

7-18-2013

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Recommended Citation

Chafetz, Josh, "'In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation': Late Tudor Parliamentary Relations and their Early Stuart Discontents" (2013). *Cornell Law Faculty Publications*. Paper 587.
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Articles

“In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation”: Late Tudor Parliamentary Relations and Their Early Stuart Discontents

Josh Chafetz*

INTRODUCTION

It is one of the most well-known incidents in English constitutional history. On December 1, 1641, the increasingly restive House of Commons presented Charles I with the so-called Grand Remonstrance, a list of 206 enumerated grievances, encompassing the entirety of his reign to date.¹ The King was not amused. On January 3, 1642, he accused five

* Associate Professor of Law, Cornell Law School. This Article was originally prepared as part of the lecture series in celebration of the centenary of the Elizabethan Club of Yale University, and I am grateful to Justin Zaremby and Steve Parks for inviting me to deliver the lecture and to the audience at the Yale Law School for helpful questions and comments. I am also grateful to Greg Alexander, Tom McSweeney, Bernie Meyler, Aziz Rana, Josh Stein, and Catherine Roach for helpful and thought-provoking comments on earlier drafts. Arthur Kutoroff provided excellent research assistance. Any remaining errors or infelicities are, of course, my own.

1. 1 JOHN RUSHWORTH, HISTORICAL COLLECTIONS. THE THIRD PART; IN TWO VOLUMES.

members of the House of Commons and Lord Kimbolton—all leaders of the opposition to the Crown—of treason and sought to have them tried before the House of Lords. Even David Hume, whose *History of England* is generally charitable toward Charles, refers to this act as “[a]n indiscretion, to which all the ensuing disorders and civil wars ought immediately and directly to be ascribed.”² The House of Commons immediately passed a resolution authorizing armed resistance to Crown officers attempting to arrest any member of Parliament.³ The King demanded that the House of Commons turn over the accused members; the Commons replied that they would think about it and get back to him.⁴

The House met the next day, with the five accused members in attendance. The Commons Journal entry for that day ends abruptly with the following notation:

His Majesty came into the House; and took Mr. Speaker’s Chair.

“Gentlemen,”

“I AM sorry to have this Occasion to come unto you[.]”

* * * *

Resolved, upon the Question, That the House shall adjourn itself till To-morrow One of Clock.⁵

One can only imagine the scene of chaos that must have overwhelmed the poor Journals Clerk. Fortunately, his assistant, the indispensable John Rushworth, provides the details in his *Historical Collections*. It seems that, shortly after assembling for the day, the House learned that Charles was marching on Westminster with a large guard.⁶ Hoping to avoid violence, the House ordered the five accused members to leave; soon thereafter, the King and his armed guard threw open the doors to the chamber.⁷ Not seeing the accused members in attendance, he ascended to the Speaker’s Chair and harangued the Commons.⁸ When he demanded that the Speaker tell him where the members had gone, the Speaker refused, insisting, “I Have neither Eyes to see, nor Tongue to speak in this place, but as the House is pleased to direct me.”⁹

CONTAINING THE PRINCIPAL MATTERS WHICH HAPPENED FROM THE MEETING OF THE PARLIAMENT, NOVEMBER THE 3D. 1640 TO THE END OF THE YEAR 1644, at 437-51 (London, Chiswell & Cockerill 1692) (reprinting the Grand Remonstrance).

2. 5 DAVID HUME, *THE HISTORY OF ENGLAND, FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION IN 1688*, at 364 (Liberty Fund 1983) (1778).

3. 2 H.C. JOUR. (1642) 366.

4. More precisely, they replied that “this House will take it into serious Consideration; and will attend his Majesty with Answer, in all Humility and Duty, with as much Speed as the Greatness of the Business will permit.” *Id.* at 367.

5. *Id.* at 368 (elision in original).

6. 1 RUSHWORTH, *supra* note 1, at 477.

7. *Id.*

8. *Id.* at 477-78.

9. *Id.* at 478.

As the King left the House in a huff, members were heard to yell, “Priviledge! Priviledge!”¹⁰ And as the King walked the streets of London the next day, commoners were heard to yell “Priviledges of Parliament! Priviledges of Parliament!”¹¹ Within a week, Charles left London—the next time he would see it, he would be a prisoner. Several days later, the House of Commons declared that anyone who arrested a member “by Pretence or Colour of any Warrant issuing out from the King only, is guilty of the Breach of the Liberties of the Subject, and of the Privilege of Parliament, and a publick Enemy to the Commonwealth.”¹² Charles soon raised his standard at Nottingham; the Battle of Edgehill took place that October.

This chain of events stands in rather marked contrast to previous great constitutional conflagrations. Parliament’s origins lie in the practice of the King’s taking “counsel with his great men” in order to “promote royal ends and policies through cooperative discussion.”¹³ This group of royal councilors was originally undifferentiated—although different advisors might attend at different times, it was still essentially one body.¹⁴ Over time, this group of “great men” expanded to include representatives of the counties and the towns,¹⁵ and by the end of the thirteenth century, Parliament had a clear institutional identity, distinct from other mechanisms of royal governance (such as the council and the law courts).¹⁶ As Parliament developed a more distinct and well-defined institutional identity, it began to exercise more power.¹⁷ Still, there can be

10. *Id.*

11. *Id.* at 479.

12. 2 H.C. JOUR. (1642) 373.

13. J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327*, at 1 (2010); *see also* JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 22 (1999) (“The acts of those parliaments were acts of the King, and their authority was his authority, fortified by counsel and consent.”); A.F. POLLARD, *THE EVOLUTION OF PARLIAMENT* 34 (2d ed. 1926) (“Parliament . . . seems to be at first simply a talk or parley of the [King’s] council in full session.”).

14. *See* CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 16-17 (1910) (noting the impossibility of “draw[ing] any definite line between *Parliamentum*, *Curia*, *concilium ordinarium*, *concilium privatum*, *magnum concilium*, *commune concilium*”).

15. *See* MADDICOTT, *supra* note 13, at 198-204 (noting that, largely as a result of Magna Carta’s requirement of consent to taxation, shire knights began to be more frequently summoned to Parliaments beginning in the 1220s); *id.* at 204-05 (noting the thirteenth-century summoning of burgesses to Parliament).

16. D.A. CARPENTER, *THE REIGN OF HENRY III*, at 382 (1996) (noting that the “first ‘official’ use of the term parliament” occurs in 1236); *see also id.* at 381 (declaring “parliament in general and the commons in particular” to be “creatures of the thirteenth century”); MADDICOTT, *supra* note 13, at 165 (“By 1258 parliament had gone some way towards becoming an institution.”). The same process of role-differentiation can also be seen from the point of view of other institutions. *See* Thomas McSweeney, *English Judges and Roman Jurists: The Civilian Learning Behind England’s First Case Law*, 84 TEMP. L. REV. 827, 832-33 (2012) (noting the efforts by the jurists and clerks of the royal courts in the mid-thirteenth century to differentiate their functions and roles from those of other parts of the royal administration).

17. *See* MADDICOTT, *supra* note 13, at 169 (noting the mid-thirteenth century emergence of Parliament “as a political force”).

no doubt that it served primarily as an engine of *royal* government. As Pollard describes Parliaments under Edward I, “He wanted money and they wanted redress of grievances; but their petitions were local or personal, and the initiative in public legislation still lay with the King and his ministers who alone possessed the knowledge, outlook, and circumspection essential to the comprehension of national problems.”¹⁸ Or, in Jeffrey Goldsworthy’s words, “[t]he acts of those parliaments were acts of the King, and their authority was his authority, fortified by counsel and consent.”¹⁹

On those few occasions—radical caesurae in English constitutional history—on which royal government broke down, it was the higher nobility, not the knights and burgesses, who stepped forward. The 1258 rebellion against Henry III was led by the baronial class;²⁰ only afterwards did Simon de Montfort (himself an earl) summon representatives of the shires to discuss the state of the kingdom.²¹ Likewise, as Maddicott notes, opposition to Edward I’s expensive foreign adventuring “was headed by the magnates, naturally enough.”²² And when opposition to his son, Edward II, began to build, it was the lords who took the lead in exiling his favorites, using the commoners simply as political cover against the charge of a baronial coup.²³ Again, in 1327, “as was only to be expected, the initiators of Edward’s deposition were not the commons but the lords,” who once more looked to the knights and burgesses simply to provide political cover,²⁴ a pattern that repeated yet again when Richard II was deposed in favor of Henry IV in 1399.²⁵ Similarly, the Parliaments summoned during the Wars of the Roses were little more than tools used by whomever summoned them to attain the rival claimant and announce their patron’s right to the throne.²⁶ It is true enough that Henry Tudor summoned a Parliament in 1485 to pass an Act of Succession, ratifying his right to rule as Henry VII,²⁷ but we should be careful not to be overly legalistic about it. Henry VII was King when Richard’s crown was placed

18. A.F. POLLARD, *PARLIAMENT IN THE WARS OF THE ROSES* 7 (1936); see also Simon Payling, *The Later Middle Ages*, in *THE HOUSE OF COMMONS: SEVEN HUNDRED YEARS OF BRITISH TRADITION* 48, 55 (Robert Smith & John S. Moore eds., 1996) (noting that the “chief importance” of parliamentary power over taxation lay in the fact that it gave the commons an opportunity to present petitions and seek redress of grievances *from the Crown*).

19. GOLDSWORTHY, *supra* note 13, at 22; see also *id.* at 29.

20. See CARPENTER, *supra* note 16, at 183-97.

21. See *id.* at 392-93.

22. MADDICOTT, *supra* note 13, at 308.

23. *Id.* at 337.

24. *Id.* at 359-60.

25. See GOLDSWORTHY, *supra* note 13, at 31 (noting that, in the depositions of Edward II and Richard II, “the responsible magnates ensured that the supposed assent of the three estates of the realm . . . was formally recorded”).

26. See POLLARD, *supra* note 18, at 10-11.

27. GOLDSWORTHY, *supra* note 13, at 32.

on his head at Bosworth;²⁸ parliamentary assent was an afterthought.

Writing in the midst of the Wars of the Roses, Sir John Fortescue referred to the English Crown as exercising *dominium politicum et regale*—political and royal lordship.²⁹ This was meant to differentiate it from the French Crown, which exercised simple *dominium regale*—royal lordship.³⁰ The former required consent to taxation, whereas the latter did not.³¹ The Monarch's position in England was not quite the Monarch's position in France; Parliament was an essential cog in the governance of the English realm. But it was still first and foremost the Monarch's realm. The King's lordship may be political as well as royal, but lordship it remained.³² Parliament was still distinctly secondary; its job was to "advise and assist [the King] in transacting the affairs of the realm."³³ As Simon Payling has noted, "The late medieval House of Commons certainly did not see itself as engaged in a struggle with the Crown for sovereignty, or even for a share in the formulation and execution of policy."³⁴

The question, then, is what happens between 1485 and 1642? That is, how do we get from a world in which a civil war is fought amongst the baronial class and the Commons is used simply as a tool to confirm the *fait accompli* of Tudor victory to a world in which the Commons leads the revolt against the Stuart Crown? I should be clear here about the nature of my inquiry: I am not asking about the "causes" of the English Civil War.

28. Although there is debate among historians as to where precisely on the battlefield Richard's circlet was found, there seems to be general acceptance that it was, in fact, found at Bosworth Field and placed on Henry's head after the battle. Compare S.B. CHRIMES, *HENRY VII* 49 n.1 (1999) (arguing that the circlet was found "amidst the spoils of the battle" but not, as later mythology had it, in a hawthorn bush), with CHARLES ROSS, *RICHARD III* 225 n.52 (1981) (arguing that the hawthorn bush would not have become so central to Tudor iconography were the story not true). Shakespeare, of course, does not tell us where the crown was found, but shows us Lord Stanley crowning Henry with it: "Lo, here this long-usurpèd royalty / From the dead temples of this bloody wretch / Have I plucked off, to grace thy brows withal. / Wear it, enjoy it, and make much of it." WILLIAM SHAKESPEARE, *RICHARD III* act 5, sc. 5, ll. 4-7 (Yale Univ. Press ann. ed. 2008). Henry's right to rule is thus figured as a consequence of the brute fact of military victory, not of the Act of Succession.

29. SIR JOHN FORTESCUE, *THE GOVERNANCE OF ENGLAND: OTHERWISE CALLED THE DIFFERENCE BETWEEN AN ABSOLUTE AND A LIMITED MONARCHY* 109-16 (Charles Plummer ed., Oxford Univ. Press rev. ed. 1885) (c. 1471) [hereinafter FORTESCUE ORIGINAL]. For a modern translation of the text, see SIR JOHN FORTESCUE, *The Governance of England*, in *ON THE LAWS AND GOVERNANCE OF ENGLAND* 81, 83-90 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (c. 1471) [hereinafter FORTESCUE TRANSLATED].

30. FORTESCUE ORIGINAL, *supra* note 29, at 113; FORTESCUE TRANSLATED, *supra* note 29, at 87.

31. FORTESCUE ORIGINAL, *supra* note 29, at 109; FORTESCUE TRANSLATED, *supra* note 29, at 83.

32. As Alan Cromartie has persuasively argued, the value of consent for Fortescue was not inherent—that is, not because of some theory of representation—but rather as "a sign that kings had taken appropriate counsel." ALAN CROMARTIE, *THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450-1642*, at 24 (2006). See also *id.* at 27-28, 30 (further elaborating on Fortescue's understanding of the role of consent). Parliamentary consent was thus a device that allowed the monarch to make better decisions for his kingdom, not a device for sharing sovereign power.

33. GOLDSWORTHY, *supra* note 13, at 32.

34. Payling, *supra* note 18, at 48.

A voluminous literature on that topic already exists, pointing to political,³⁵ religious,³⁶ economic,³⁷ social,³⁸ and cultural³⁹ factors that led to the revolt, and this Article has no new causal candidates to put forward.⁴⁰ Rather, it is focused on the following institutional question, a question that has not received nearly as much attention: What allowed the House of Commons to serve as the locus of discontent? How were the members of the House of Commons able to develop the *esprit de corps*, the constitutional self-confidence, and the justificatory language that enabled them to take the lead in a war against Charles I?⁴¹

My argument here is that, to answer this question, we must attend carefully to developments in matters of institutional procedure, beginning roughly in the middle of Henry VIII's reign. These developments might individually seem minor and purely internal to Parliament, which may well explain why they have been largely overlooked by scholars, who have seen the late Tudor period as one of monarchical domination of Parliament. But this Article contends that, in the aggregate, these procedural developments allowed the House of Commons to begin to understand itself as a key constitutional actor in its own right—that is, they allowed it to begin to see itself as an essential element in the

35. See, e.g., CROMARTIE, *supra* note 32, at 3 (“This book sets out to recreate the intellectual world in which the aspirations of the godly fitted into a *political* solution to the crisis of the Stuart monarchy.”); Noah Millstone, *Evil Counsel: The Propositions to Bridle the Impertinency of Parliament and the Critique of Caroline Government in the Late 1620s*, 50 J. BRIT. STUD. 813, 815 (2011) (“[P]roblems of constitutional change and tyranny formed a critical part of early Stuart political life; in other words, they were native categories.”); see also William H. Dray, *J.H. Hexter, Neo-Whiggism and Early Stuart Historiography*, 26 HIST. & THEORY 133, 139-43 (1987) (discussing historian J.H. Hexter's political account of the Civil War).

36. See, e.g., JOHN MORRILL, THE NATURE OF THE ENGLISH REVOLUTION 68 (1993) (“The English civil war was not the first European revolution: it was the last of the Wars of Religion.”); S.K. Baskerville, *Puritans, Revisionists, and the English Revolution*, 61 HUNTINGTON LIBR. Q. 151, 153 (1998) (“Only by confronting the content of religious zeal squarely can we begin to see the radicalism of the English Revolution and of Puritanism within it.”).

37. See, e.g., Christopher Hill, *A Bourgeois Revolution?*, in THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 109, 111 (J.G.A. Pocock ed., 1980) (arguing that the English Civil War was “made possible by the fact that there had already been a considerable development of capitalist relations in England”); Christopher Hill, *Introduction* to THE GOOD OLD CAUSE: THE ENGLISH REVOLUTION OF 1640-1660, at 19, 20-31 (Christopher Hill & Edmund Dell eds., 2d ed. 1969) (summarizing the economic causes of the Civil War).

38. See, e.g., H.R. TREVOR-ROPER, THE GENTRY 1540-1640, at 26-53 (1960) (describing the Civil War in terms of the Court-Country divide); Conrad Russell, *Why Did Charles I Fight the Civil War?*, HIST. TODAY, June 1984, at 31, 32-33 (describing the Civil War as a baronial rebellion akin to earlier instances of the magnates rising against the crown).

39. See, e.g., Bernadette Meyler, “*Our Cities Institutions*” and the Institution of the Common Law, 22 YALE J.L. & HUMAN. 441, 442 (2010) (suggesting that Jacobean drama played a role in “deliberat[ions] about legal and political arguments”).

40. Conrad Russell, whose groundbreaking study set out to match specific Civil War “effects” to a myriad of causes, began by noting that “we [historians] have certainly spilt enough ink on the causes of the English Civil War.” CONRAD RUSSELL, THE CAUSES OF THE ENGLISH CIVIL WAR I (1990).

41. Because this Article focuses on events culminating in 1642, I do not here discuss the later power struggle between the House of Commons and Cromwell's New Model Army, leading in 1648 to Pride's Purge and the Rump Parliament.

governance *of the realm*, rather than as an element of *royal* governance. When the first two Stuart monarchs attempted to roll back the gains that the House had made in these areas under Henry VIII and Elizabeth, the House fought back, all the while continuing to hone its sense of its constitutional place.⁴² The issues of institutional procedure discussed in this Article fall under the general heading of parliamentary privilege.⁴³ The best-known privilege of Parliament is freedom of speech and debate—and it is not coincidental that the practice of demanding this privilege in the Speaker’s petition to the Crown at the beginning of a new parliamentary session dates to the reign of Henry VIII (1541, to be precise).⁴⁴ In this Article, however, I intend to focus on two lesser-studied elements of parliamentary privilege in this period: the House’s power over its own composition and its power to hold outsiders in contempt of Parliament.

Part I traces the transformation of these powers from tools of royalist government to tools of Parliament in its own right. This transformation took place during the late Tudor period—that is, roughly the period from the last decade of Henry VIII’s reign through the end of Elizabeth’s. Part II traces the early Stuart reaction against and dismissal of these late Tudor precedents, including James I’s dismissal of an Elizabethan precedent with the line that gave this Article its title.⁴⁵ But the institutional self-confidence that it had gained in the course of winning its privileges from Henry VIII and Elizabeth allowed the House of Commons to push back with increasing fortitude against James’s and Charles’s attempts at

42. In writing this, I am well aware of recent controversies over the extent to which most members of the House were concerned with local affairs, to the exclusion of great matters of state. Compare Glenn Burgess, *On Revisionism: An Analysis of Early Stuart Historiography in the 1970s and 1980s*, 33 *HIST. J.* 609, 619–20 (1990) (noting that “local studies” of mid-seventeenth century England have shown that “[t]he ‘political nation’ (divided into Royalists and Parliamentarians) [consisted of] two tiny groups of zealots struggling to overcome the apathy and indifference of everyone else For many of the English gentry the major aim in the 1640s was to preserve the local community, their country, from disruption”), with CROMARTIE, *supra* note 32, at 219–20 (arguing that revisionist scholarship has both overstated the provincialism of members of Parliament of the era and erroneously treated provincialism as apolitical), and LAWRENCE STONE, *THE CAUSES OF THE ENGLISH REVOLUTION, 1529–1642*, at 168–69 (rev. ed. 2002) (arguing both that local leaders had numerous attachments with the government at London and that local elites were deeply concerned with national politics). But even if we take the revisionist claims at face value and read the grand actions in the House of Commons as reflecting only the interests of a dedicated few who made such issues their own, it is still no less important to ask why and how they were able to situate this opposition *in the House*. And how did their arguments for authority in the House come to be so compelling that people on the street in London chastised the King for his infringement on parliamentary privilege? See *supra* text accompanying note 11. These are the questions that I seek to answer here.

43. On parliamentary privilege generally, see JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* (2007); and CARL WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* (1921).

44. See CHAFETZ, *supra* note 43, at 70; F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 242 (H.A.L. Fisher ed., Cambridge Univ. Press 1963).

45. See *infra* text accompanying note 97.

retrenchment. The Conclusion completes the circle, returning to Charles I's flight from London, and points toward the lasting consequences of this chain of events.

I. THE LATE TUDORS

A. *Composition of the House*

When Parliament's role was merely to assist the King in governing his realm, it made sense that any questions about Parliament's composition would be settled by the King, either personally or via his designated agents.⁴⁶ And that is precisely what we see in early disputes over parliamentary elections. Thus, in 1319, Mathew de Cranthorn petitioned the King's Council, claiming that he had been elected a knight of the shire for the county of Devon, but had been deprived of his seat by a false return by the sheriff. The Council referred the petition to the Court of Exchequer—that is, to the King's justice—for adjudication.⁴⁷ In 1384, Thomas Camoyes, a minor noble, was returned a knight of the shire for Surrey. Being a peer of the realm, he was ineligible, and his election was accordingly voided by Richard II and his Council, which then issued a writ for the election of a new knight of the shire.⁴⁸ And in 1413, Henry IV actually turned a disputed Commons election over to the “discretions” of the Lords.⁴⁹ Nor was royal control over parliamentary composition limited to entering the House; those seeking to *leave* parliamentary service had to seek royal permission, which was not infrequently denied.⁵⁰

But this state of affairs began to change in the mid-sixteenth century. In 1553, during Mary's reign, the House of Commons took an active role in determining an election result for the first time. Alexander Nowell was returned as the member for the borough of West Looe in Cornwall, but his election was challenged on the grounds that he was a church official and therefore ineligible.⁵¹ A committee, appointed by the House to investigate, reported back that he was, indeed, ineligible; the House accepted the

46. See G.R. ELTON, *THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY* 253 (1960) (noting, of parliamentary privilege generally, that it was “intended to enable an institution which the king required for his purposes to do the work which he demanded from it”).

47. JOHN GLANVILLE, *REPORTS OF CERTAIN CASES, DETERMINED AND ADJUDGED BY THE COMMONS IN PARLIAMENT, IN THE TWENTY-FIRST AND TWENTY-SECOND YEARS OF THE REIGN OF KING JAMES THE FIRST*, at xi-xii (London, Baker & Leigh 1775). I thank Tom McSweeney for help with the translation.

48. *Id.* at xvi-xvii. I again thank Tom McSweeney for help with the translation.

49. *Id.* at xx-xxi.

50. See Betty Kemp, *The Stewardship of the Chiltern Hundreds*, in *ESSAYS PRESENTED TO SIR LEWIS NAMIER* 204, 205 (Richard Pares & A.J.P. Taylor eds., 1956); Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 *DUKE L.J.* 177, 185 (2008).

51. 3 S.T. BINDOFF, *THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS, 1509-1558*, at 28-29 (1982).

Committee's report; and the Speaker asked the Queen to issue a writ for a new election.⁵² Whether or not she in fact ordered a new election has been lost to history,⁵³ but the Commons were just getting started. It was during Elizabeth's reign that the jurisdictional clash over election disputes really came to the fore.

Elizabeth's fourth Parliament, elected in 1572, did not meet between 1576 and 1581. In those years, naturally, some members had died, become seriously ill, or gone abroad in the Queen's service. In preparation for the 1581 session, the Lord Chancellor accordingly issued writs of election to choose replacements. When the House convened, however, it was moved that "divers Persons being newly returned in the Places of others, yet living, were not, or ought to be accounted, Members of this House."⁵⁴ In other words, the motion disputed the right of the Crown to declare vacant the seats of those elected members who were still alive. The newly returned claimants were asked to step aside while their membership was debated.⁵⁵ Supporters of their right to sit argued that "it sufficeth to make suggestion in the Chancery, and to procure a Writ thereupon for a new Election. And to question this was to discredit the Lord Chancellor and to scandalize the Judicial Proceedings of that Court."⁵⁶ Here, then, we have a jurisdictional clash. Those who wanted to debate the claimants' right to sit thought, relying on the Nowell precedent, that such things were examinable in the House. Those who disagreed thought that the mere fact of an election writ issued out from Chancery was sufficient—that is, they thought that, once royal officials had made clear how they wished the matter to be settled, the House should fall meekly in line. It was the partisans of the House's own power who carried the day: after receiving a committee report, the House readmitted those members who were still living and voided the election of their replacements.⁵⁷ The House also issued a strong rebuke to the Lord Chancellor, resolving that, "during the time of sitting of this Court, there do not at any time any Writ go out for the chusing or returning of any Knight, Citizen, Burgess, or Baron without the Warrant of this House first directed for the same to the Clerk of the Crown . . ."⁵⁸ The Commons thus asserted that they had the exclusive right to judge in matters of their own composition.

This right was put to the test a mere five years later. In the 1586 elections to Elizabeth's sixth Parliament, the county of Norfolk returned

52. *Id.*

53. *Id.*

54. 1 H.C. JOUR. (1581) 117.

55. *Id.*

56. SIMONDS D'EWES, THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH 281-82 (Paul Bowes ed., London, Starkey 1682).

57. *Id.* at 307-08.

58. *Id.* at 308.

Thomas Farmer and William Gresham as shire knights. This election was protested in Chancery, and another election writ was issued. This time, Gresham and Christopher Heydon were returned. When the House convened, it opened an inquiry into the Norfolk election.⁵⁹ Elizabeth, however, wanted to reassert her authority—via the Lord Chancellor—to resolve disputed elections, and she had the Lord Chancellor inform the House that it was “in truth impertinent” for it to consider electoral disputes, which “only belong[] to the Charge and Office of the Lord Chancellor, from whence the Writs for the same Elections issued out, and are thither returnable again.”⁶⁰ The House promptly ignored this rebuke and appointed a committee to examine the Norfolk returns;⁶¹ this committee concluded that the first election was conducted properly.⁶² Apparently, the Lord Chancellor, after consulting with some of the judges, had come to the same conclusion;⁶³ the committee wanted it known, however, that it was *its* conclusion that counted. Accordingly, it resolved that it was

prejudicial to the privilege of the House to have the same determined by others than such as were Members thereof. And though they thought very reverently of the said Lord Chancellor and Judges, and thought them competent Judges in their places; yet in this case they took them not for Judges in Parliament in this House.⁶⁴

The committee thus quite literally sought to put royal officials “in their places.” The House accepted the committee’s report and passed its own resolution stating

[t]hat it was a most perilous Precedent, that after two Knights of a County were duly Elected, any new Writ should issue out for a second Election without order of the House of Commons it self

That the discussing and adjudging of this and such like differences, only belonged to the said House

That though the Lord Chancellor and Judges were competent Judges in their proper Courts, yet they were not in Parliament.⁶⁵

Elizabeth yielded, and Thomas Farmer took his seat.⁶⁶ By the end of the sixteenth century, then, admission to the House of Commons had passed

59. GLANVILLE, *supra* note 47, at xlii-xliii.

60. D’EWES, *supra* note 56, at 393.

61. *Id.* at 396.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 397.

66. See 2 P.W. HASLER, THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS, 1558-1603, at 106-07 (1981).

from being a matter of royal judgment to a matter of parliamentary judgment.⁶⁷ Or, put differently, the Crown was no longer the legal gatekeeper to the House of Commons.⁶⁸

And, of course, gates tend to swing both ways, so it is unsurprising that the House was simultaneously asserting exclusive jurisdiction over the resignations of its members. No longer did members who wished to leave Parliament seek the permission of the Crown to do so; rather, beginning with Elizabeth's long parliament (1572-1583), they had to seek the permission of the House itself.⁶⁹ This, of course, makes perfect sense if the House now understood its members to be servants *of the House*, rather than servants of the Crown.⁷⁰

B. Contempt of Parliament and Breach of Privilege

At almost exactly the same time, this same understanding of the House of Commons as a body with a distinct and powerful constitutional identity began to assert itself in contempt of Parliament proceedings as well. The story here has a similar outline to the elections story.⁷¹ At first, because Parliament was an instrument of *royal* governance, contempt of Parliament was an offense against the Crown. Thus, in 1404, when John Sallage "emblemished and maimed even to the peril of death" the servant of a member of Parliament, Henry IV ordered Sallage to appear before the King's Bench, where he was ordered to pay double damages, plus a fine

67. Andrew Thrush suggests that the House "beat a hasty retreat" from its stand in the Norfolk election controversy when, in 1589, a committee resolved that "this House is to take notice of all Returns only in such sort as the same shall be certified unto this House by the Clerk of the Crown in the Chancery and not otherwise." D'EWES, *supra* note 56, at 430; *see also* Andrew Thrush, *Commons v. Chancery: The 1604 Buckinghamshire Election Dispute Revisited*, 26 PARLIAMENTARY HIST. 301, 302 (2007). But Thrush stopped reading too quickly, for the committee immediately went on to void the election for the borough of Appleby and to recommend the granting of a new election writ, an opinion that was "well liked of by this House." D'EWES, *supra* note 56, at 430. *See also id.* at 441 (seating a member for the Port of New Rumney despite the fact that the Clerk of the Crown had not yet certified his election). And in the midst of a 1601 election dispute, when it was inquired whether, if the returned member were not seated, a new election warrant should issue out from the Speaker of the House or from the Clerk of the Crown, "it was agreed *per omnes*, that from the Speaker." *Id.* at 624; *see also* Thrush, *supra*, at 303-04 (describing this incident). The House's practice post-1586 thus seems fully consistent with its resolution of the Norfolk election.

68. J.E. Neale succinctly summarized the stakes of this transition: "There can be no doubt as to where, by [prior] constitutional theory, jurisdiction lay. It lay with the Crown in Chancery. Equally there can be no doubt about the practical issue involved. If the Crown—through Council or Chancery, or both—could quash elections displeasing to itself and order new ones, then, when hard-driven and unscrupulous, it could take steps to exclude troublesome critics from Parliament." 2 J.E. NEALE, *ELIZABETH I AND HER PARLIAMENTS, 1584-1601*, at 184 (1957). *See also* RUSSELL, *supra* note 40, at 41 (noting fears of royal "power to control the Parliament by controlling its membership").

69. *See* Kemp, *supra* note 50, at 205; *see also* sources cited in *id.* at 205 nn.2-4.

70. Elton and Neale thus view the assertion of exclusive jurisdiction over disputed elections as evidence of the House's political maturation. *See* ELTON, *supra* note 46, at 254; 2 NEALE, *supra* note 68, at 185.

71. For more extended discussions of contempt of Parliament, *see* CHAFETZ, *supra* note 43, at 193-206; and Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1093-119 (2009).

and ransom to the Crown.⁷² And in 1433, a statute made double damages, fine, and ransom the punishments for all cases of assault upon a member of Parliament.⁷³ Indeed, it is worth noting the enacting language of this statute: “The King willing to provide for the Ease and Tranquility of them that come to the Parliaments and Councils of the King by his Commandment, hath ordained and stablished”⁷⁴ As long as the Crown was the motive force in the political state—as long as the King “ordained and stablished” laws—it made perfect sense to consider contempts against Parliament (that is, against his advisory body) as contempts against himself. Thus, the statute treats parliaments identically to councils: both are mechanisms by which subjects participate in royal governance. And the penalties for assaulting parliamentarians and councillors were not only meted out by royal justice; they also included fines and ransoms payable *to the Crown*.

But, as with jurisdiction over disputed elections, the location of the contempt power began to change in the mid-sixteenth century. The defining moment came with the arrest of George Ferrers in 1542. Ferrers was a member of Parliament from Plymouth when he was arrested in London pursuant to an action in the King’s Bench to recover a debt (for which Ferrers served as a surety).⁷⁵ Upon being notified of his arrest, the House of Commons sent its sergeant to demand his release; the jailers, however, refused to turn him over. A physical confrontation ensued, and the sergeant was forced to flee back to the House.⁷⁶ The Lord Chancellor, a Crown official, offered to arm the sergeant with a royal writ for Ferrers’s release, but, in a remarkable move, the House of Commons declined his assistance, declaring that “all commandments and other acts proceeding from the [House of Commons], were to be done and executed by their Serjeant without writ, only by shew of his mace, which was his warrant.”⁷⁷ In other words, they did not want him released because the Crown said so; they wanted him released because *they* said so.

By this point, word had gotten out that the House of Commons was on the warpath, and the jailers holding Ferrers decided to surrender him without a fight when the sergeant returned. But securing Ferrers’s release was not enough; the House also committed to prison the sheriffs and jailers who had held Ferrers and the person upon whose suit Ferrers had

72. HENRY ELSYNGE, *THE MANNER OF HOLDING PARLIAMENTS IN ENGLAND 1399-1547* (London, Richardson & Clark 1768).

73. 11 Hen. 6, c. 11 (1433).

74. *Id.*

75. 1 JOHN HATSELL, *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS; WITH OBSERVATIONS* 53 (London, Hughs 2d ed. 1785).

76. *Id.* at 53-54.

77. *Id.* at 54-55.

been arrested.⁷⁸ Special pains were reserved for the jailer who had started the physical confrontation with the sergeant—he was committed to the Little Ease dungeon of the Tower of London, a cell so small that the prisoner could not fully stretch out in any direction.⁷⁹ The House's prisoners were only released after the Mayor of London and other powerful friends made "humble suit" to the House on their behalf.⁸⁰

But the matter was not quite finished, for, in addition to being a member of Parliament, Ferrers was in the King's service.⁸¹ After the Commons had resolved the matter, freeing Ferrers on its own authority and imprisoning those who had arrested him, Henry called prominent members of the House before him:

First commending their wisdome in maintaining the Privileges of the House (which he would not have to be infringed in any point) alledged that he, being head of the Parliament, and attending in his own person upon the business thereof, ought in reason to have Privilege for him, and all his servants attending there upon him. So that if the said Ferrers had been no Burgess, but only his servant, that in respect thereof he was to have the Privilege, as well as any other. For I understand, quoth he, that you, not only for your own persons, but also for your necessary servants, even to your cooks and horse-keepers, enjoy the said Privilege And further, we be informed by our Judges; that we at no time stand so highly in our Estate Royal, as in the time of Parliament; wherein we as Head, and you as Members, are conjoin'd and knit together into one Body Politick, so as whatsoever offence or injury (during that time) is offered to the meanest Member of the House, is to be judg'd as done against our Person and the whole Court of Parliament; which prerogative of the Court is so great (as our learned Counsel informeth us) as all acts and processes coming out of any other inferior Courts, must for the time cease and give place to the highest.⁸²

Beneath the superficial pleasantries here lies a serious struggle over Parliament's role in the constitutional order. The King is attempting to reassert the House's role as his advisory body. His claim that his servants should be afforded privilege is a claim that privilege is meant to help the House *serve him*. Just as the House of Commons's rejection of the Lord Chancellor's proffered writ constituted a statement about the role of the House in the English Constitution, the King's speech constituted his rejoinder. The House asserted that it could act by itself, for itself. The

78. *Id.* at 55-56.

79. *Id.* at 55. On the Little Ease, see L.A. PARRY, *THE HISTORY OF TORTURE IN ENGLAND* 80 (1975).

80. 1 HATSELL, *supra* note 75, at 55-56.

81. See 2 BINDOFF, *supra* note 51, at 130.

82. 1 HATSELL, *supra* note 75, at 56-57.

King insisted that the House's actions were necessarily in his service.⁸³

But Henry's words notwithstanding, it was the House's deeds that set the tone for the future. Henceforth, it would be the House, and the House alone, that would punish contempt of Parliament and breach of parliamentary privilege. In doing so, the House would assert an institutional identity distinct from the Crown. Contempts were no longer interferences with the functioning of royal governance; instead, they were interferences with the House's ability to do its *own* business. And this shift had an important corollary: it now became possible to conceive of contempts committed by Crown officials, or even by Monarchs themselves. After all, when Parliament was just one instrument of royal governance, a dispute between it and some other instrument of royal governance could be settled by reference to a supervening authority: the will of the King. But once Parliament stood outside of royal governance, there was no supervening power, and Crown officials, like everyone else, could run afoul of the contempt power. Thus, for example, throughout the 1560s and 1570s, we see a repeating pattern in which the House irks the Queen (usually by poking its nose into issues of succession and/or religion); Elizabeth responds by ordering them to cease their discussions or by detaining a member; the House howls that the Queen has breached its privileges; and the Queen backs down.⁸⁴ The language of contempt and breach of privilege was powerful, even against the Monarch herself.

We thus have a moment in the mid-sixteenth century—a time when many historians have viewed the House of Commons as “very submissive,” in Maitland's words⁸⁵—in which we can see the House carving out for itself a distinct institutional identity. It is, of course, true that the initiative on great matters of state remained with the Crown throughout the Tudor period.⁸⁶ But beneath the surface, in these disputes

83. Cromartie, in discussing this passage, has likewise observed that Henry's remarks were “less a claim that kingship was parliamentary than that the houses of parliament were royal.” CROMARTIE, *supra* note 32, at 79. But Cromartie discusses *only* Henry's speech to the members of the House, completely ignoring the back-and-forth between crown officials and members of the House. He therefore misses the extent to which this episode marked a rising assertiveness on the House's part—an assertiveness against which Henry was pushing.

84. See Chafetz, *supra* note 71, at 1098-100.

85. MAITLAND, *supra* note 44, at 242; see also CROMARTIE, *supra* note 32, at 92, 98 (suggesting that English government under Mary and Elizabeth can accurately be characterized as absolutist); STONE, *supra* note 42, at 59 (“After many years in which it has not been respectable to use the phrase in academic circles, the concept of ‘Tudor despotism’, as an aspiration if not a reality, is at last becoming something that can be talked about again.”).

86. Wallace Notestein famously located the House's “winning of the initiative” in the reign of James I, and described Elizabeth as having “the whip hand” over the House of Commons. WALLACE NOTESTEIN, *THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS* 13 (photo reprint 1971) (1926). Notestein's focus was on legislation, and he accordingly noted that parliamentary upstarts like Strickland and Wentworth were unable to overcome the power of the Crown, as exercised via Privy Councillors in the House, in matters such as religion, succession, etc. But Notestein overlooked the ways in which Parliament's struggles with Henry and Elizabeth over its privileges laid the groundwork for its struggles with James and Charles over affairs of state.

over parliamentary privilege, the House began to carve out essential space in which *it* controlled admission and in which *it* kept order.

And then the Stuarts came.

II. THE EARLY STUARTS

A. *Composition of the House*

In his very first parliamentary summons, in 1604, James I directed that election returns should be made in Chancery, which would judge any election or qualification disputes.⁸⁷ In Buckinghamshire, Sir Francis Goodwin had defeated Sir John Fortescue;⁸⁸ Goodwin, however, had been outlawed for personal debt, and the Crown thus directed that a new writ should issue, as James's summons had forbidden the election of outlaws.⁸⁹ The House of Commons, determining that outlawry in personal actions did not create a disqualification to serve in Parliament, resolved that Goodwin was the rightfully elected member from Buckinghamshire and proceeded to seat him.⁹⁰ Fortescue, it should be noted, was a Privy Councillor, and James seems to have taken a personal interest in his career.⁹¹ The King was therefore naturally unsatisfied with the Commons' determination, and he asked the Lords to look into the matter. The Lords resolved that Goodwin was disqualified and that the seat should have gone to Fortescue, and they sought a conference with the Commons to explain their reasons.⁹² The Commons declined, on the grounds that "it did not stand with the Honour and Order of the House, to give Account of any of their Proceedings or Doings" to the Lords.⁹³

The Commons then sought a meeting with James himself, and the King granted the Speaker an audience.⁹⁴ James insisted that "he had no Purpose to impeach [the House's] Privilege: But since they derived all Matters of Privilege from him, and by his Grant, he expected they should not be turned against him."⁹⁵ In other words, he was attempting the same gambit that Henry VIII tried in Ferrers's case—he was asserting that privilege

87. GODFREY DAVIES, *THE EARLY STUARTS, 1603-1660*, at 2 (1952); *see also* Thrush, *supra* note 67, at 304-06 (describing how Lord Chancellor Ellesmere's maneuverings were designed to create a clash between Chancery and the Commons).

88. On the Goodwin-Fortescue controversy generally, *see* CHAFETZ, *supra* note 43, at 147-48.

89. GEORGE PETYT, *LEX PARLIAMENTARIA: OR, A TREATISE OF THE LAW AND CUSTOM OF THE PARLIAMENTS OF ENGLAND 299-301* (London, Goodwin 1690).

90. 1 H.C. JOUR. (1604) 151-52; *see also* PETYT, *supra* note 89, at 302-04 (laying out the House's reasons).

91. *See* WITKE, *supra* note 43, at 58-59; *see also* CONRAD RUSSELL, *KING JAMES VI AND I AND HIS ENGLISH PARLIAMENTS 28* (Richard Cust & Andrew Thrush eds., 2011) (noting the unusual "depth of involvement of an inexperienced king" in the Goodwin-Fortescue controversy).

92. PETYT, *supra* note 89, at 304-05.

93. 1 H.C. JOUR. (1604) 156.

94. PETYT, *supra* note 89, at 306-07.

95. 1 H.C. JOUR. (1604) 158.

existed to help Parliament serve the Crown, not to allow Parliament to resist the Crown. And what of the Elizabethan precedent, from the case of the Norfolk election? After all, that case seemed clearly to stand for the proposition that the House, and not the Crown, had the final word on parliamentary composition.⁹⁶ It did not bind, James asserted, because it occurred “in the Time of a *Woman*, which *Sex* was not capable of *Mature Deliberation*.”⁹⁷ Using Elizabeth’s gender as a convenient excuse,⁹⁸ James was seeking to roll back the gains the House had made in the previous century.

The House would not yield, with one member insisting that the issue had now “become the Case of the whole kingdom” because, if Chancery were to win, “the free election of the country is taken away, and none shall be chosen but such as shall please the king and council.”⁹⁹ The House drew up a petition setting out its reasons for accepting Goodwin as the rightfully returned member, as well as asserting its exclusive jurisdiction over election returns.¹⁰⁰ Finally, James proposed a compromise: neither Goodwin nor Fortescue would have the seat; instead, there would be yet another election for the Buckinghamshire seat.¹⁰¹ Moreover, at the King’s suggestion, the House quietly admitted both Goodwin and Fortescue for other seats.¹⁰² But the House wanted to ensure that its acceptance of the compromise could not be construed as acquiescence on the jurisdictional point; it therefore appointed a committee, which drew up a document titled *The Form of an Apology or Satisfaction of the House of Commons Concerning Their Privileges*. The *Apology* reiterated the House’s claim that “the House of Commons is the sole proper Judge of the Return of all

96. Derek Hirst has insisted that the Elizabethan precedents “left the central issue of ultimate jurisdiction undecided” and therefore that “there was still no universally accepted precedent to guide the parties” in the Goodwin-Fortescue controversy. Derek Hirst, *Elections and the Privileges of the House of Commons in the Early Seventeenth Century: Confrontation or Compromise?*, 18 *HIST. J.* 851, 852 (1975). But this conclusion seems unsupported, not only by the results of the 1581 controversy, see *supra* text accompanying notes 54-58, but also by the stridency of the House’s language—language that went unrebutted by the Crown—in the case of the Norfolk election, see *supra* text accompanying notes 59-68. Moreover, the fact that James resorted to an *ad feminam* argument against the Monarch who acceded to parliamentary jurisdiction, see *infra* text accompanying note 97, suggests that he, at least, thought that the outcome of the Elizabethan cases was clear—and clearly bad. Contra Hirst, then, the best interpretation is not that the 1581 and 1586 precedents were ambiguous, but rather that James was attempting to overturn those precedents and return to an earlier understanding of the relationship between Crown and Parliament.

97. PETYT, *supra* note 89, at 309.

98. This certainly does not make James unique. As Natalie Mears has persuasively argued, gendered attacks on Elizabeth, even during her life, were most often used, not as attacks on female monarchy as such, but rather as a convenient language for opposition rooted in other factors. See NATALIE MEARS, *QUEENSHIP AND POLITICAL DISCOURSE IN THE ELIZABETHAN REALMS* 222-29 (2005).

99. 1 WILLIAM COBBETT, *THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 1003 (London, Hansard 1806).

100. 1 *H.C. JOUR.* (1604) 162-65.

101. *Id.* at 168, 171.

102. See Hirst, *supra* note 96, at 853.

such Writs, and of the Election of all such Members as belong unto it.”¹⁰³ Moreover, the *Apology* insisted, Chancery’s role was limited to sending out the writs of election, receiving the returns, and preserving them for the House, “yet the same is done only for the Use of the Parliament.”¹⁰⁴ This is the mirror image of Henry’s and James’s claims that Parliament exists to serve the Crown; here, the House is insisting that Crown officers exist to serve the House of Commons. As Derek Hirst has noted, the most salient feature of the Goodwin-Fortescue incident was “the passion displayed by members in their resistance to the Council’s attempt to unseat Goodwin.”¹⁰⁵ Against a Monarch who sought to roll back the House’s gains under the Tudors, the House pushed back, continuing to develop a sense of itself as an essential and independent component of the constitutional state.¹⁰⁶

B. Contempt of Parliament and Breach of Privilege

This clash of constitutional visions was even more apparent in an incident that occurred toward the end of James’s reign. In 1620, James, in need of funds, summoned a new Parliament. When it assembled in 1621, it was more interested in discussing—and decrying—rumors of a Spanish Match than it was in voting him supply. James immediately dashed off a letter to the Speaker, demanding that he “acquaint that house with our pleasure, that none therein shall presume to meddle with any thing concerning our government or mysteries of state, namely, not to speak of our dearest son’s match with the daughter of Spain.”¹⁰⁷ The House replied with a petition appealing to its “ancient and undoubted right” of “freedom of speech, jurisdiction, and just censure of the house.”¹⁰⁸ The King responded in kind, asserting that

we cannot allow of the stile, calling it, your antient and undoubted right and inheritance; but could rather have wished, that ye had said, that your privileges were derived from the grace and permission of our ancestors and us . . . yet we are pleased to give

103. Reprinted in MATTHEW HALE, *THE ORIGINAL INSTITUTION, POWER AND JURISDICTION OF PARLIAMENTS* 206, 216 (London, Tonson 1707).

104. *Id.*

105. Hirst, *supra* note 96, at 853. Hirst then proceeds to insist that this passionate pushback was merely “political,” as distinguished from “the elaboration of clear constitutional conventions.” *Id.* at 855. In the context of the customary, political English constitution, this distinction is hardly clear-cut. See CHAFETZ, *supra* note 43, at 1 (“The British Constitution cannot be distinguished from institutional interpretations of it: the actual, current structure of institutions is constitutive of the Constitution itself.”). What is most important about this interaction between Crown and Parliament is that each is asserting its own constitutional vision and seeking to create the constitutional order that it desires.

106. Cromartie has a useful discussion of Goodwin-Fortescue, but he—like James—ignores the Tudor precedents, thereby making the House’s claims appear more novel than they really were. See CROMARTIE, *supra* note 32, at 194-96.

107. 1 COBBETT, *supra* note 99, at 1326-27.

108. *Id.* at 1335.

you our royal assurance, that as long as you contain yourselves within the limits of your duty, we will be as careful to maintain and preserve your lawful liberties and privileges, as ever any of our predecessors were¹⁰⁹

In case there was any doubt about what “containing [themselves] within the limits of [their] duty” meant, he clarified that they “only have need to beware to trench upon the prerogative of the crown.”¹¹⁰ In response, the Commons entered a protestation in their Journal, reasserting that their privileges were independent of the Crown, and, indeed, ran against the Crown.¹¹¹ James made clear what he thought of that: he sent for the Commons’s Journal, tore out their protestation, declared it “invalid, annulled, void, and of no effect,”¹¹² imprisoned some of the parliamentary ringleaders (including Coke), sent others off to Ireland as royal commissioners, and dissolved Parliament.¹¹³

Again, we see a clash of constitutional visions: the House was reasserting the rights that it had won under the Tudors in the face of James’s attempts to undermine those victories.¹¹⁴ The House’s response was to accuse James of breach of privilege—that is, to reassert its right to defend its own privileges, even as against the Crown. Notice how this power has evolved over eighty years: what began with the House declining royal assistance in securing the release of George Ferrers evolved into a language by which the House could actually work at cross-purposes to the Crown. In some sense, of course, James still had the upper hand—he did, in the end, dissolve Parliament and imprison some of its leaders. But it is clear that the House had found a language of opposition—a language that derived directly from the privileges it had won during the reigns of Henry VIII and Elizabeth.

And, of course, these battles only intensified during the reign of James’s son. From the beginning of his reign, Charles made it clear that he saw Parliament as his tool at best, and an inconvenience at worst. Parliamentary reactions were increasingly framed by the language of privilege: the House asserted that it had rights, and it regarded the Monarch’s infringement of those rights as a breach of privilege or a contempt of Parliament.¹¹⁵ Consider the proceedings against the Duke of Buckingham, Charles’s royal favorite, in the second Parliament of his

109. *Id.* at 1344.

110. *Id.*

111. *Id.* at 1361.

112. *Id.* at 1362-63.

113. *Id.* at 1366-71.

114. See CONRAD RUSSELL, *PARLIAMENTS AND ENGLISH POLITICS, 1621-1629*, at 138-40 (1979) (describing the constitutional stakes of this dispute for both James and the House).

115. See generally Chafetz, *supra* note 71, at 1100-12; see also Joyce Lee Malcolm, *Doing No Wrong: Law, Liberty, and the Constraint of Kings*, 38 J. BRIT. STUD. 161, 176 (1999) (noting that the language of breach of parliamentary privilege was used by the House of Commons against Charles).

reign.¹¹⁶ The House (and, indeed, much of the nation) held Buckingham responsible for any number of state miscues, from military defeats in Spain and France to the disastrous state of royal finances. When Charles's second Parliament refused to grant him supply until he had addressed its grievances, including the growing power of Buckingham, the King angrily replied, "I must let you know, that I will not allow any of my servants to be questioned amongst you, much less such as are of eminent place, and near unto me."¹¹⁷ The House continued its investigation into Buckingham and adopted a report proposing to grant supply to the Crown as soon as "they had presented their grievances, and received his answer to them."¹¹⁸ In response, Charles sent his Lord Keeper to insist that he would

by no means suffer [royal prerogative] to be violated by any pretended colour of parliamentary liberty; wherein his maj. doth not forget that the parliament is his council, and therefore ought to have the liberty of a council; but his maj. understands the difference betwixt council and controlling, and between liberty and the abuse of liberty.¹¹⁹

Note carefully the language here: Parliament is Charles's council. It ought to have "the liberty of a council." A wise principal gives his subordinates certain liberties so that they may better serve him. But there is a "difference betwixt council and controlling"—Parliament, like other subordinates, must use its liberties in the service of its principal, not in an attempt to assert power over its principal.

Such a claim might once have cowed the Commons, but the post-Tudor House had a much-expanded sense of its own institutional identity. It responded by asserting its "undoubted right and usage . . . to question and complain of all persons, of what degree soever, found grievous to the common-wealth."¹²⁰ It then, in direct contravention of Charles's commandment to "cease this unparliamentary inquisition,"¹²¹ set aside all other business to focus on preparing articles of impeachment against the Duke of Buckingham.¹²² Charles, enraged, dissolved the Parliament, without having received the funds he sought.¹²³

This, of course, was a vicious cycle. One of Parliament's chief grievances against Charles was his reliance on unconstitutional

116. For more on Buckingham's role in Charles's government and on the special ire directed toward the Duke, see Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 369-76 (2010).

117. 2 COBBETT, *supra* note 99, at 49-50.

118. *Id.* at 56.

119. *Id.* at 57.

120. *Id.* at 69.

121. *Id.* at 58.

122. *Id.* at 79; see also 3 H.L. JOUR. (1626) 619-26 (reprinting the articles of impeachment).

123. 2 COBBETT, *supra* note 99, at 193-200.

prerogative taxation—that is, taxation not authorized by Parliament.¹²⁴ When Charles refused to redress—or, indeed, even listen to—parliamentary grievances, the House refused to vote him supply. Given the ruinously expensive course that Charles and Buckingham were charting in foreign affairs, the King’s only option was to rely yet more on prerogative taxation, thus increasing the intensity of parliamentary grievance.¹²⁵

In the midst of Charles’s third Parliament, in 1629—mere months after Buckingham had been assassinated by a disgruntled army veteran¹²⁶—the complaints over unconstitutional taxation came to a head. John Rolle, a merchant and member of the House, had refused to pay the customs duties of tonnage and poundage levied on his goods, on the grounds that they were illegal, as Parliament had not authorized them.¹²⁷ Charles suggested that Rolle’s problems might disappear if the House simply authorized him to collect the duties; the House declined this invitation.¹²⁸ In the course of debating the issue, members of the House explicitly used the language of contempt and breach of privilege to refer to royal actions.¹²⁹ Charles promptly ordered the Speaker to adjourn the House; to prevent this, several of the opposition leaders physically held the Speaker in his chair while another presented a remonstrance asserting that the collection of tonnage and poundage without parliamentary consent was “a breach of the fundamental liberties of this kingdom.”¹³⁰ The House passed this remonstrance, and followed it with a resolution declaring that “Whosoever shall counsel, or advise, the taking and levying of the subsidies of Tunnage and Poundage, not being granted by Parliament; or shall be an actor or instrument therein, shall . . . be reputed an innovator in the government, and a capital enemy to this kingdom and commonwealth.”¹³¹ Charles dissolved Parliament the next day;¹³² obviously fed up with the institution, he proceeded to govern without it for the next eleven years. What’s more, he had the parliamentary ringleaders arrested and tried before the King’s Bench on charges of sedition and assault (for holding

124. See generally Chafetz, *supra* note 71, at 1100-16; Chafetz, *supra* note 116, at 369-83.

125. For an excellent discussion of the failure of royal finances and its role in bringing about the Civil War, see RUSSELL, *supra* note 40, at 161-84. To my mind, however, Russell improperly minimizes the extent to which Charles’s debts were a consequence of his own decisions to undertake ill-advised military campaigns at the beginning of his reign.

126. See Chafetz, *supra* note 116, at 374-76; Thomas Cogswell, *John Felton, Popular Political Culture, and the Assassination of the Duke of Buckingham*, 49 HIST. J. 357 (2006).

127. 2 COBBETT, *supra* note 99, at 437.

128. *Id.* at 443.

129. See Chafetz, *supra* note 71, at 1109 (quoting Sir Robert Philips and John Selden).

130. 2 COBBETT, *supra* note 99, at 490. For the rather dramatic story of the passage of this remonstrance and the subsequent resolutions, see CHAFETZ, *supra* note 43, at 73-74; Chafetz, *supra* note 71, at 1110-11.

131. 2 COBBETT, *supra* note 99, at 491.

132. *Id.* at 492.

the Speaker in his chair).¹³³ In their defense, the members argued that Parliament had exclusive jurisdiction over matters occurring on the floor of the House,¹³⁴ essentially insisting that the Crown had breached parliamentary privilege in haling them before the court. The judges did not buy the jurisdictional defense, and the members were convicted and imprisoned.¹³⁵

When, as a result of the Bishops' Wars in Scotland, Charles's need for funds became truly desperate in 1640, he called a new Parliament. But the Commons of England in Parliament Assembled had a long institutional memory. The House would do nothing about funds until Charles addressed their grievances—both the ones they already had in 1629 and the ones they had accumulated in the intervening years.¹³⁶ The House was especially enraged about Charles's order to the Speaker to adjourn the House and the prosecution and conviction of its members for resisting that order, which it asserted over and over was a "Breach of Privilege of this House."¹³⁷ Charles dissolved this Parliament a mere three weeks after it assembled; it is known to history as the "Short Parliament." But he could not so easily dissolve his debts; within months, he was forced to call another Parliament. The "Long Parliament," Charles's last, was every bit as intent on vindicating its privileges as its predecessor had been,¹³⁸ and it, too, was especially upset about the punishment of members in the courts of law for actions taken in the House.¹³⁹ This Parliament would grow increasingly confrontational over the next year.¹⁴⁰

133. See *R. v. Elliot, Hollis & Valentine*, 3 How. St. Tr. 294 (K.B. 1629).

134. *Id.* at 295-300.

135. *Id.* at 310.

136. See generally THEODORE F.T. PLUCKNETT, *TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 390-91* (11th ed. 1960) (enumerating the grievances that the House wanted addressed); DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 210 (9th ed. 1966) (same).

137. 2 H.C. JOUR. (1640) 7; *id.* at 12.

138. See Chafetz, *supra* note 71, at 1112-13.

139. See 2 H.C. JOUR. (1641) 200-01; *id.* at 203.

140. See generally PLUCKNETT, *supra* note 136, at 393-406. It is worth noting that, by 1642, the confrontational attitude was no longer limited to the House of Commons. On January 12 of that year—the same day that the Commons resolved that anyone who arrested a member by authority of a royal warrant alone was guilty of a breach of the privileges of Parliament, see *supra* text accompanying note 12—the Lords held the Lieutenant of the Tower in contempt for obeying the King's order to remain at his post rather than the Lords' order to attend upon the House. 4 H.L. JOUR. (1642) 508. Russell refers to this incident as an example of Charles's "diminished majesty." RUSSELL, *supra* note 40, at 23. Likewise, in April of that year, when Charles dismissed the Lord Chamberlain (Essex) and the Groom of the Stool (Holland) for refusing to attend upon him at York, the Lords and Commons both resolved that Charles's summoning of them away from Parliament and his dismissal of them when they refused to come were both breaches of parliamentary privilege. Moreover, they resolved that anyone who accepted the vacant offices "until Satisfaction be given to both Houses of Parliament" would breach privilege. 4 H.L. JOUR. (1642) 719.

CONCLUSION

And this brings us full circle—back to the Grand Remonstrance, back to the accusation of treason, back to Charles barging into the House, and back to Charles being driven from London.¹⁴¹ Perhaps now we are a bit better positioned to understand how these events came to be—that is, to understand what allowed the House of Commons to take the lead in initiating the Civil War. Parliament in the second half of the Tudor dynasty made great strides. They have not always been recognized as such by historians, for they dealt not with foreign affairs, religion, succession, or even taxation, but rather with the more prosaic and procedural matters of the House's own privileges—its authority over its own composition, its ability to use the contempt power, its freedom of speech. These had theretofore been dealt with by Crown officers, a natural consequence of Parliament's subordination to the Crown. As long as Parliament's institutional authority was wholly subordinated to royal authority, then of course who sat in Parliament would be a matter for royal judgment. And of course contempts against the House would be understood and punished as interferences with the normal functioning of royal governance.

But in the late Tudor moment, from the 1540s through the end of Elizabeth's reign, a significant shift occurred. The House itself took over these functions, and it did so consciously. Assuming these functions necessitated clashing with the Crown. That they were willing to provoke the Crown in this way indicates the importance the Commons assigned to control of these functions. Moreover, the very act of confronting the Crown required the House to begin articulating reasons for its positions.

What emerged in this period was a House of Commons that was developing and articulating a sense of itself as a power in its own right, a power that need not—and, indeed, refused to—rely on any other. It was the development of this constitutional self-image, and its supporting arguments, in the late Tudor period that allowed the House to push back against Stuart attempts at retrenchment.¹⁴² Try as James might to dismiss precedents from “the Time of a Woman,” he could not will the House's newfound self-conception into oblivion.

When the House of Commons refused to accept royal assistance in securing George Ferrers's release, it insisted that *it* must be the one to vindicate its own rights. Contempt of Parliament is an offense against Parliament, and Parliament alone has jurisdiction to remedy it. The issue, when it was merely about George Ferrers, a private creditor, and a few

141. See *supra* text accompanying notes 1-12.

142. In this regard, I very much agree with Lawrence Stone's conclusion that a number of revisionist historians of the Civil War have “seriously under-estimated the degree of continuity in the constitutional struggle from crisis to crisis, as proven by the constant harping back to previous episodes.” STONE, *supra* note 42, at 167. Victories, cast as precedents, are analytically, emotively, and rhetorically powerful.

London jailers, seems like a low-stakes controversy. But the Commons's victory—its winning of exclusive jurisdiction over contempt—opened up new vistas.¹⁴³ Soon it became possible to think of holding royal officials themselves in contempt. Indeed, it became possible to conceive of a contempt committed by the King himself, a fact that Charles I discovered shortly after he barged into the House of Commons on January 4, 1642.

This parliamentary mobilization against the King would have significant consequences, both in England and beyond. In England, even after the royal Restoration, Parliament would be unwilling to return to its older role. When Charles's son, James II, pushed too far in that direction, he too was deprived of his throne. And in America, the historic struggles between Crown and Parliament played a major role in the thinking of the rebellious colonists. As Jack Greene has noted, oppositional behavior of colonial legislatures was “deeply rooted” in the tradition of parliamentary opposition to the Stuart monarchs,¹⁴⁴ opposition that was enabled by the procedural developments discussed in this Article. This opposition was also foremost in the minds of the newly independent Americans as they drafted and ratified their national Constitution,¹⁴⁵ with its checks on executive behavior and explicit protections for legislative privileges. Parliamentary victories won “in the Time of a Woman” thus continue to have important ramifications today.

143. Thus the “new modes of parliamentary action” that Cromartie identifies in the Stuart House of Commons are, in fact, deeply rooted in the Tudor House of Commons. See CROMARTIE, *supra* note 32, at 190-94.

144. JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 189-90* (1994).

145. See, e.g., Chafetz, *supra* note 116, at 367-88 (noting the importance of the example of Charles I in the debates over making the American president subject to impeachment).