe’s other literary works, as well as his less fictionalized *General History of the Pyrates*, turned to what was, at the time, the paradigmatic situation of the individual

¹⁶⁴ *Id.* at 94. A work Defoe published in 1727, entitled *A Treatise Concerning the Use and Abuse of the Marriage Bed*, similarly insists on the permanence of the marriage contract as well as other features that render it less like an ordinary contract and more akin to a constitution. According to Defoe, the marriage contract creates a new unity out of parts that were previously disparate: “Matrimony is not a single Act, but it is a Condition of Life, and therefore when People are new-married, they are said to have altered their Condition; it is a Series of Unity contracted . . .” DANIEL DEFOE, *A TREATISE CONCERNING THE USE AND ABUSE OF THE MARRIAGE BED* 44 (1727). Rather than being a temporary condition, it is, for him “not a Branch of Life only, but [] a State, [] a settled Establishment of Life, and an Establishment for a continuance at least of the Life of one of the two.” *Id.* at 30. Finally, like a constitution, the marriage contract does not merely mark the moment of the parties’ transition between conditions but more importantly structures the relation in which they continue to exist. See *id.* at 29, 44, and 54. Failing to abide by the limitations implicit in the marriage contract “dishonours” the contract itself, even if no one is capable of enforcing these limitations from outside the confines of the couple itself. *Id.* at 44.

¹⁶⁵ *Id.* at 98.

¹⁶⁶ *Id.* at 98, 105-06.

¹⁶⁷ The cultural context of the native women whom the English colonists “marry” is not, however, incorporated and is instead effaced by their conversion to Christianity. This aspect of the plot demonstrates the significant limitations of Defoe’s inclusiveness and, by implication, of his conception of written constitutionalism. A number of scholars have performed post-colonial readings of Defoe’s work, and, in particular, *Robinson Crusoe*, that develop critiques of his representation of native populations, but the most compelling such reading may be J.M. Coetzee’s novel *Foe*. See generally J.M. COETZEE, *FOE: A NOVEL* (1988).

isolated from conventional society and its norms—that of the pirate.¹⁶⁸ In both his novelistic and more historical accounts of piracy, Defoe focused upon the political status of the pirate, conceived as an individual who leaves behind the bonds of society and enters into an alternative social compact from the standpoint of the state of nature.¹⁶⁹ In the 1719 novella *The King of Pirates*, composed in the form of two letters from the notorious Captain Avery, purportedly published, in part, to dispel misapprehensions about the pirate’s career, Defoe presents the portrait of a collectivity bound together in a manner reminiscent of Thomas Hobbes’ description of the genesis of political community. The pseudonymous *General History of the Pyrates*, the two volumes of which appeared in 1726 and 1728, represents a range of piratical communities and provides a more detailed account of the political organization of one, in particular, explaining the pirates’ agreement to found a society on the seas whose norms would be enshrined in a set of quasi-constitutional “Articles”, the interpretation of which would devolve to those citizen-subjects who formed the people of this commonwealth.¹⁷⁰ These piratical political orders, and the Articles that formed their guiding principles, more fully presaged the written constitutionalism of the American polity than the other kinds of social compact that Defoe represented. Rather than simply benefiting the people in perpetuity, the piratical Articles were formed as the marker of the compact into which a number of self-liberated subjects entered. As Defoe continually emphasized, the pirates taken collectively constituted both the source and the beneficiaries of the Articles; in this respect, they provide a paradigm for democratic constitutionalism.

¹⁶⁸ Defoe’s novelistic and “historical” work overlaps more than a contemporary reader might expect—indeed, some of his fictions employed the designation “histories” and were only retrospectively classified as novels. This is perhaps because, as Lennard Davis has written, “[w]hen *Robinson Crusoe* was written in 1719, there was no clear distinction between news and fiction, and Defoe’s work rests uneasily in that world of a discourse which is more and more inclining to separate into two subdiscourses but which still has not broken apart.” LENNARD DAVIS, *FACTUAL FICTIONS: THE ORIGINS OF THE ENGLISH NOVEL* 154 (1983). Be that as it may, the close relationship between what we would designate Defoe’s novels and his historical writings justifies treating them together.

¹⁶⁹ As Max Novak and others have observed, Defoe tends to romanticize the pirates’ polity, removing reference to some of the more bloody exploits in which they may have been engaged. See NOVAK, DANIEL DEFOE, *supra* note 2, at 582 (explaining that “Defoe tends toward building his own mythology of piracy,” one that verged on the utopian); Manuel Schonhorn, *Defoe’s Captain Singleton: A Reassessment with Observations*, *PAPERS ON LANGUAGE AND LITERATURE* 7 (1971), at 38 (discussing how Defoe softened the violence of piracy in his narratives).

¹⁷⁰ The most thorough extant account of Defoe’s description of this constitutional scheme occurs in Lee A. Casey’s excellent article *Pirate Constitutionalism: An Essay in Self-Government*, 8 *J.L. & Pol.* 477 (1991).

The letters supposedly emanating from the pen of Captain Avery that comprise the main text of *The King of Pirates* present themselves as disabusing the public of the false, “romance”-like accounts that they have received of the narrator, and instead replacing these fictions with his true story, one in which he is, of course, a much more sympathetic figure who eschews cruelty and generally endorses principles of democratic equality among his crew.¹⁷¹ Captain Avery was, in fact, a historical personage—Captain Henry Every (1653-96)—but the “historical” reports of pirates at the time contained such embellishments that separating fact from fiction remains almost impossible. The Preface from the “Publisher” of *The King of Pirates*—presumably by Defoe himself—alludes to this situation, and the reasons for the indistinction of fact and fiction in this area; as he writes, “this may be said, without any arrogance, that this story, stripped of all the romantic, improbable, and impossible parts of it, looks more like the history of Captain Avery than anything yet published ever has done; and, if it is not proved that the Captain wrote these letters himself, the publisher says none but the Captain himself will ever be able to mend them.”¹⁷² One of the principal difficulties in developing an accurate account of the pirates’ escapades lay, as this passage indicates, in the fact that, in many cases, the pirates themselves were the only available eye-witnesses to their activities. Narratives about the pirates were thus obliged to rely either on rumor or, as many parts of Defoe’s later *History of the Pyrates* did, on the reports of the pirates’ trials;¹⁷³ it is doubtful that a full or accurate version of the pirates’ narratives would emerge out of this kind of forensic context.

The commonwealth of pirates that Avery describes in his letters partakes of a modified Hobbesian vision.¹⁷⁴ If, for Hobbes,

¹⁷¹ DANIEL DEFOE, *THE KING OF PIRATES* 7 (Peter Ackroyd ed., 2007) (1720). In particular, Defoe undermines the notion that Captain Avery had raped and murdered the Mogul’s daughter and become King of Madagascar. *Id.* at 5-6. *The King of Pirates* has generally been attributed to Defoe, but some skeptics remain. In *Daniel Defoe*, Max Novak treats the text as definitely derived from Defoe and as providing a template for the subsequent novel *Captain Singleton*. See NOVAK, DANIEL DEFOE, *supra* note 2, at 580-83. Furbank and Owens, however, remain unconvinced. See FURBANK & OWENS, *supra* note 41, at 122.

¹⁷² DEFOE, *THE KING OF PIRATES*, *supra* note 171, at 6.

¹⁷³ DANIEL DEFOE, *A GENERAL HISTORY OF THE PYRATES* 665-95 (Manuel Schonhorn ed., 1999) (1724). The origins of this work, the original edition of which listed “Captain Charles Johnson” as the author, have been the subject of much scholarly speculation. The evidence of Defoe’s authorship derives largely from parallels with his other writings. See JOHN ROBERT MOORE, *DEFOE IN THE PILLORY AND OTHER STUDIES* (1939); *but cf.* FURBANK & OWENS, *DEFOE DE-ATTRIBUTIONS*, *supra* note 41, at 133-34.

¹⁷⁴ In his forward to the Hesperus edition, Peter Ackroyd comments in passing that “The world of *The King of Pirates* is a desperate one It is the world of

men enter into the social compact out of the fear that they experience in the state of nature, it is ambition and avarice that set Avery and his compatriots upon his piratical adventures.¹⁷⁵ Fear and the goal of self-preservation do, however, play a central role. As Avery comments early on, “for self-preservation being the supreme law of nature, all things of this kind must submit to that.”¹⁷⁶ The passion of fear also enters into the community at the prospect of the dissolution of the commonwealth that has been formed. Once Avery enters into the service of Captain Redhand, who not only attacks the vessels of foreign nations but is “at war with all mankind,” the danger of disbanding increases.¹⁷⁷ When the pirates contemplate doing so, and consider attempting to “by degrees reduce [themselves] to a private capacity,” they fear that one among them will betray the others.¹⁷⁸ They therefore determine that there is “no safety for us but by keeping all together, and going to some part of the world where we might be strong enough to defend ourselves, or be so concealed till we might find out some way of escape that we might not now be so well able to think of.”¹⁷⁹ The ultimate result is their establishment in Madagascar, from whence Avery disseminates a rumor that he will help all pirates and buccaneers who find him there to settle and form new towns in the colony he has created.¹⁸⁰

The pirates’ polity was, however, established well before they arrived in Madagascar. As Avery’s narrative continually emphasizes, they resolved important issues through mutual consent and even elected him captain democratically.¹⁸¹ At one point,

Hobbes’ *Leviathan* transported to the high seas.” DEFOE, THE KING OF PIRATES, *supra* note 171, at ix.

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 10.

¹⁷⁸ *Id.* at 29-30.

¹⁷⁹ *Id.* at 30.

¹⁸⁰ As Avery, disguised as one of his own minions, informs a group of Englishmen whom he captures and holds for a few days before sending them off again, “If any gang of pirates or buccaneers would go upon their adventures, and when they had made themselves rich would come and settle with us, we would take them into our protection and give them land to build towns and habitations for themselves—and so in time we might become a great nation, and inhabit the whole island. I told them the Romans themselves were, at first, no better than such a gang of rovers as we were, and who knew but our General, Captain Avery, might lay the foundation of as great an empire as they.” *Id.* at 75.

¹⁸¹ Defoe confirms in *A General History of the Pyrates* that the captain, although endowed with unquestioned authority in times of emergency, generally remains a representative of the community rather than an individual placed above it, like a king. As Defoe writes of the selection of a new captain, paraphrasing one of the crew members, “it was not of any great Signification who was dignify’d with Title; for really and in Truth, all good Governments had (like theirs) the supream Power lodged with the Community, who might doubtless depute and revoke as

Avery found himself “by the unanimous consent of all the crew, made captain of the great ship and of the whole crew.”¹⁸² When they later encountered a group of buccaneers, these latter sailors decided to join Avery and his companions, and, in order to do so, “they sent us word they had chosen [Avery] unanimously for their captain.”¹⁸³ Allotments of money and determinations about whether individuals should be permitted to abandon the enterprise likewise depended upon general consent.¹⁸⁴ The entire crew is thus described as “one body”—like the body politic of the Leviathan.¹⁸⁵

This body politic was not in continual flux, entirely governed by the pirates’ shifting moods. Instead, it was secured, like Robinson Crusoe’s colony, by one central law—one that, not surprisingly, concerned the distribution and regulation of the wealth that they had acquired. As Avery explained:

Here also we shared our booty, which was great indeed to a profusion, and as keeping such a treasure in every man’s particular private possession would have occasioned gaming, quarrelling, and perhaps thieving and pilfering, I ordered that so many small chests should be made as there were men in the ship. And every man’s treasure was nailed up in these chests, and the chests all stowed in the hold, with every man’s name upon his chest, not to be touched but by general order. And to prevent gaming I prevailed with them to make a law or agreement, and everyone to set their hands to it. By which they agreed that, if any man played for any more money than he had in his keeping, the winner should not be paid whatever the loser run in debt, but the chest containing every man’s dividend should be all his own to be delivered whole to him. And the offender, whenever he left the ship, if he would pay any gaming

suited Interest or Humour.” DEFOE, GENERAL HISTORY OF THE PYRATES, *supra* note 173, at 194. As the man continues, recalling Defoe’s own statements about the location of the original power in disparate political settings, “*We are the Original of this claim . . . and should a Captain be so saucy as to exceed Prescription at any time, why down with him!*” *Id.* at 194-95.

¹⁸² *Id.* at 25.

¹⁸³ *Id.* at 26.

¹⁸⁴ *See id.* at 12 (“they all approved it with a general consent, and I had the honour of being the contriver of the voyage”); *id.* at 78 (“When this was agreed, they resolved to take no money out of the grand stock, but to take such men’s money as were gone and had left their money behind, and this being consented to truly, my friends took the occasion and took all their own money, and mine . . . and carried it on board . . .”); *id.* at 80 (“They did not leave us without our consent”).

¹⁸⁵ *Id.* at 26 (“Accordingly we did so, and gave them that ship with all her guns and ammunition, but made one of our own men captain, which they consented to, and so we became all one body”).

debts afterward, that was another case, but such debts should never be paid while he continued in that company.¹⁸⁶

According to this account, equal allocation of the prize that had been acquired would be the only surety against strife or dissention amongst the group. The implicit justification for prohibiting gambling is likewise the diminution in a particular individual's wealth—and the resulting conflict—that it would occasion. This theme reappears in similar terms in *Captain Singleton*, another of Defoe's novels loosely based upon the life of Captain Avery; in that narrative, upon the discovery of gold, Captain Singleton formulates a similar strategy by which to forestall distributive conflicts and prevent gambling.¹⁸⁷

Nor is it incidental that the resolution takes the form of a “law or agreement.” Although it is not specified in *The King of*

¹⁸⁶ *Id.* at 26-27.

¹⁸⁷ DANIEL DEFOE, *CAPTAIN SINGLETON* 79-80 (2005) (1720) (“While we were eating, it came into my thoughts that while we worked at this rate in a thing of such nicety and consequence, it was ten to one if the gold, which was the make-bait of the world, did not, first or last, set us together by the ears, to break our good articles and our understanding one among another, and perhaps cause us to part companies, or worse; I therefore told them that I was indeed the youngest man in the company, but as they had always allowed me to give my opinion in things, and had sometimes been pleased to follow my advice, so I had something to propose now, which I thought would be for all our advantages, and I believed they would all like it very well. I told them we were in a country where we all knew there was a great deal of gold, and that all the world sent ships thither to get it; that we did not indeed know where it was, and so we might get a great deal, or a little, we did not know whether; but I offered it to them to consider whether it would not be the best way for us, and to preserve the good harmony and friendship that had been always kept among us, and which was so absolutely necessary to our safety, that what we found should be brought together to one common stock, and be equally divided at last, rather than to run the hazard of any difference which might happen among us from any one's having found more or less than another. I told them, that if we were all upon one bottom we should all apply ourselves heartily to the work; and, besides that, we might then set our negroes all to work for us, and receive equally the fruit of their labour and of our own, and being all exactly alike sharers, there could be no just cause of quarrel or disgust among us.

They all approved the proposal, and every one jointly swore, and gave their hands to one another, that they would not conceal the least grain of gold from the rest; and consented that if any one or more should be found to conceal any, all that he had should be taken from him and divided among the rest; and one thing more was added to it by our gunner, from considerations equally good and just, that if any one of us, by any play, bet, game, or wager, won any money or gold, or the value of any, from another, during our whole voyage, till our return quite to Portugal, he should be obliged by us all to restore it again on the penalty of being disarmed and turned out of the company, and of having no relief from us on any account whatever. This was to prevent wagering and playing for money, which our men were apt to do by several means and at several games, though they had neither cards nor dice.”)

Pirates whether the law is written, *The History of the Pyrates* elaborates much more explicitly on the written character of the “articles” formulated under pirate Captain Roberts. These provide a paradigmatic example because the legal system of which they formed a part was, Defoe claimed, “pretty near the same with all Pyrates.”¹⁸⁸ Defoe sets forth the content of “the Substance of the Articles, as taken from the Pyrates’ own Informations.”¹⁸⁹ Testimony here substituted for the written document itself, because only the pirates were permitted to be privy to the latter; as Defoe observes, the pirates “had taken Care to throw over-board the Original they had signed and sworn to”¹⁹⁰ These articles were therefore written not for the purpose of promulgating them but instead in order to fix certain principles in place for the duration of the society. Hence the justification for adopting them was that, “finding hitherto they had been but as a Rope of Sand, they formed a Set of Articles, to be signed and sworn to, for the better Conservation of their Society, and doing Justice to one another.”¹⁹¹ Not only did the original pirates swear to abide by these articles, but any newcomer was obliged to do so as well; the articles “were together the Test of all new Comers, who were initiated by an Oath taken on a Bible, reserved for that Purpose only, and were subscribed to in presence of the worshipful Mr. Roberts.”¹⁹² True to Hobbesian theory, however, Roberts did not base the belief that these articles would constrain the pirates solely on faith in their oath; as Defoe observes, “he thought their greatest Security lay in this, that it was every one’s Interest to observe them, if they were minded to keep up so abominable a Combination.”¹⁹³ Self-interest therefore played a part equal to if not greater than honor in this quasi-constitutional structure.

The content of the articles echoes, in part, both the laws established in *The King of Pirates* and *Captain Singleton* and the guiding principles of the society in *The Farther Adventures*. The first rule, however, is that of democracy, establishing that “Every

¹⁸⁸ DEFOE, GENERAL HISTORY OF THE PYRATES, *supra* note 173, at 213. Defoe refers to similar articles, although with much less elaboration, elsewhere in *A History of the Pyrates*. In talking about Captain Howel Davis, he writes that, “[a]s soon as he was possess’d of his Command, he drew up Articles, which were signed and sworn to by himself and the rest, then he made a short Speech, the sum of which was a Declaration of War against the whole World.” *Id.* at 167-68. The reader discovers subsequently at least part of the content of the articles, which specify that “he who first espies a Sail, if she proves a Prize, is entitled to the best Pair of Pistols on board, over and above his Dividend, in which they take a singular Pride.” *Id.* at 191.

¹⁸⁹ *Id.* at 211-212.

¹⁹⁰ *Id.* at 213.

¹⁹¹ *Id.* at 210.

¹⁹² *Id.* at 213.

¹⁹³ *Id.* at 210.

Man has a Vote in Affairs of Moment”;¹⁹⁴ within this first article is also contained a guarantee that, except in cases of scarcity, each person possesses “equal title” to the provisions obtained and may freely enjoy them.¹⁹⁵ Equal participation in decision-making, rapidly followed by the ability to provide for physical necessities, are thus the foundational principles established by the articles. Violations of the commonwealth, such as desertion in battle, or defrauding the general fisc, were punished severely.¹⁹⁶ Furthermore, no man was even supposed “to talk of breaking up their Way of Living, till each had shared a 1000 l.”¹⁹⁷ Maintaining the community was thus another priority under the articles. Finally, the articles shared with Captain Avery’s laws the prohibition against gambling and with Robinson Crusoe’s community the fear of the division within the polity that might result from the introduction of women.¹⁹⁸ Whereas this latter difficulty was resolved in *The Farther Adventures* by a compact among the men to resist making attempts upon each others’ wives, it is dealt with in the articles by prohibiting women from being carried on board at all.¹⁹⁹

The method that Defoe describes of interpreting the laws provides some insight into the potential for written constitutionalism to entail something other than judicial review, despite Chief Justice Marshall’s assertion of an inevitable relation between the two. Instead, as Defoe explains, “in Case any Doubt should arise concerning the Construction of these Laws, and it should remain a Dispute whether the Party had infringed them or no, a Jury was appointed to explain them, and bring in a Verdict upon the Case in Doubt.”²⁰⁰ In this manner, interpretation would be accomplished by some of the same individuals who had concocted and signed the articles. Although Defoe acknowledges that doubt might arise about the meaning of the text, the pirates’ solution was not to appoint a particular expert or authority but rather to allow the decision about interpretation to be returned to members of the crew itself.²⁰¹

¹⁹⁴ *Id.* at 211.

¹⁹⁵ *Id.*

¹⁹⁶ Marooning or death was the fate of those who had defrauded the company as a whole or attempted to desert. *Id.* at 211-12.

¹⁹⁷ *Id.* at 212.

¹⁹⁸ *Id.* at 212.

¹⁹⁹ *Id.* at 212.

²⁰⁰ *Id.* at 213.

²⁰¹ The novel *Roxana* also includes a scene suggesting the extra-judicial enforcement of certain written agreements. Having been deserted by her first husband, Roxana—still technically married—is romantically approached by her landlord, whose wife has also left him. DEFOE, *ROXANA*, *supra* note 41, at 41. The man proposes to contract a quasi-marriage with Roxana and, as she recounts, “shew’d me a Contract in Writing, wherein he engag’d himself to me;

The method of interpreting that Defoe sparsely describes in *A History of the Pyrates* also entails examining the meaning of terms in a manner that would be accessible to such a jury of pirates. He therefore lauds the fact that the pirates' trials involved "no torturing and wresting the Sense of the Law, for bye Ends and Purposes, no puzzling or perplexing the Cause with unintelligible canting Terms, and useless Distinctions."²⁰² Subsequently, when he recounts some of the pirates' trials for piracy itself at the hands of an admiralty court on the coast of Africa, Defoe describes the judicial body as far from versed in law yet capable of interpreting statutory language and reaching a just result.²⁰³ The court therefore gives substantial consideration to "those Words in the Act of Parliament, of, *particularly specifying in the Charge, the Circumstances of Time, Place, &c.*," despite the circumstance that "the Country . . . [was] exempted from Lawyers, and Law-Books."²⁰⁴ The tools of interpretation, on this account, stretch beyond the boundaries of the recognized institutions of law.

The rotation of interpretive authority in the judgment of the pirates is paralleled by the rotation of judicial authority in a game played by another group of pirates, tied to Captain Anstis. Occupying their leisure while awaiting a response to their petition for pardon, the pirates entertained themselves through mock trials, in which they would alternately assume the roles of judge and condemned: "they appointed a Mock-Court of Judicature to try one another for Piracy, and he that was a Criminal one Day was made Judge another."²⁰⁵ Although a game, this mock court demonstrated an important aspect of piratical law, that of the interchangeability of judge with judged. Defoe likewise lauds the actual act of judicature accomplished when some of Captain Roberts' company deserted, partly because the defendants in the case "were arraigned upon a Statute of their own making." As he

to cohabit constantly with me; to provide for me in all Respects as a Wife; and repeating in the Preamble, a long Account of the Nature and Reason of our living together, and an Obligation in the Penalty of 7000 l. never to abandon me; and at last, shew'd me a Bond for 500 l. to be paid to me, or to my Assigns, within three Months after his death." *Id.* at 42. Roxana accepts, announcing that she will depend upon his promise. *Id.* at 43. After the man meets an untimely death at the hands of highway robbers, Roxana does not invoke the terms of the contract but instead engages in self-help based upon her private agreement with him, claiming to have been married to him in France without knowing that he already possessed an English wife. *Id.* at 55-57. The written contract, despite being arranged only between the parties and never introduced in a court of law, thereby retains significance because it legitimates Roxana's own efforts to recover money from the man's estate.

²⁰² DEFOE, GENERAL HISTORY OF THE PYRATES, *supra* note 173, at 222.

²⁰³ *Id.* at 250.

²⁰⁴ *Id.* at 248-249.

²⁰⁵ *Id.* at 292.

writes, “[h]ere was the Form of Justice kept up, which is as much as can be said of several other Courts, that have more lawful Commissions for what they do.”²⁰⁶ Thus those composing the laws are those applying them; those judging could well be those judged; and those being judged have made the very law by which they are condemned.

V THE MYTH OF WRITTEN CONSTITUTIONALISM

Written constitutionalism has today assumed a mythic status as a political ideal to which nearly all aspire, and which is viewed as bringing stability and order to hitherto chaotic governmental regimes. In the establishment of this myth, Defoe played a heretofore unappreciated role. Defoe’s prolific writings exerted influence over a vast range of subsequent political thinkers as well as the modern public’s self-conception.²⁰⁷ Furthermore, Defoe either provided or presaged most of the critical normative arguments that can be offered to support the notion that writtenness constitutes an important, and even essential, aspect of constitutionalism. Although they diverge in emphasis, Defoe’s arguments for written constitutionalism are cognate with both Chief Justice Marshall’s reasoning in *Marbury* and contemporary scholars’ discussions of the subject. This Part details six aspects of written constitutionalism that have been promoted: 1) promulgation; 2) durability; 3) documenting a social contract; 4) limiting legislative power; 5) interpretive methods; and 6) judicial review. Whereas Defoe’s writings rely largely on the first four of these qualities, contemporary constitutional law often focuses on the final two. Defoe’s early championing of written constitutionalism thus demonstrates a slightly different set of bases for valuing it than indicated by Chief Justice Marshall’s conjunction of writtenness and judicial review.

The aspect of written constitutionalism that appears most salient to Defoe—that of promulgation—is perhaps least considered in today’s context. The fact of writing, for Defoe, renders a document accessible to the individual for perusal, evaluation, and comparison with other practices or, more importantly, other relevant texts. To several of his political pamphlets Defoe appends the actual text of the relevant legal

²⁰⁶ *Id.* at 222.

²⁰⁷ As Ian Watt has shown, *Robinson Crusoe* was, from the eighteenth-century onwards, “appropriat[ed] . . . for different, and indeed often contradictory, ideological purposes” by thinkers ranging from Jean-Jacques Rousseau to Karl Marx. WATT, *supra* note 121, at 180, 172-80.

documents, whether charters or statutes.²⁰⁸ Moreover, he calls our attention to the precise formulations of these texts, at one point even interrupting his argument to instruct the reader to turn to the relevant statute before continuing.²⁰⁹ When, in *A Serious Inquiry*, he relied on Queen Anne's promise to tolerate the religious dissenters and insisted that it should prevent contrary Parliamentary legislation, Defoe emphasized the number of people who had heard this speech act.²¹⁰ Although a public address may reach a multitude, especially when made by the Queen, writing by its very nature has the potential to be received even more broadly, disseminated beyond the confines of a particular ceremony. Writing's reach, furthermore, for Defoe, binds those who have promulgated the writing more than would simple declaration. The proprietors of the Carolinas had extensively advertised the virtues of their colony, emphasizing not only its natural bounty but also the political and religious privileges that they were willing to grant settlers, and these documents had exerted an influence of unknown extent in encouraging individuals to move to the colony.²¹¹ Because of their written representations, the proprietors were, in Defoe's view, estopped from removing the vaunted privileges they had described.²¹² Precisely because of its unmoored promulgation to a wide range of recipients, who relied upon it, writing therefore generates a more pronounced obligation than speech.

This obligation is also, for Defoe, more durable than one orally generated. Scholars have often debated whether a written or unwritten constitution should prove more lasting. An unwritten constitution, the argument goes on one side, both ensures adherence to abstract principles better than a written document with manipulable clauses and, by avoiding brittle rigidity, remains in place through adapting to new circumstances; a written constitution, according to the other side of the argument, itself embodies permanence through the durability of the text. As Jed Rubenfeld has elaborated on a number of occasions, the fact that the constitution is written implies a particular relation to temporality, one that values not the immediacy of a social compact emanating from the present and spoken will of the people, but rather one that views the most significant act of a democracy as that of creating a commitment over time.²¹³ For Rubenfeld, the very fact that a constitution is written entails temporal extension:

²⁰⁸ See *supra* note 119 and accompanying text.

²⁰⁹ See *supra* note 117 and accompanying text.

²¹⁰ See *infra* notes 45-47 and accompanying text.

²¹¹ See *supra* notes 63-67 and accompanying text.

²¹² See *supra* notes 106-114 and accompanying text.

²¹³ See JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995).

“Written constitutionalism breaks from the premise that self-government ideally consists of government by the will or consent of the governed at any given moment. It begins rather with the idea of self-government as a temporally extended project.”²¹⁴ Defoe similarly emphasizes the durability entailed by writing. As he explains in relation to the Charter and Fundamental Constitutions of Carolina, present majorities cannot abrogate the obligations that the proprietors assumed through them, partly because these obligations inure to the benefit of future generations as well.²¹⁵ Writing therefore imports, for Defoe, a new level of constitutional commitment.

A focus on durability leads to the question of what exactly endures. One answer insists that the U.S. Constitution memorializes in writing a particular social compact. According to this argument, the American Revolution reduced the colonies to a state of nature, from which it became possible to enter into a formalized social compact, articulated “in concrete terms.”²¹⁶ Derived from the social contract theory of John Locke, the metaphorical version of contracting that came to explain the genesis of written constitutions on both the state and federal level envisioned the people as coming together on their own behalf in order to leave the state of nature and form a society. As Gordon Wood has explained, this conception entailed that “the existence of society itself depended upon a concrete charter or constitution.”²¹⁷ Although contractual reasoning had been employed during the colonial period to explain the mutual obligations that the King and colonists owed each other, the form of social compact theory that held sway in late-eighteenth-century America abrogated this dualistic model and replaced it with a single source of authority—that of the people.²¹⁸ If colonial charters were grants from the

²¹⁴ Rubinfeld, *Reading the Constitution as Spoken*, *supra* note 213, at 1144.

²¹⁵ See *supra* note 115 and accompanying text.

²¹⁶ Matthew Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 69 (2003). In his article, Harrington relies on Justice William Patterson’s statements about the written constitution in *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795), maintaining that “Paterson’s formulation of the role of a written constitution is significant . . . [because] it confirms the view that American constitutions are different from the English in that they are explicit social compacts, agreed to by ‘the people themselves’ at a definite and fixed time.” *Id.* at 71. See also GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1998) (1969), at 282-91 (explaining the transition in American thought to the notion of a social compact entered into by a people who had been thrust into the state of nature).

²¹⁷ See WOOD, *supra* note 216, at 288.

²¹⁸ See *id.* at 268-73 (describing the “contract of rulers and ruled” between the English King and American subjects under which “protection and allegiance became the considerations”); *id.* at 282-91 (explaining the new version of contract theory that supervened).

King in favor of the people, the Constitution itself constituted “the *charter or compact of the whole people.*”²¹⁹

The perceived need for formalization of the contract emanated out of increasing distrust of the unchecked exercise of legislative power after 1776.²²⁰ Having objected for so long to the abuse of the King’s power, post-revolutionary Americans were obliged to rediscover the problems that legislative authority itself could generate. Thomas Tucker’s 1784 South Carolina pamphlet “Conciliatory Hints,” which Leslie Friedman Goldstein has argued represents the first expression of the need for a written constitution to check legislative power, explains the nature of the social compact or covenant embodied in a constitution deserving of the name, then elaborates how such a constitution should be constructed so as to set enforceable limits upon legislative power.²²¹ As Tucker wrote of the constitutional compact:

In a true commonwealth or democratic government, all authority is derived from the people at large The constitution is a social covenant entered into by express consent of the people, upon a footing of the most perfect equality with respect to every civil liberty. . . . No man has surrendered any portion of his natural freedom, except the liberty of refusing to contribute his equal share of personal and pecuniary service for the common benefit. This he gives up in exchange for the valuable consideration of receiving protection both in person and property against the

²¹⁹ *Id.* at 284, quoting Thomas Paine.

²²⁰ See Jack N. Rakove, *Once More into the Judicial Breach*, 72 GEO. WASH. L. REV. 381, 383 (2003) (“Why, after all, did Americans come to think of a written constitution in such exalted terms? There are multiple answers one could give to this question. But high on any historically grounded explanation of this process must lie the recognition that American constitutionalism, in its formative period, was shaped by an adverse reaction to the received doctrine of legislative supremacy that was part of the legacy of English constitutionalism. That reaction, however, was driven less by an intellectual repudiation of the pre-1776 assertion of parliamentary authority over America than by a new consideration of the uses to which legislative power could be put. That consideration became evident only after independence, as American legislatures converted this general principle into a working description of how republican governments would actually operate.”); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999) (noting the decline in faith in the legislature and increasing faith in the judiciary in the 1780s); Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51 (1986) (describing a movement during this period away from the idea that the legislature can be considered equivalent to the people).

²²¹ See Goldstein, *supra* note 220, at 61-62, 64 (discussing Tucker); GORDON WOOD, *supra* note 216, at 280-82 (treating Tucker).

evil disposed part of his fellow citizens or a foreign enemy, and of partaking the advantages of all civil regulations.²²²

This account positions the people both as the source of obligation and as the ones obliged. Nor can elected representatives exceed the boundaries pre-ordained by the constitution. Generally, Tucker explains, the people act through representatives, who are “invested with . . . certain powers.”²²³ With respect to these legislators, Tucker maintains that:

Whilst they confine themselves within the limits prescribed, their act is the act of the people. But when they exceed their bounds and violate the conditions of their appointment, their acts are no longer binding, and they are accountable to their constituents for a traitorous abuse of trust. But the terms of the compact or constitution should be so contrived, as to provide a remedy, in all such cases, without outrage, noise, or tumult. If tumultuous measures are necessary to procure redress, in any case of grievance whatever, it is owing to a fault in the original compact.²²⁴

Thus the terms of the constitutional compact, when well formed, both curb legislative over-reaching and obviate the need for the people to resort to revolutionary solutions when confronted with violations of the social compact. The written constitution thus provides a substitute for revolution, just as did judicial review in its early incarnations.²²⁵

For Defoe, the Charter and Fundamental Constitutions of Carolina likewise represent distinctively written social contracts, ones that modify the bilateral structure typically identified with early colonial charters and associated with the constitutional contractarianism thought to govern relations between the King and his subjects, and place more emphasis on writing than earlier social contract theory. On the one hand, in the *Case of Protestant Dissenters*, Defoe argues for benefits to the colonists based upon the Charter and Fundamental Constitutions that do not simply depend upon the colonial proprietors’ protection of the colonists’ rights.²²⁶ Through these arguments, the colonists are constructed in a fashion that renders them predecessors to the “people” of the American republic. Although they have not, on Defoe’s account, joined together to create a compact *ex nihilo*, they are the

²²² Philodemus [Thomas Tudor Tucker], *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, in Charles S. Hyneman & Donald S. Lutz eds., *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805*, vol. 1, at 606, 613-14.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See Wood, *supra* note 220, at 796-99; SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 74 (1990).

²²⁶ See *supra* notes 94-115 and accompanying text.

recipients of the privileges provided by several compacts through their individual and successive agreements to emigrate to the Carolinas, and, therefore, derive their rights in a more permanent and inalienable form than if these rights were simply granted directly to them by the King.

Similarly, and even more radically, in his *History of the Pyrates*, Defoe provides an account of the social compact among the pirates memorialized in a set of “articles,” a quasi-constitutional document that details the sailors’ rights and obligations and also structures the political community in which they partake.²²⁷ In discussing these articles and the formation of political authority based upon them, Defoe explains that, although one individual is elected captain and entrusted with leading the expedition, he does not thereby assume an unlimited executive power but is only delegated the amount of capacity that the articles have deemed advisable.²²⁸

Defoe also modifies seventeenth-century social contract theory significantly by foregrounding the role of writing. Even constitutional contractarianism, which had posited that the King’s coronation oath to abide by the laws of the realm bound him to respect certain fundamental rights of his subjects, relied on the sovereign’s oral rather than written representations.²²⁹ Defoe instead emphasizes the actual text of the quasi-constitutional documents and insists upon its importance.

Taking up a prevalent seventeenth-century analogy between the marital and social contracts, Defoe places a similar priority upon the written marriage contract in *The Farther Adventures of Robinson Crusoe*. In this context, the merit of writing appears to consist in its ability to bridge disparate religious traditions and obviate the necessity for a ceremony based upon one rather than another. If the ritual structure and even efficacy of the speech act emanates from particular customary traditions, writing, for Defoe, enables a free-floating formality that does not depend for its success on the presence of ambient cultural conditions other than literacy.

Defoe’s social contractarianism, like that of the Founding generation, also emanates largely out of an effort to limit exercises of legislative power. Many of the struggles of the seventeenth century, from King James I’s arguments for a status above the law, to the English Civil War, to the Glorious Revolution, had involved royal attempts to assert supremacy and the resistance posed against this effort by the judiciary, Parliament, or the people. By the time of Defoe’s major writings in the early eighteenth century, however,

²²⁷ See *supra* notes 188-201 and accompanying text.

²²⁸ See *supra* note 181 and accompanying text.

²²⁹ See *supra* notes 99-100 and accompanying text.

Parliamentary sovereignty had virtually been established. Defoe, like some at the Founding moment, appears to have harbored doubts about the merits of endowing the legislature with power to this extent. As a religious dissenter himself, Defoe was concerned, in particular, with the potential for legislatures to oppress members of religious minorities. A social contract embodied in a written constitution therefore emerges, for him, as a valuable limitation upon the scope of Parliamentary power.

Unlike many contemporary scholars who espouse a social contractarian vision of the U.S. Constitution, however, Defoe did not derive a specific method of interpretation from the fact of writtenness. Michael Stokes Paulsen, among others, reads Chief Justice Marshall's argument in *Marshall* and its notion of written constitutionalism as "impl[y]ing] a particular methodology of constitutional interpretation: originalist textualism."²³⁰ Paulsen derives this conclusion from Marshall's insistence that the Constitution is supreme; according to Paulsen's interpretation, "the whole idea that the Constitution is supreme . . . presupposes that there is some objective meaning to the Constitution that stands on its own, apart from the interpretations or applications of that document by any particular actor. The Constitution means what it means."²³¹ This objective meaning, Paulsen assumes, can be ascertained by applying an originalist textualist method.²³²

Defoe, by contrast, provides few comments on interpretive methods, except insofar as he frequently advocates comparing the texts of a quasi-constitutional document with the legislation that supposedly conflicts with it.²³³ This procedure, he presupposes, will lead to an accurate assessment of whether a particular law has, in fact, been constitutionally passed. The notion that one could compare the language of two documents and arrive at a conception of their compatibility does, of course, imply the possibility of deriving some meaning from the texts; but this meaning does not necessarily appear determinate for Defoe. In his *General History of the Pyrates*, one of the rare works in which he treats legal interpretation, Defoe describes procedures for evaluating the meaning of the constitutive articles in cases of doubt. Although he disparages legalistic quibbling, and describes the allotment of interpretive authority to the community itself, in the form of juries composed of a collection of pirates, Defoe acknowledges that the meaning of the quasi-constitutional texts may be subject to interpretation. Likewise, in a 1714 pamphlet, he gestures towards

²³⁰ Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2725 (2003).

²³¹ *Id.* at 2739.

²³² *Id.* at 2740.

²³³ See *supra* notes 117-119 and accompanying text.

considering the “spirit” rather than the “letter” of a law, and paraphrases its postulates in such a manner as to ask whether its general thrust, rather than its particular language, is compatible with the earlier Act of Toleration.²³⁴ Legal interpretation is not, therefore, entirely literalist according to Defoe’s account, nor will the import of legal provisions always be self-evident.

Those whom Defoe assigns the task of interpreting are also multiple. Some scholars today, following Marshall, insist that the written nature of the U.S. Constitution of necessity implies judicial review.²³⁵ Although the *Case of Protestant Dissenters* is presented in the context of an appeal to the Privy Council, Defoe does not insist on judicial review *per se* and instead places this practice within the broader field of constitutional interpretation.²³⁶ For Defoe, the binding nature of a written agreement entails not only that the judiciary or the people can acknowledge the violation of particular terms, but even that the original parties should recognize when they have failed to conform to their obligations. Thus, in the novel *Roxana*, a couple engage in a “private” marital agreement—despite the fact that both are already married to other people—that would probably never be upheld in a judicial tribunal but nevertheless obliges the respective parties.²³⁷ When this type of self-enforcing version of the written agreement fails, however, Defoe does view other actors in the political arena as capable of intervening; hence, he appeals first to Parliament in *Party-Tyranny*

²³⁴ See *supra* note 119 and accompanying text.

²³⁵ For a contemporary argument for judicial review based, in part, upon the written nature of the U.S. Constitution, see Sai Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 914-21 (2003). Jeremy Waldron has, by contrast, contended that the institution of judicial review is separable from the presence of a written constitution. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366 (2006) (“there is a distinction both at the cultural and at the institutional level between a commitment to rights (even a written commitment to rights) and any particular institutional form (e.g., judicial review of legislation) that such a commitment may take”).

²³⁶ As Michael Warner has argued, Marshall’s views on this point may not even have accorded with those prevalent at the time of ratification. According to Warner,

The republican ideology of print eroded, and an official hermeneutics emerged. . . .

Between the legitimating drama of sovereignty that gave rise to the Constitution and the official hermeneutics that resulted from it, the meaning of the document’s writtenness had been transformed. The transformation was not recognized as such, but was regarded as a restatement of republican principles. A good example is John Marshall’s decision in *Marbury v. Madison*, where he appeals to the Constitution’s writtenness in order to argue that hermeneutics gives the law exactly in the act of receiving the law.

WARNER, THE LETTERS OF THE REPUBLIC, *supra* note 31, at 114.

²³⁷ See *supra* note 201.

and then to the Privy Council in the *Case of Protestant Dissenters* to invalidate the acts of the colonial legislature in the Carolinas and describes the pirates who had created their articles as judging their comrades in accordance with them. Judicial review, while encompassed within Defoe's scheme, therefore remains a component of a broader range of interpretive activities; while judicial review is certainly contemplated by Defoe's work, it does not furnish the exclusive or even predominant method of enforcing written constitutions.

V CONCLUSION

In political tracts and literary works from the early decades of the eighteenth century, Daniel Defoe prefigured many of the arguments for written constitutionalism that would subsequently emerge as salient in the context of the U.S. Constitution. Rather than associating written constitutionalism ineluctably with judicial review or a particular type of interpretation, however, Defoe instead envisioned a written constitution as one that is capable of embodying a particular form of social compact. Some aspects of the myth of written constitutionalism that Defoe emphasized have waned in significance. Simultaneously, Defoe's most famous account of the social compact, *Robinson Crusoe*, has been the subject of almost innumerable adaptations. By returning to the original of the myth of written constitutionalism, we can best discern the version appropriate for today—and the adaptation of *Robinson Crusoe* for our time.